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(2) Ibid, Art 16 1041 C
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(4) Co-operative Societies — U P Co-operative Societies Act (1966), S 70 (3) 2 (NOC)
(5) Houses and Rents — U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (1972), S 14 1009 A
(6) Houses and Rents — U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (1972), S 16 (1) (a) 795 A
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(11) Houses and Rents — U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (1972), S 34 (1) (a) and (b) 127 A (NOC)
(12) Panchayats — U P Kshettra Samitis and Zilla Parishads Adhiniyam (1961), S 239 868 B
(13) Public Safety — U P Control of Goondas Act (1971), S 3 (1) 897 A **(FB)**
(14) Tenancy Laws — U P Consolidation of Holdings Act (1954), S 9 31 A
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1976 AWC 229 — **Held no longer good law** in view of 1977 AWC 289 and AIR 1979 All 114 (FB) 1981 All LJ 58.

1977 All Cri R 314 — **Over.** 1981 All LJ 344

(1978) W P No 4499 of 1977, D/- 23-5-1978 (All) — **Revers. 1981 All LJ 400 (SC)**

AIR 1978 NOC 101 (All) (1977) 3 All LR 690 — **Over. 1981 All LJ 467 E (SC).**

1978 All LJ 251 1978 All Cri C 150 **1978** Cri LJ 1430 — **Held no longer good law** in view of 1980 SC 1883 1981 All LJ 750

(1979) Civil Misc Writ No Nil, D/- 3-12-1979 (All) — **Revers. 1981 All LJ 136 (SC).**

(1979) Civil Revision No 1904 of 1978, D/- 6-8-1979 (All) — **Revers. 1981 All LJ 1341 (SC).**

(1979) F A F O No 39 of 1977, D/- 18-4-1979 (All) — **Revers. 1981 All LJ 737 (SC).**

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1979 All LJ 1061 : 1979 All Cri C 300 — **Not F.** in view of amendment, D/- 27-8-1968 1981 All LJ 412

1979 Cri LJ NOC 37 1978 All Cri C 287 — **Not F.** in view of amendment, D/- 27-8-1968 1981 All LJ 412

(1979) 1 Ren CJ 327 (All) — **Revers. 1981 All LJ 74 (SC).**

(1980) Civil Misc Petn No 4376 of 1969, D/- 8-8-1980 (All) — **Revers. 1981 All LJ 141 A (SC).**

(1980) Civil Revn No 525 of 1980, D/- 3-12-1980 (All) - **Revers. 1981 All LJ 908 (SC).**

(1980) Criminal Appeal No 674 of 1975, D/- 14-4-1980 (All) - **Revers. 1981 All LJ 674 A (SC).**

(1980) Criminal Misc Case No 2261 of 1976, D/- 10-4-1980 (All) **Not Approved.** 1981 All LJ 699 A

(1980) S. A. No 2047 of 1970, D/- 11-4-1980 (All) **Revers.** 1981 All LJ 1312.

1980 All LJ 769 (Pt B) - **Held no longer good law in view of 1980 SC 1883** 1981 All LJ 750

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(1981) Civil Misc App No 113 of 1981 in Second Appeal No 1434 of 1973, D/- 7-1-1981 (All) — **Revers. 1981 All LJ 704 A (SC).**

1981 All LJ 82 - **Over. 1981 All LJ 908 (SC).**

ANDHRA PRADESH

(1970) 77 PLR 180 (Andh Pra) — **Over. 1981 All LJ 1 (SC).**

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AIR 1935 Bom 247 (Pt C) **Over. 1981 All LJ 504 A (SC).**

ORISSA

AIR 1965 Orissa 102 - **Diss.** 1981 All LJ 1255 A

PATNA

(1923) 60 IC 493 (Pat) **Diss.** 1981 All LJ 1255 A

AIR 1941 Pat 108 **Diss.** 1981 All LJ 1255 A

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AIR 1933 Lah 890 **Diss.** 1981 All LJ 1149

(1980) 82 Punj LR 597 **Diss.** 1981 All LJ 121

Errata

1981 All LJ 812

In Headnote please read as Civil P C (1908), O 14, R 2 instead of Civil P C (1908), O 15, R. 2.

[1981 All LJ 404 (30th April part)

At p. 404, Col. 2, Hn. Pt. B, Line 6, add the word "not" after the word "is".

COMPARATIVE TABLE

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1	AIR 1981 S C 401
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	1980 Tax L R 1474
	(1980) 126 ITR 561
	(1980) 80 Taxation 80
	1980 U J (SC) 954
	(1980) 4 Taxman (S C) 80
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9	AIR 1981 S C 827
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70 1980 All W C 736
79 1981 (U P) R C C 74
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98 1981 U P T C 448
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117 1981 All Rent Cas 30
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119 1981 (?) All L R 144
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128 1981 All C J 19
130 1980 All W C 675
1981 (?) All L R 91
1981 U P L R E C 330
135 A I R 1981 S C 515
(1980) 4 S C C 603
1980 Cri L J 1844
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1980 S C C (Cri) 947
1981 B L J R 101

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(1981) 1 S C R 403
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150 1981 All W C 85
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1981 (?) All L R 148
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151 1981 All Rent Cas 231
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165 1981 All C J 963
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171 1981 All Rent Cas 246
172 1980 All W C 720
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185 1981 All Rent Cas 37
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191 1981 All Rent Cas 41
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213 1981 (?) All L R 227
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216 1981 All Rent Cas 26
218 1981 All W C 1

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221 1981 All Rent Cas 150
1981 (UP) R C C 11
(1981) 1 Ren C J 66
224 1981 All W C 74
228 1980 All C J 488
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246 1981 All W C 58
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252 1981 Rev Dec (H C) 79
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255 1981 (?) All L R 139
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268 1981 All W C 9
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271 1981 All W C 17
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275 1981 All W C 356
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278 1981 All W C 132
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280 1981 All Cri R 179
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285 1981 All W C 154
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1981 All C J 321
317 1981 All Cri R 108
1981 All W C 176
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318 1981 (U P) R C C 197
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320 (1981) 1 E A C 157
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1981 F A J 473
325 1981 All Cri C 189
1981 U P Cri C (All) 71
326 ?1981 (U P) R C C 185
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329 1981 (?) All L R 284
334 (1981) 7 All L R 265
335 1981 All Rent Cas 266
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339 1981 (U P) R C C 107
342 1981 (U P) R C C 119
344 1981 All W C 340
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345 1981 All W C 492
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350 ...
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361 1981 Rev Dec 80
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385 1931 All W C 356
1931 All Cri R 144
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387 1931 All Cri R 193
1931 All W C 192

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373 1931 All W C 116
1931 All C J 410

375 1931 All W C 68

381 1931 (U P) R C C 148

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390 (1931) 2 Rent L R 454

391 1931 All W C 176 (1)

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394 (1931) 7 All L R 150
1931 All W C 120

397 (1931) 2 Rent L R 459
1931 Hindu L R 548

409 AIR 1931 S C 1157
(1931) 2 S C J 570
1931 All C J 978

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404 1931 All W C 428
1931 U P L R C 305
(1931) 7 All L R 508
1931 All C J 216

406 1931 (U P) R C C 184
1931 All Rent Cas 215

409 1931 (7) All L R 542

413 1931 All W C 248
1931 All Cri R 158

418 1931 (7) All L R 540

416 1931 All C J 355

420 1931 All W C 167
(1931) 7 All L R 500

421 1931 (U P) R C C 166
1931 All Rent Cas 360

425 1931 All W C 435
1931 All C J 425

423 1931 Rev Dec 161

427 1931 (7) All L R 528

431 ...

432 1931 (U P) R C C 68
1931 All Rent Cas 215

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439 1931 All W C 154
1931 (U P) R C C 191

440 AIR 1931 S C 1149
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(1931) 2 S C J 704
1931 S C C (Lah) 480
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441 AIR 1931 S C 1160
1931 Cri L J 855
(1931) 2 S C J 712
1931 S C C (Cri) 520
1931 Cri App R (S C) 217
1931 Cri L R (S C) 395
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442 1931 All Rent Cas 94

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450 AIR 1931 S C 1041
1931 S C C (Lah) 464
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455 1931 All Cri R 183

1931 All Cri R 110

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458 1931 All W C 382
1931 All Cri R 193
1931 All Cri C 311

459 1931 All Rent Cas 102

1931 All C J 367

462 1931 All Cri R 82
1931 All Cri C 57 (2)

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467 AIR 1931 S C 1274
1932 (7) All L R 244
(1931) 8 S C C 605
1931 U J (S C) 281
1931 All C J 823
(1931) 8 S C R 889

476 AIR 1931 S C 1465
(1931) 1 Rent L R 828
1931 All Rent Cas 404
(1931) 2 Ren C R 270
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464FB 1931 All W C 313
1931 Rev Dec 165
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504 AIR 1931 S C 1284
(1931) 1 Rent L R 806
1931 (7) All L R 806
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504con1931 M P H C J 90
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(1931) 2 Ren C R 149

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519 1931 All Cri R 199
1931 All Cri 1 J 98

521 1931 All W C 185
1931 All Cri R 119
(1931) 1 P A C 93
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1931 (7) All L R 298

1931 P & J 461

529 1931 All W C 87
1931 All Cri R 25

528 1931 All W C 341

526 1931 All W C 345
1931 (7) All L R 557

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1931 (U P) R C C 346

1931 All C J 174

536 1931 (U P) R C C 360

1931 All C J 159

540 1931 (7) All L R 149

1931 (U P) R C C 370

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547 1931 All W C 371
1931 All Cri R 167
1931 U P Cri C (All) 116

548 1931 All W C 179
1931 (7) All L R 169

1931 All Cri R 116
(1931) 1 P A C 148
1931 P & J 864

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555 1931 All Cri R 237
1931 All W C 441

559 1931 All W C 341

560 1931 All W C 361
1930 (U P) R C C 264

1931 All C J 868
1931 (U P) R C C 378

1931 All Rent Cas 381

562 AIR 1931 S C 1151
1931 Cri L J 894
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584 1931 (U P) R C C 278
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566 (1931) 7 All L R 511

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570 1931 All Rent Cas 151

1931 (U P) R C C 193

1931 All C J 815

572 1931 All Rent Cas 360

1931 All W C 363

1931 (7) All L R 575

1931 (U P) R C C 206

1931 All C J 340
(1931) 1 Rent C J 350

578 1931 U P L R C 399

577 1931 All W C 176 (2)

1931 All Cri R 119
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580 1931 All Cri R 80
(1931) 1 P A C 124
1931 (7) All L R 809

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582 1931 Rev Dec 90 (S C)

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588 1931 (7) All L R 552.

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606 1931 All Rent Cas 347

1931 All W C 226

1931 (7) All L R 858

1931 (U P) R C C 215

1931 All C J 860

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608 1931 All Rent Cas 474

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610 1931 All Cri R 159

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611 1931 All Rent Cas 371

1931 (U P) R C C 192

(1931) 7 All L R 595

614 1931 All C J 811

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618 1931 (7) All L R 167

622 1931 All W C 142.

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647	1981 All W C 459
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657FB	AIR 1981 NOC 124 (All)
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665	1981 All Cri R 159
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	(1981) 7 All L R 561
666	1981 All W C 242
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674	AIR 1981 S C 1366
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696	1981 (7) All L R 360
699	1981 All Cri R 64
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704	AIR 1981 S C 1400
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707	AIR 1981 S C 1172
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756	AIR 1981 S C 1536
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807	1981 All W C 881
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809	1981 All Rent Cas 414
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	(1981) 4 S C C 595
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817	1981 All Cri C 217
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850	AIR 1981 S C 1582
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(1981) 2 S C C 599
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613 " NOC 140	
617 " ALJ 1260	
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638 " " 1237	
643 " " 1036	
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693 " " 907	

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185 " " 1205	
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550 " " 11	
572 " ALJ 310	
595 " " 20	
690 " " 60	
693 " NOC 69	
698 " ALJ 69	
703 " NOC 42	
719 " ALJ 62	
750 " " 178	
725 " NOC 51	
726 " ALJ 78	

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All WC	All LJ
1 1981 ALJ 218	
1 " NOC 127	
5 " ALJ 41	
9 " " 266	
12 " " 255	
17 " " 271	
29 " " 70	
35 " " 98	
35 " " 150	
37 " " 522	
38 " " 248	
42 " " 108	
52 " NOC 46	
55 " " 107	
55 " ALJ 958	
68 " " 376	
74 " " 221	
84 " NOC 85	
92 " ALJ 661	
98 " " 993	
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116 1931 ALJ 378
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359 " NOC 70
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401 1931 ALJ 697
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577 " " 1101
579 " " 888
585 " " 795
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604 " " 1048
606 " " 1057
609 " " 1064
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624 " " 1108
631 " "1082(2)
649 " " 1196
657 " "1166(2)
654 " " 880
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714 1931 ALJ 1084
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17 1931 NOC 188
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69 " " 187
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75 " " 199

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Rev Dec All LJ

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1959 Rev Dec

Rev Dec All LJ

952 1931 NOC 88
953 " " 98

1931 Rev Dec

Rev Dec All LJ

45 1931 NOC 60
48 " " 27
53 " " 80
55 " " 75
56 " " 130
60 " " 491
66 " " 30
67 " " 78
69 " " 128
72 " ALJ 259
77 " " 271
82 " NOC 20
88 " " 74
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82 " " 64

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297 " NOC 88
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272 " " 184
284 " ALJ 1764
192 " NOC 181
298 " " 98
305 " " 66
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320 " " 1200
330 " NOC 46
340 " ALJ 989

1982 Rev Dec

Rev Dec All LJ

5 1961 ALJ 769
9 " " 1330
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18 1930 ALJ 79
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17 " " 110
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24 " " 18
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34 " " 141
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61 " " 353
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220 1931 ALJ 180
228 1930 " 1090
222 1941 " 573
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(UP) RCC All LJ

905 1931 NOC 4

1931 (UP) RCC

(UP)RCC All LJ

1 1931 ALJ 30
4 " " 22
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46 " NOC 42
52 " ALJ 482
61 " " 268
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68 " " 188
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87 " " 48
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252 " " 290
256 " " 710
257 " NOC 68
270 " ALJ 580
273 " " 284
288 " NOC 108
276 " ALJ 552
281 " " 1280
285 " NOC 140
289 " ALJ 1097
298 " NOC 168
304 " ALJ 818
316 1931 NOC 85

1981 ALL. L. J. 785

R. B. LAL, J

Syed Mukhtar Ahmad, Applicant v Smt. Moonis Fatma and another, Opposite Parties.

Criminal Revn No 1761 of 1979, D/- 22-5-1981.

(A) Criminal P. C. (2 of 1974), S. 127 (3) (c) — Claim for maintenance by Muslim divorcee on her behalf and on behalf of her daughter — Plea of relinquishment of claim raised by husband — Evidence and proof — Adverse inference against wife — Tenability. (Evidence Act (1872), S. 114).

A muslim divorcee-wife filed an application under S 125 for maintenance and that of her daughter The husband alleged that he had sent a letter to the wife making a conditional offer of divorce and had fixed a limit for a reply but the wife did not care to answer He further alleged that he had sent his brother and one of his friends to the father's house of the wife with whom she was residing to persuade her to come and live with her husband but the wife declined the request and stated that she would not claim maintenance. The alleged representation by the brother and friend of the husband was not set out in the written statement. Not a word was put to the wife and her father on this point in cross-examination Though the brother of the husband said about the relinquishment the friend of the husband did not say a word about it.

Held that, the solitary evidence of the brother who was an interested witness could not be accepted.

Held further that, wife's silence to her husband's letters would not amount to acceptance of the terms and conditions contained in those letters and it could not be inferred that by her silence the wife had relinquished her right to claim maintenance (Para 9)

(B) Criminal P. C. (2 of 1974), S. 125 — Maintenance — Consideration of previous conduct of divorced wife — It is wholly irrelevant in case under S. 125. (Para 10)

(C) Criminal P. C. (2 of 1974), S. 125 — Application for maintenance, by divorcee — No plea in application that she was unable to maintain herself — Issue as to maintenance joined by parties at time of enquiry and when evidence was led — Wife could not be denied maintenance for absence of specific plea in application — Rules of pleading and proof applicable to civil cases should not be extended to cases under Section 125. (Civil P. C. (1908), O. 6, R. 4). (Para 17)

Cases Referred :	Chronological	Paras
AIR 1979 SC 362	1979 Cri LJ 151	9
AIR 1977 Cal 29		15
AIR 1975 Pat 168		15
AIR 1966 SC 1861		15
AIR 1964 Pat 127		15
AIR 1953 SC 235		15
1951 All LJ 64	AIR 1951 SC 177	15
AIR 1930 PC 57 (1)		15

Rasul Hasan Zaidi, for Applicant; Addl. Govt Advocate and S A Kazmi, for Opposite Parties

ORDER :— This revision arises out of proceedings under Sec 125, Cr. P C and has been filed by the husband against the order dated July 31, 1979 of Special Judicial Magistrate, Ist Class, Agra.

2. Smt Moonis Fatma, opposite party No 1 (hereinafter to be referred as wife) moved application under S 125, Cr P C. on 12-5-75 claiming maintenance allowance for herself and her daughter Kumari Mutahara Rana She came with the allegations that she was married to Syed Mukhtar Ahmad the present applicant (hereinafter to be referred as husband) on 12th June, 1955 and prompt dower of Rs 17,000/- was fixed. She performed her marital obligations faithfully A daughter Mutahara Rana was born to her and she (daughter) was aged about 15 years and reading in 11th Standard in St Patrick Convent at Agra She alleged that the husband treated her with cruelty and turned her out and thereafter divorced her in November, 1967 Thereafter the husband did not care to pay any maintenance allowance to her or her daughter Her father was old The husband was working as a Telephone Operator and getting a salary of Rs 565/-

3. The husband contested the application He admitted his liability to maintain the daughter till the age of puberty He denied his liability to pay any maintenance allowance to the wife He, inter alia, contended that the behaviour of the wife towards him was very insulting from the very beginning and a divorce was in a way forced on him

4. The Magistrate observed that the wife had not pleaded in the petition that she was unable to maintain herself but she had made a statement to that effect at the time of the enquiry The parties had led

evidence on this aspect of the matter The Magistrate held that the wife was unable to maintain herself and was, therefore, entitled to claim maintenance He refused to go into the circumstances prior to the divorce and observed that after divorce the wife was entitled to claim maintenance allowance under the new Code of Criminal Procedure He also held that the wife and the daughter had been neglected by the husband. The Magistrate, therefore, allowed maintenance allowance at the rate of Rs. 90/- per month to the wife and at the rate of Rs 100/- per month to the daughter till she attained majority

5. Feeling dissatisfied by the above judgment of the Magistrate, the husband has filed this revision.

6. The learned counsel for the husband-applicant has stated that the applicant was not challenging his liability to pay maintenance allowance to his daughter till she attained the age of majority The applicant was challenging the order of maintenance allowance passed in favour of the wife

7. This revision was admitted on one ground, though a number of grounds were taken up in the memorandum of revision. The learned counsel for the husband-applicant insisted to argue on some other points as well and I accorded him permission to address me on all such points

8. The first contention of the learned counsel for the husband-applicant is that the wife had agreed to relinquish her right to maintenance allowance and therefore she was not entitled to claim maintenance allowance in view of the provisions of S 127 (3) (c) of the Code The husband had sent a letter to the wife on 29-11-65 (Kha-3) making a conditional offer of divorce and fixing a limit for a reply. The wife did not care to answer. The husband sent two persons namely his brother Intizar and a friend Mnafooz Alam Khan to the house of the father of the wife to persuade the wife to come and live with the husband. At that time the father and wife both declined the request and the wife said that she would not claim any maintenance allowance or Mehar. When these persons came back notice dated 10-12-65, Ext Kha-5 was sent by the husband to the wife mentioning this fact in it All this amounted to relinquishment of the wife's right to claim maintenance allowance from the husband.

9. I have carefully considered the above submission of the learned counsel and, in my opinion, it has no merit It is noteworthy that the alleged representation by the wife to Syed Intzar Ahmad and Mehfooz Alam Khan was not set out in the written statement Only this much was said that these persons went to persuade the wife but she and her father refused, and said that the wife would never live with the husband except at the house of the wife's father. Thereafter the husband divorced the wife in the year 1965. Since no plea about the alleged relinquishment was taken up by the husband in his written statement, the wife and her father did not say a word in connection with the alleged relinquishment, not a word was put to them on this point in cross-examination No doubt Syed Intzar Ahmad said about this relinquishment in his statement. He is an interested witness It is note-worthy that Mehfooz Alam DW did not say a word about this relinquishment. In these circumstances solitary statement of Syed Intzar Ahmad about the alleged relinquishment cannot be accepted Under the Muslim Personal Law a divorced wife is not entitled to any maintenance allowance after the expiry of the period of Iddat For this reason too there could be no question of the wife saying that she was relinquishing her right to claim maintenance allowance. No reply to the aforesaid letters of the husband was given by the wife Her silence would not amount to acceptance of the terms and conditions contained in those letters and it cannot legally be inferred that by her silence the wife was relinquishing her right to claim maintenance allowance from the husband The Code of Criminal Procedure, 1973 has conferred a right on a divorced wife to claim maintenance allowance from her ex-husband. In Bai Tahira v Ali Hussain Fissalli Chothia, 1979 Cri LJ 151 : (AIR 1979 SC 362), there was a settlement between the husband and the wife in the year 1962; that settlement was set up by the husband in defence of a claim of maintenance allowance under S. 125, Cr. P C. The Supreme Court did not accept that settlement and observed thus (at p. 365) :

"The last defence, based on mehar payment, merits more serious attention The contractual limb of the contention must easily fail. The consent decree of 1962 resolved all disputes and settled all claims then available But here is a new statutory right created as a projection of public policy by the Code of 1973, which could not have been in the contemplation of the parties when in 1962, they entered into a contract to adjust their then mutual rights. No settlement of claims which does not have the spe-

and statutory right of the divorce under Section 125 can operate to negate that claim."

In view of the above the first contention of the learned counsel for the husband is repelled as having no merit on fact or in law

10. The next contention of the learned counsel for the husband applicant is that there was no neglect on the part of the husband to maintain the wife In this connection the learned counsel has laid great stress on the conduct of the wife prior to the date of the divorce He has taken pains to show that the wife was at fault and was not willing to live with the husband, there was no maltreatment or acts of cruelty on the part of the husband Since the wife was not willing to live with the husband, therefore, the latter had no option left but to divorce her The Magistrate did not discuss the conduct of the wife prior to divorce, in his judgment and this has been adversely criticised before me In my opinion, the Magistrate was right in not dealing with that part of the life of the husband and the wife Once, the husband divorces the wife or the wife obtains a divorce from her husband she becomes entitled to claim maintenance from her ex-husband provided she is unable to maintain herself and the husband has neglected to maintain her Her right to claim maintenance would come to an end only if she remarries or lives in adultery or if she voluntarily surrenders her right to maintenance In the instant case none of these eventualities has come to pass The story of voluntary surrender has been found untenable There is nothing in Chap IX to warrant the inference that the ground of divorce or the previous conduct of either spouse are to be looked into and the wife is to be held entitled to a right to maintenance only if she was not guilty of any faulty conduct Hence, a consideration of the previous conduct of the divorced wife is wholly irrelevant in a case under Section 125, Cr. P. C

11. The wife asserted that the husband had neglected to maintain her The husband pleaded in his written statement that he was paying a certain amount to the wife for her and her daughter's maintenance He however, did not produce any cogent and convincing evidence on this point Hence, the wife's assertion on this point remained unrebutted. The learned counsel for the husband-applicant too has not argued before me that in fact there was no neglect of the wife and the husband had been making regular payments to the wife for her maintenance

12. In view of the above it must be held that the husband had neglected to maintain the wife

13. It has not been argued on behalf of the husband-applicant that the wife has means to maintain herself and she does not come within the category of 'Unable to maintain herself' The Magistrate discussed the means of the wife and recorded a finding that she had no means to maintain herself It is a well discussed and well reasoned finding and no defect or illegality has been pointed out in it and, therefore, this finding must be accepted

14. The learned counsel for the husband-applicant has urged that the wife did not plead in her application for grant of maintenance that she was unable to maintain herself In the absence of such a plea she could not give any evidence on the point of her inability to maintain herself. The evidence which was given before the Magistrate on this point should be ignored.

15. In support of this contention, the learned counsel has placed reliance on the following decisions Siddik Mahomed Shah v Mt Saran, AIR 1930 PC 57 (1), Trojan & Co v R M N N Nagappa Chettiar, AIR 1953 SC 235, Bhagat Singh v Jaswant Singh, AIR 1966 SC 1861, Smt Ramsurat Devi v Smt Satrap Kuer, AIR 1975 Pat 168; State of West Bengal v Mir Fakir Mohammad, AIR 1977 Cal 29, Firm Sriniwas Ram Kumar v Mahabir Prasad, AIR 1951 SC 177 (1951 All LJ 64) and State of Bihar v. Motilal Chamaria, AIR 1964 Pat 127.

16. The learned counsel for the wife has conceded that the fact that wife was unable to maintain herself was not pleaded in the application for grant of maintenance But he has pointed out that the wife was allowed to adduce evidence on this point and the husband did not raise any objection at that stage, the husband cross-examined the wife and her evidence on this point Not only this, the husband gave evidence in rebuttal to establish that the wife had means to maintain herself In these circumstances, it was not open to the husband to raise the question of want of plea in the application The learned counsel has further, urged that the strict rules of pleadings applicable in a civil matter are not applicable in a proceeding under Section 125, Cr P C which is meant to give relief to wives and children who have no source of livelihood

17. I have carefully considered the submissions of the learned counsel for the par-

ties The aforesaid seven decisions cited by the learned counsel for the husband relate to civil matters No doubt in these cases, it was held that if a party had not pleaded a particular case it could not be allowed to lead evidence and further, evidence on such a non-pleaded point cannot be looked into. In my opinion, these strict rules of pleading and proof which are applicable to civil matters, should not be extended to cases under Section 125, Cr. P C. This section contains a beneficial socio-economic provision for the assistance of unprovided for and discarded wives and children and, therefore, this provision is to be construed liberally so far as the question of taking up a plea in the application is concerned. If no plea is taken up in the application and no evidence is led to prove that the wife is unable to maintain herself, her claim for maintenance may be negatived but where the parties have joined issue on this important point at the time of enquiry and have led evidence, then the technical contention that the plea was not taken up in the application, should not be allowed to prevail. Clause (a) of sub-section (1) of Section 125, Cr. P. C. clearly says that a wife who is unable to maintain herself can claim maintenance allowance from her husband if some other conditions are also fulfilled. It does not specifically lay down that this plea must be raised by the wife in the application. A party is not to be taken by surprise and it is for this reason, that it is necessary and desirable that the plea sought to be relied upon is set out in the application. However, in a case where the plea was not mentioned in the application but was raised at the time of enquiry and the parties joined issue on it and led evidence, it cannot be said that the other party (here the husband) was taken by surprise or was prejudiced in his defence.

18. In the above circumstances I am unable to accept the contention of the husband and to reject the claim of maintenance of the wife on this ground.

19. The order of the Magistrate has not been challenged on any other ground.

20. In the result this revision has no merit and must fail.

21. The revision is dismissed. The stay order, if any, is hereby vacated. The record be sent back to the lower Court at a very early date.

Revision dismissed.

1981 ALL. L. J. 788

MURLIDHAR, J

Shitla Prasad, Applicant v Kishuni Devi, Respondent.

Criminal Revn No 1886 of 1980, D/- 3-3-1981

Criminal P. C. (2 of 1974), S. 125 (3), Proviso — Provisions of S. 14, Limitation Act, are applicable to the proviso to Section 125 (3). (Limitation Act (1963), S. 14).

The provisions of S. 14, Limitation Act, 1963, are applicable to the proviso to Section 125 (3), Cr. P. C. AIR 1980 All 149 (FB), Rel. on. (Para 2)

In the instant case, the order for maintenance of the wife was passed on 9-6-76. The husband went in revision against the order, which revision was dismissed on 7-10-76 An application by the wife for enforcement of the maintenance order was then bona fide prosecuted before the Executive Magistrate from 20-12-77 to 29-3-79, on which date he rejected the application holding that he had no jurisdiction to enforce the order under the new Cr P C. The wife subsequently filed on 17-5-79, before the proper court, another application for enforcement of the maintenance order with effect from 9-6-1976.

Held, the period during which revision against the original order of maintenance remained pending and the first application for enforcement of the maintenance order remained pending had to be regarded as period during which the wife had been prosecuting with due diligence civil proceedings relating to the matter in issue in good faith Therefore, by virtue of S 14, Limitation Act, such period between 9-6-76 to 7-10-76 and 20-12-77 to 29-3-79 had to be excluded while computing the period of limitation of 1 year from the date of the maintenance order viz. 9-6-76. As a result of such exclusion the application dated 17-5-79 was not barred by time. Therefore the wife was entitled to arrears of maintenance from 9-6-75 to 17-5-79. (Para 2)

Cases Referred: Chronological Paras
AIR 1980 All 149 (FB) 2

Man Mohan Srivastava, for Applicant; S. K. Srivastava, for Respondent.

ORDER:— The short question in this revision arising out of the enforcement by the wife of an order dated 9-6-1976 for maintenance at Rs. 75 per month with

effect from 9-6-76 is whether the application dated 17-5-1979 is barred by time for any part of the arrears of maintenance in view of the proviso to Section 125 (3), Cr P C This proviso lays down that "No warrant shall be issued for the recovery of any amount due under this section unless application be made to the court to levy such amount within a period of one year from the date on which it became due" Therefore, if literally applicable this proviso would mean that on the application dated 17-5-1979 a warrant for realisation of maintenance allowance with effect from 18-5-1978 only could issue and the maintenance for the period 9-6-1976 to 17-5-1979 would be barred by time

2. The respondent's (wife) contention, however, is that in view of the facts that a revision against the order dated 9-6-1976 was dismissed on 7-10-1976 and an application for enforcement was bona fide prosecuted before the Executive Magistrate from 20-12-1977 to 29-3-1979 on which date he rejected it holding that he had no jurisdiction to enforce the order under the new Code of Criminal Procedure The period between 9-6-1976 and 7-10-1976 and 20-12-1977 to 29-3-1979 should be excluded under Section 14 of the Limitation Act for computation of the period of one year The fact that the revision by the husband was decided on 7-10-1977 and that the wife's application dated 20-12-1977 for enforcement of the order to an Executive Magistrate was rejected on 29-3-1979 is not disputed On behalf of the respondent wife reliance has been placed on Azizul Haq v State (AIR 1980 All 149 (FB)) where it was held that the provisions of Sections 4 to 24 of the Limitation Act, 1963, are applicable even to the Code of Criminal Procedure under Section 29 (2) of the Limitation Act because there is no express exclusion of such application by any provision of the Cr P C In the case before the Full Bench the provisions of Section 5, Limitation Act, were applied to Section 96, Cr P C under which an application to set aside declaration of forfeiture of any publication lies "within two months from the date of publication in the Official Gazette of such declaration" On a parity of reasoning the provisions of Section 14, Limitation Act, would be applicable to the proviso to Section 125 (3), Cr P C There can be no question that the period during which a revision against the original order remained pending or the first application for enforcement of the order remained pending must be regarded as period during which the wife had been prosecuting with due diligence civil proceedings relating to the matter in issue in good faith. Learned counsel tried to argue that the first application before the Magistrate who had no jurisdiction could not be regarded as a bona fide prosecution. I cannot agree, Section 14 itself speaks of proceedings in good faith before a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it There is absolutely no ground to suspect that the first application by the wife was not filed bona fide. In fact although the Executive Magistrate held on the authority of a single Judge decision of this Court that he could not deal with the case the matter is a fairly debatable one Without going into that it is clear that the benefit of Section 14, Limitation Act, is available to the wife and if so even the arrears from 9-6-1976 to 17-5-1979 would be recoverable

3. The revision, therefore, fails and is hereby dismissed The stay order dated 13-11-80 is vacated

Revision dismissed.

1981 ALL L. J. 789

GOPI NATH, J

Rama Shanker Misra, Applicant v. Kashi Misra and another, Respondents

Civil Revn No 1216 of 1977, D/- 25-2-1981 *

U. P. Consolidation of Holdings Act (5 of 1954), S 49 — Suit for cancellation of sale deed — Sale deed challenged as voidable — Suit is cognizable by Civil Court and it is not barred by S 49 — Consolidation authorities have no jurisdiction to cancel a document. 1980 All LJ 902 (SC), 1980 Allahabad Civil Journal 78 and 1977 All LJ 310 (FB), Foll.; 1978 All LJ 661, Disting. (Paras 3, 5)

Cases Referred: Chronological Paras

1980 All LJ 902 AIR 1981 SC 77 4
1980 UPLT NOC 71 1980 Allahabad Civil Journal 78 3
1978 All LJ 661 1978 Rev Dec 262 5
1977 All LJ 310 AIR 1977 All 360 (FB) 3
1976 All WC 412 (FB) 3
1973 Rev Dec 423 3

S N Srivastava, for Applicant; S K. Varma, for Respondents

*Against order of I P Singh, 2nd Addl. Dist J, Ghazipur, D/- 26-2-1977.

ORDER:— This is a defendant's application in revision from an order passed by the 2nd Addl District Judge, Ghazipur, dated 26-2-1977. By that order the learned Judge allowed a revision against an order passed by the Munsif holding that the suit filed by the plaintiff was not barred by Section 49 of the U. P Consolidation of Holdings Act The learned Judge held that the suit was barred under Section 49 of the U. P Consolidation of Holdings Act as adequate relief could be granted by the consolidation authorities in proceedings under the U P Consolidation of Holdings Act.

2. The plaintiff filed a suit for cancellation of a sale deed executed by defendant No 2 on his behalf as well as on behalf of the plaintiff representing himself to be the plaintiff's Karpardaz, in favour of the defendant No. 1 The plaintiff and defendant No. 2 were brothers The plaintiff was the tenant of the holding in dispute He was originally a sirdar but had subsequently become the Bhumidhar of the same According to him he was out of the province of Bihar for the last seven or eight years and had not been living in the village in question It appears that the defendant No. 2 was looking after the plaintiff's holdings The plaintiff alleged that the defendant No 2 surreptitiously got his name entered in the revenue records during the consolidation operations and no notice had been received of the proceedings by the plaintiff. The defendant No 2 thereafter executed a sale deed of the land in dispute in favour of defendant No. 1 on his behalf as well as on behalf of the plaintiff disclosing himself to be his Karpardaz. According to the plaintiff the defendant No 2 was not authorised to act as a Karpardaz in respect of the transfer made by him. The entries made in favour of defendant No. 2 during consolidation operations were according to the plaintiff made on misrepresentation of facts and by practising fraud on the authorities. By the execution of the sale deed in favour of the defendant No. 1 a cloud had been cast on the title of the plaintiff in respect of the property in dispute and he was called upon to get the same cancelled The plaintiff alleged that the transaction was voidable at law and was liable to be set aside on an action laid challenging the same One of the defences raised in the suit was that the suit was barred by Section 49 of the U. P. Consolidation of Holdings Act as the village in question had come under consolidation operation. The trial Court held that the suit being one for cancellation of a sale deed and the transaction being tainted with fraud and misrepresentation of facts the consolidation authorities had no jurisdiction to adjudicate upon the rights of the parties, the suit accordingly was cognizable by the Civil Court.

3. On revision the learned Judge reversed that order and held that appropriate proceedings could be taken under Section 12 of the Consolidation of Holdings Act as regards rights of the plaintiff over the land in dispute and the civil suit was barred under Section 49 of the U. P Consolidation of Holdings Act. It may be stated that consolidation proceedings in the village had reached the stage of Section 23 and the map had been published It may further be pointed out that according to the plaintiff no notice of the proceedings under Section 9 of the U. P Consolidation of Holdings Act had been served on the plaintiff and the defendant No 2 had got his name entered over the plots by practising a fraud on the consolidation authorities. The defendant No. 2 had obtained mutation of his name along with the plaintiff and had thereafter executed the sale deed in favour of the defendant No. 1 on his behalf as also on behalf of the plaintiff representing himself to be his karpardaz. Thus the sale deed was one which purported to be executed jointly by the plaintiff and defendant No 2 The plaintiff's case is that the transaction is voidable as it is tainted with fraud and misrepresentation of facts. The question is whether the suit for cancellation of the sale deed is barred by Section 49 of the Consolidation of Holdings Act. A suit for cancellation of a deed is maintainable in the civil court The Consolidation authorities have no jurisdiction to cancel a document. See Smt. Prem Vati v. Harnam Singh (1980 Allahabad Civil Journal 78); (1980 UPLT NOC 71) and Similesh Kumar v. Gaon Sabha Uskar Ghazipur (AIR 1977 All 360) · (1977 All LJ 310). In Gorakh Nath Dube v Hari Narain Singh (1973 Rev. Dec. 423) it was held that a transaction which is void could be ignored by consolidation authorities and rights of the parties to the land could be determined by them, while a transaction needing to be cancelled or set aside cannot be dealt with by them and the same can be adjudicated upon by a court competent to grant the relief in that behalf. In Ram Nath v. Smt. Munna (1976 All WC 412) (FB) it was held that a suit for can-

cellation of a voidable sale deed as regards an agricultural holding pending in a Civil Court did not abate under Section 5 (2) of the U P Consolidation of Holdings Act

4. The question, therefore, is whether the transaction on the allegations made by the plaintiff was void or voidable The plaintiff alleged that the document was voidable It appeared to be executed on his behalf by defendant No 2 as his Karpardaz but since he was not authorised to alienate the holding the transaction did not bind the plaintiff It was further alleged that the defendant No 2 obtained entries in his own name in the revenue records by misrepresentation of facts and by practising fraud on the consolidation authorities The transaction in these circumstances was voidable at the plaintiff's instance In Karbalai Begum v. Mohammad Sayeed (AIR 1981 SC 77) (1980 All LJ 902) it was held that a suit for joint possession of land on the allegation that the defendants had obtained mutation of their names over the plots in dispute by practising fraud on the consolidation authorities was not barred by Section 49 of the U P Consolidation of Holdings Act. The facts were these

5 The plaintiff in the suit was a widow She succeeded to the interest of her husband in the holding Cousins of the husband were looking after the land on her behalf They got their names mutated over the holdings Separate chaks were carved out in their favour, and the plaintiff's name was deleted from the revenue records When she came to know of the conduct of the defendants and the entries made in the revenue records she filed a suit for joint possession of the land on the allegation that the contesting defendants had by practising fraud on the authorities obtained mutation in their favour to the detriment of the plaintiff The Supreme Court held that the suit filed was cognizable by the civil court and it was not barred by Section 49 of the U P Consolidation of Holdings Act Facts are parellel to the instant case, suit does not appear to be barred Learned counsel for the opposite party placed reliance on Amanat Ullah v Mohd Fariyad (1978 Rev Dec 262) (1978 All LJ 661) to contend that a suit for declaration challenging a document or transaction as void is liable to abate under Section 5 (2) of the U P Consolidation of Holdings Act The case is distinguishable. The sale deed in the instant case is challenged as voidable and not as void and since its cancellation is sought the bar of Section 49 of the Consolidation of Holdings Act is not attracted to the proceedings

6. The revision, accordingly, succeeds and is allowed with costs The order of the court below dated 26-2-1977 is set aside and that of the trial court is restored.

Revision allowed.

1981 ALL. L J. 791

V K MEHROTRA, J

Shyam Lal, Appellant v Ganeshi Lal, Respondent

Second Appeal No 3257 of 1972, D/- 24-2-1981 *

(A) U P (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7-C — Deposit of rent under — Rent demanded by landlord as well as by Receiver appointed by Court in respect of property in suit in some pending litigation — Tenant can entertain bona fide doubt as to who is entitled to receive rent and would be justified in depositing rent under Section 7-C. (Para 7)

(B) U P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S 7-C (3) — U P. Control of Rent and Eviction Rules (1949), R 9 — Deposit of rent by tenant in Court of Munsif — It can be said to have been made in 'prescribed manner' — Requirement of R. 9 as to deposit to be made under particular head — Directory.

Under sub-sec (3), the deposit is to be made in the Court of the Munsif having jurisdiction in the area where the accommodation is situate The manner which has been prescribed for the deposit of the amount under S 7-C, obviously relates to the procedure to be adopted in making a deposit The procedure, in substance, is that an application is to be made to the Court in the form given in Appendix A of the Rules whereafter a notice is to be issued by the Court in the Form as in Appendix B thereto The requirement of the deposit being made under a particular head provided in R. 9 has to be held to be directory (Para 9)

*Against decree of Prem Singh, Second Temporary Civil & Sessions J, Gorakhpur, D/- 23-5-1972.

Where the tenant deposited the rent in the Court of Munsif having jurisdiction in the area where premises in suit was situate and it was found that an application was made by the tenant as required by S. 7-C and an order was passed by the Court as required by the rules it could not be said that the fact that the deposit was not made by the tenant under appropriate head prescribed under R 9 would lead to the conclusion that no deposit under S. 7-C had been made at all

(Para 9)

S R Misra, S P Srivastava, for Appellant; Kamleshwar Sahai, for Respondent

JUDGMENT:— This is a plaintiff's second appeal

2. It is undisputed that defendant-respondent Ganeshi Lal was a tenant of a shop which stood on land of which the plaintiff had a lease expiring on September 30, 1964 The case of the plaintiff was that the defendant was in arrears of rent at the rate of Rs 20 per month in respect of this shop for a long period since September 1, 1964 The plaintiff gave a notice of demand, together with that terminating the defendant's tenancy, which was served on the defendant on June 26, 1967. The defendant did not pay the amount of rent in arrears to him nor did he vacate the shop. Hence, the suit for the defendant's ejectment and for recovery from him of the amount due as arrears.

3. The defendant took the plea that he was not in default for he had deposited the amount of rent for the aforesaid period (between 1-9-1964 and 30-8-1967) under Section 7-C of U P. Act No III of 1947 (hereinafter, for brevity "the Act"). He had to do so because there was doubt as to whether the plaintiff or the Receiver appointed by the Court in respect of the property in suit, which was subject matter of litigation before it, was entitled to receive the amount of rent. The plaintiff, therefore, was not entitled to the decree claimed.

4. The trial Court, under Issue No. 2 framed by it on the pleading of the parties, and which was "whether the defendant committed default in payment of rent or is he saved by his depositing it in court under Section 7-C proceedings?", found that the defendant had definitely proved that rent was demanded from him also by the court Receiver and that there was "bona fide doubt as to the person who was entitled to receive rent." The court also found that the defendant could, in the circumstances, deposit the amount of rent under Section 7-C (2) of the Act It also found that the amount of rent in arrears had actually been deposited by the defendant in the Court of Munsif However, according to the trial Court, the rent was not deposited under the head under which it should have been deposited as per the requirement of R. 9 of the U P Control of Rent and Eviction Rules, 1949. In the words of the trial Court, "the only fault of the poor man (the defendant) is that he has failed to deposit the rent under a proper head as prescribed by Rule 9. The defendant is to suffer irreparable loss for this trivial matter But I cannot help the same for we are to implement the will of the Legislature". The Court, upon its view aforesaid held that the deposit made by the defendant was not a valid deposit so as to make it available to him for purposes of sub-section (6) of Section 7-C of the Act as being rent "duly paid to the landlord." The defendant was held to be a defaulter by the trial Court and a decree, as prayed by the plaintiff was passed by it.

5. The matter was taken up in appeal by the defendant The lower appellate Court, on reappraisal of evidence on record, affirmed the view of the trial Court that in the circumstances of the case, the defendant could make a deposit of the amount of rent under Section 7-C (2) of the Act. It also affirmed the conclusion that the defendant had, in fact, applied to the Munsif having territorial jurisdiction in the matter for obtaining an order for the deposit of the amount from him. Further that he had made the deposit in that court. However, in the opinion of the lower appellate Court, the view of the trial Court that the deposit was invalid as it had not been made under the proper head in terms of Rule 9 was erroneous and too technical. The lower appellate Court held that the deposit could be treated to be a valid one. In its opinion, the defendant could not be held to be a defaulter nor could, therefore, a decree for his ejectment be passed. It, therefore, dismissed the suit for that relief The plaintiff has now approached this court in the present appeal.

6. It has been urged before me on behalf of the plaintiff-appellant that the view that the defendant was justified in making the deposit of the amount of rent under Section 7-C of the Act was incorrect. So also was the view taken by the lower appellate Court that the amount

deposited by the defendant, though not under the head under which it should have been, deposited was to enure to the benefit of the defendant It has been submitted that the order of ejectment was rightly passed by the trial court

7. On the facts found by both the courts below, namely, that apart from the plaintiff-appellant, rent was being demanded from the defendant by the Receiver appointed by the court in respect of the property in suit in some pending litigation, it is obvious that the view taken by them that the defendant could entertain a bona fide doubt about the person who was entitled to receive the rent for the premises in suit is plainly correct. In this view of the matter, it has to be held that the first submission of the learned counsel has no merit

8. The second submission of the learned counsel is that the amount of rent can be deposited by a tenant under Sec 7-C of the Act only "in the prescribed manner" which requires him to deposit it under the head mentioned in Rule 9 of the Rules As such, any deposit not made under that head could not be characterised as a deposit made "in the prescribed manner" and the tenant could not be held to have made the deposit at all As such, the provisions of sub-section (6) of Section 7-C would not come into play —

Section 7-C of the Act read thus —

"7-C (1) When a landlord refuses to accept any rent lawfully paid to him by a tenant in respect of any accommodation the tenant may in the prescribed manner deposit such rent and continue to deposit any subsequent rent which becomes due in respect of such accommodation unless the landlord in the meantime signifies by notice in writing to the tenant his willingness to accept

(2) Where any bona fide doubt or dispute has arisen as to the person who is entitled to receive any rent referred to in sub-section (1) in respect of any accommodation, the tenant may similarly deposit the rent stating the circumstances under which such deposit is made and may until such doubt has been removed or such dispute has been settled by the decision of any competent Court, or by settlement between the parties, continue to deposit, in like manner, the rent that may subsequently become due in respect of such building

(3) The deposit referred to in sub-section (1) or (2) shall be made in the Court of the Munsif having jurisdiction in the area where the accommodation is situate.

(4) On any deposit being made under sub-section (1) the Court shall cause a notice of the deposit to be served on the landlord and the amount of deposit may be withdrawn by the landlord on application made by him to the Court in this behalf

(5) When a deposit has been made under sub-section (2) the amount of the deposit shall be held by the Court for the benefit of the person who may be entitled to it and the same shall be payable to such person

(6) In any case where a deposit has been made, as aforesaid, it shall be deemed that the rent has been duly paid by the tenant to the landlord"

9. A perusal of this section would show that under sub-section (3), the deposit is to be made in the Court of the Munsif having jurisdiction in the area where the accommodation is situate Thus, admittedly, was done in the instant case The manner which has been prescribed for the deposit of the amount under Section 7-C, obviously relates to the procedure, to be adapted in making a deposit. The procedure in substance, is that an application is to be made to the Court in the form given in Appendix A of the Rules whereafter a notice is to be issued by the court in the Form as in Appendix B thereto It has been found by the lower appellate Court that an application (Ext A-1) was made by the defendant on July 3, 1967 for the purpose and an order (Ext A-2) was passed by the court on July 22, 1967 as required by the rules The substantive provisions of Section 7-C require the deposit to be made in the court of Munsif having jurisdiction in the area where the accommodation is situate If the deposit is made in the appropriate court, it is clear that the requirement of the substantive provision of law is fully satisfied It is settled that rules of procedure are handmaids for advancing the cause of justice They cannot be utilised to defeat it The object of the Act, as is evident from the relevant portion of its preamble, inter alia, was to prevent eviction of tenants from accommodation in the State of which there was shortage This object, amongst other, has to guide the interpretation of the provisions made by the rule-making authority in exercise of the powers conferred on it under the Act Insistence upon rigid adherence to a rule like the one for deposit being made under a particular head would clearly negate one of the objects

with which the Act was brought on the statute Book The rules have to be read in a manner so as to subserve the object of the Act In this view of the matter, the requirement of the deposit being made under a particular head provided in R 9 of the Rules has to be held to be directory It cannot, therefore, be held as was done by the trial Court, that the fact that the deposit was not made by the defendant under the appropriate head would lead to the conclusion that no deposit under Section 7-C had been made at all. The lower appellate Court was clearly right in its view that the approach of the trial Court in this respect was too technical It rightly dismissed the plaintiff's suit, in view of the factual findings recorded by both the courts, for the relief of ejectment of the defendant

10. The appeal has no merit and is dismissed but, without any orders as to costs

Appeal dismissed.

1981 ALL. L. J. 794

S D AGARWALA, J

Ram Saran, Petitioner v The Ist Addl District Judge, Rampur and others, Respondents

Civil Misc. Writ Petn No. 3599 of 1980, D/- 13-2-1981.

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 157-A — Applicability — Section applies to voluntary sale by Scheduled Caste Bhumidhar — Has no application to auction sale in execution of decree.

The prohibition in the section on transfer of land applies only to voluntary sales. It does not apply where the court is only executing a sale deed in execution of a decree passed against the Scheduled Caste Bhumidhar. Such a conclusion is also supported by absence of specific provision relating to auction sales in execution of decree made in S. 23 (2).

(Paras 5, 7)

K. B Sinha, for Petitioner; Standing Counsel, B. D Mandhyan, for Respondents

ORDER:— This is a petition under Article 226 of the Constitution of India. Opposite Party No. 3 Mohd. Ayaz Khan filed a suit for recovery of Rs 4,000 along with interest against the petitioner on the basis of a promissory note and receipt executed by the petitioner in favour of Mohammad Ayaz Khan. The suit was decreed for Rs. 5,318 together with interest. When the decree holder started proceedings for execution of the decree by sale of the land belonging to the petitioner, the petitioner filed an objection under Section 47, C P C that the auction sale of the agricultural land of the petitioner cannot be made as it is against the mandatory provisions of Section 157-A of the U. P Zamindari Abolition and Land Reforms Act, 1950. The objection was dismissed by the executing court on 21st July, 1979. Against the judgment dated 21-7-79 a revision was filed by the petitioner in the court of the District Judge, Rampur The revision was ultimately dismissed by the Ist Additional District Judge, Rampur, on 10th September, 1979 The petitioner has now challenged the above mentioned orders by means of the present petition

2. Learned counsel for the petitioner has urged that Section 157-A of U. P. Zamindari Abolition and Land Reforms Act, hereinafter referred to as the Act, restricts the transfer of land by members of Scheduled Castes or Scheduled Tribes. In view of the provision no attachment or sale of the property belonging to the petitioner can take place as he belongs to a Scheduled Caste

3. The contention of the petitioner is that the auction sale would be included in the word 'transfer' and as such the restriction imposed by this section would be applicable.

4. The relevant portion of S 157-A (1) of U. P. Zamindari Abolition and Land Reforms Act is as follows.—

"(1) Without prejudice to the restrictions contained in Ss. 153 to 157, no Bhumidhar or Asami belonging to a Scheduled Caste or a Scheduled Tribe shall have the right to transfer by way of sale, gift, mortgage or lease any land to a person not belonging to a Scheduled Caste or a Scheduled Tribe except with the previous approval of the Collector....."

5. Section 157-A of the Act in terms only prohibits a Bhumidhar who is of Scheduled Caste or Scheduled Tribe from transferring by way of sale, gift or mortgage or lease any land to a person not belonging to the Scheduled Caste or Scheduled Tribe except with the previous approval of the Collector. It applies to voluntary sales. This prohibition has been made so far as the Bhumidhar is one who either belongs to the Scheduled Caste or Scheduled Tribe. The prohibition is against such a Bhumidhar. It is only when

a Scheduled Caste or Scheduled Tribe Bhumidhar wants to sell or transfer any land then only the previous approval of the Collector is required and not in other cases In the instant case, the petitioner who is admittedly the Bhumidhar and belongs to a Scheduled Caste is not transferring the land to any person and as such this provision does not apply to the present case at all In the instant case the court would be executing a sale deed in execution of a decree passed against the Scheduled Caste Bhumidhar In my opinion, therefore, the prohibition contained in Section 157-A of the Act does not prohibit in any manner the attachment and sale of the property belonging to the Scheduled Caste

6. Since I have held that Sec 157-A of the Act would not apply no question arose of taking permission of the Collector for selling the property by auction

7 Learned counsel for the petitioner has particularly relied on Section 23 (2) of the Act which provides that nothing in sub-section (1) shall apply to any sale made under order of court in execution of any decree or order for payment of money The Legislature was aware of the fact that the sale by an auction may come up for consideration in execution of a decree which specifically excludes the said sale under Section 23 of the Act No such specific provision has been made under Section 157-A of the Act In the circumstances Section 23 does not advance the arguments made on behalf of the petitioner but in fact supports the view which I have already taken above In any case as I have already stated above here it is not a case for transfer by the petitioner in favour of a third party It is a case of an auction sale held in pursuance of the decree by the court passed against the petitioner

8. In the result, I do not find any force in this petition It is accordingly dismissed but in the circumstances of the case, the parties are directed to bear their own costs

Petition dismissed

1981 ALL L J. 795

S J. HYDER, J

Smt Kanti Khare, Petitioner v Kali Prasad Asthana and others, Respondents

Civil Misc. Writ Petn No 6456 of 1978, D/- 7-5-1981.

FY/FY/C656/81/SSG

(A) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Ss 10 (1) (a), 12 (3) — U. P. Urban Buildings (Regulation of Letting, Rent & Eviction) Rules (1972), R 8 — Allotment of premises deemed to be vacant — Application for — No opportunity to applicant of presenting his case either before Inspector or before Officer — Non-compliance with mandatory provisions of R. 8 — Held, Officer's order could not operate as res judicata between parties in proceedings of second application — ((i) Civil P. C. (1908), S 11 — (ii) Constitution of India, Art. 226 — Natural justice). (Paras 10, 11, 17, 18)

(B) U P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 18 — S. 18 is in pari materia with S 115, C P.C — Revisional jurisdiction — Exercise of — Ambit of — (Civil P C (1908), S 115).

Like S 115 of Civil P C a revision under S 18 of the Act lies only on a ground of an error in the exercise of jurisdiction Section 18 of the Act is analogous to S 115 of Civil P C and is in pari materia with it (Para 21)

True it is that the exercise of revisional power is entirely discretionary When adequate justice has been done between the parties to a litigation by an order which may have been passed irregularly or even improperly, the revisional court is not bound to interfere unless injustice and hardship would result from a failure to do so (Para 22)

If the Statute prohibits the revisional Court from going into question of fact and law while exercising its power as such revisional Court, it is not possible for it to circumvent the bar on the plea that in doing so, it is only trying to find whether adequate justice had been done to the parties by the order impugned before it The question of exercise of discretion in deciding a revision arises only in those cases where the question of justice inter partes is evident on the record. (Paras 25, 27)

(C) Constitution of India, Art 226 — Jurisdiction under — High Court ordinarily does not enter into disputed question of fact — Question as to what is residential building — It raises a pure question of law and merits decision by High Court — (U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 12 (3).) (Paras 31, 44)

(D) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act

(13 of 1972), Section 12 (3) — Question whether a building is residential — Determination — Test.

In answering the question as to whether a particular building is a residential or non-residential accommodation, what is to be kept in view is the suitability of the structure for residence or business or commercial one No hard and fast rule can be laid down and it is for the Court or Tribunal of fact to ultimately determine after taking into account the nature of the structure to come to a conclusion as to whether a particular building can be classified as residential or non-residential. Broadly speaking, if a building is suitable for residential purposes, no amount of ingenuity should be allowed to defeat the legislative intent behind Section 12 (3) of the Act. (Para 42)

Cases Referred:	Chronological Paras
1979 Allahabad Civil Journal 212	18
1978 All LJ 82	29, 40
AIR 1977 SC 1360	40, 41, 42
AIR 1976 SC 1988	12, 13, 14
AIR 1970 SC 1468	26, 27
(1917) 15 All LJ 645 : AIR 1917 PC 71	23
(1867) LR 1 SC & Div 177 (HL), Jenkins v. Robertson	17

Chand Kishore; A N Sinha and D. S. Sinha, for Petitioner, C. P Srivastava; R. R. Agrawal; Gyan Prakash; A K. Banerji and Standing Counsel, for Respondents

ORDER:— The petitioner feels aggrieved by the order of the Rent Control and Eviction Officer dated 28-11-1977 and the order of the III Additional District Judge, Allahabad, dated May 23, 1978. She has accordingly filed this writ petition for the issue of a writ of certiorari quashing the said orders She has also prayed that this court may issue a writ of mandamus directing the Rent Control and Eviction Officer to allot the accommodation in dispute in favour of the petitioner.

2. The writ petition has been mainly contested on behalf of Dr. (Smt.) D. Kaur who is arrayed as respondent No. 2. No doubt a counter-affidavit has also been filed by Sri Kali Prasad Asthana who is III Additional District Judge at Allahabad on May 23, 1978

3. Dr. (Smt.) D. Kaur was posted as Medical Officer in charge, Dufferin Hospital, Allahabad in the year 1954. On an application made by her, the then Rent Control and Eviction Officer allotted the accommodation in dispute bearing Municipal No 17, Kanpur Road, in her favour. The owner of the said accommodation is the Methodist Church, Allahabad and has been impleaded as respondent No. 4 to this Writ Petition. Dr. (Smt.) D Kaur resigned from Government Service in about the year 1958 and she began a residence in the above said accommodation along with her husband Sri K. Kumar There is no serious dispute between the parties in so far as these facts are concerned.

4. Petitioner alleges that sometime before the dispute between the parties Dr. (Smt.) D Kaur constructed a residential building for herself at Hastings Road (Nyaya Marg) known as "Purab Pashchim". She alleges that in consequence of the construction of the said building by Dr (Smt.) D Kaur, the accommodation in dispute, 17 Kanpur Road, will be deemed to have fallen vacant In support of her contention, she relies on sub-section (3) of Section 12 of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 hereinafter referred to as 'the Act' Sub-section (3) of Section 12 of the Act reads:—

"In the case of a residential buildings, if the tenant or any member of his family builds or otherwise acquires in a vacant state or gets vacated a residential building in the same city, municipality, notified area or town area in which the building under tenancy is situate, he shall be deemed to have ceased to occupy the building under his tenancy.

Provided that if the tenant or any member of his family had built any such residential building before the date of commencement of this Act, then such tenant shall be deemed to have ceased to occupy the building under his tenancy upon the expiration of a period of one year from the said date.

Explanation.— For the purposes of this sub-section:—

(a) a person shall be deemed to have otherwise acquired a building, if he is occupying a public building for residential purpose as a tenant, allottee or licensee;

(b) The expression "any member of family", in relation to a tenant, shall not include a person who has neither been normally residing with nor is wholly dependent on such tenant."

5. The petitioner further alleges that on May 4, 1977, she moved an application for the allotment of the disputed house No. 17, Kanpur Road because she genuinely needed the accommodation for her personal use. It is stated by her that

the application moved by her was referred for enquiry to the Rent Control Inspector who made an ex parte inspection and submitted his report on July 29, 1977 The Rent Control and Eviction Officer, without hearing the parties and without giving the petitioner an opportunity to rebut the report of the Rent Control Inspector, dismissed her application by an order dated July 30, 1977 When the petitioner came to know of the said order, she moved a second application supported by an affidavit stating the correct facts therein This application was again made over to the Rent Control Inspector for report

After hearing the parties, the Rent Control and Eviction Officer dismissed the petitioner's application on the ground that it was barred by the principle of res judicata It may be stated that another application for the allottment of the disputed accommodation had also been made by the petitioner's husband Sri P B L Khare That application was also rejected by means of the order dated 28-11-1977 The petitioner goes on to say that against the order of the Rent Control and Eviction Officer dated November 28, 1977, two revisions were preferred before the District Judge, Allahabad One of these revisions was on behalf of the petitioner herself and the other on behalf of her husband Sri P B L Khare The two revisions were transferred for disposal to the III Additional District Judge, Sri Kali Prasad Asthana He dismissed both the revisions by his impugned order dated May 23, 1978

6. The III Additional District Judge, in his impugned order, noted the fact that it was urged on behalf of the petitioner that the application was not barred by the principle of res judicata and that the said contention was opposed by the counsel appearing on behalf of Dr (Smt) D Kaur He, however, did not decide the said controversy He went into the merits of the case and recorded a finding that the accommodation in dispute had not fallen vacant and as, such, it was not available for allotment He observed that a revisional Court is not bound to interfere with the order of an inferior Tribunal except in aid of justice Since he was of the view that on merits, the petitioner had no statable case, no useful purpose will be served by sending back the case for a fresh decision to the Rent Control and Eviction Officer

7. Learned Counsel appearing for the petitioner has contended that the Rent Control and Eviction Officer was in error in holding that the petitioner's application was barred by the principle of res judicata He also argued that the III Additional District Judge had no jurisdiction to go into the merits of the case and to record findings on disputed questions of fact while hearing the revision The learned counsel appearing for Dr (Smt.) D Kaur has, on the other hand opposed the contentions advanced on behalf of the petitioner

8. As already stated above, the Rent Control Inspector made a report on the application moved by the petitioner on July 29, 1977 The order under Sec 16 (1) (a) of the Act rejecting the application of the petitioner was passed by the Rent Control and Eviction Officer on July 30, 1977 The Inspection Note of the Rent Control Inspector dated July 29, 1977 indicates that at the time of the inspection, Dr (Smt) D Kaur along with three other witnesses of the locality were present The Inspector does not indicate in his report nor it has been stated by Dr (Smt) D Kaur in her counter-affidavit that any intimation of the date and time fixed for inspection was given to the petitioner or her counsel There is nothing on the record from which it can be concluded that the landlord of the accommodation was informed about the inspection by the Rent Control Inspector or that any one on its behalf when the Rent Control Inspector visited the accommodation in dispute for the purpose of local inspection.

9. In this connection, sub-rule (2) of Rule 8 framed under the Act is relevant and is quoted below—

"The Inspector shall inspect the building, so far as possible, in the presence of the landlord and of the tenant or any other occupant and submit his report after eliciting the facts wherever practicable by at least two respectable persons residing in the locality, and the conclusion in the report of the Inspector shall be pasted on the notice board of the office of the District Magistrate for the information of the general public, and an order of allotment may be passed not before the expiration of three days from the date of such pasting and if in the meantime any objection is received not before the disposal of such objection".

10. The Rule quoted above makes it obligatory on the Rent Control Inspector to make the inspection amongst others in the presence of the landlord. The result of the inspection has to be pasted on a

notice board for a period of at least three days for the information of the general public An order of allotment can only be passed after the expiry of the said period or if an objection is filed, after the disposal of the objection The right to file an objection against the report is not limited to the landlord or the tenant, as the case may be Such an objection can also be filed by any member of the public for whose benefit the purport of the Inspection Report has to be pasted on the Notice Board. The provisions of the sub-rule above are mandatory.

11. The Inspector's report should not be ex parte unless a party fails to attend at the time of the inspection in spite of sufficient information This is necessary because the report submitted by the Inspector can be made a basis for recording findings by the District Magistrate or the revisional authority

12. In the instant case, it was not only the Rent Control Inspector who was at fault by not giving notice of the time and date of the inspection to the landlord and to the petitioner, the Rent Control and Eviction Officer himself committed a breach of the said Rule by not pasting the purport of the Inspection Report on the Notice Board as required by sub-rule (2) of Rule 8 framed under the Rules. Learned counsel appearing for Dr. (Smt.) D Kaur has urged before me that it was not necessary for the Rent Control Inspector to give any intimation about the time and date of the inspection to the petitioner. He submitted that such notice is not necessary to be given in the case of a tenant

In support of this contention, learned counsel has relied on the Supreme Court decision in the case of Trilok Singh and Company v. District Magistrate, Lucknow, AIR 1976 SC 1988. In that case the accommodation in dispute was in possession of M/s. Trilok Singh & Company and on a perusal of the report of the Rent Control Inspector, the Rent Control and Eviction Officer passed an order directing that the vacancy of the accommodation may be notified. Aggrieved by the said order, the petitioner filed a writ petition alleging that it has been passed in violation of the principle of natural justice and without giving a hearing to the petitioner The writ petition was dismissed by a Division Bench of this court with a brief speaking order.

This court held that the writ petition was premature and the proper remedy for the petitioners was to approach the Rent Control and Eviction Officer under Section 16 (5) (a) of the Act for the review of the order directing the vacancy to be notified The view taken by the Division Bench of this court was affirmed by the Supreme Court which held that the Act contemplated successive opportunities being afforded to the persons whose interest was likely to be affected by an order passed by the District Magistrate under Section 12 (4) of the Act After a review of the relevant provisions of the Act, Chandrachud, J (now C J) observed (at p 1991):—

"The Act thus contemplates successive opportunities being afforded to the persons whose interests are likely to be affected by any order passed by the District Magistrate Putting it briefly an order notifying a vacancy can be objected to and the objection has to be decided after considering the evidence that the objector or any other person concerned may adduce Secondly, if an order of allotment or release is passed under Section 16 following upon a notification of vacancy, the aggrieved person can file a review application Thirdly as against an order passed under Section 16, there is a right of appeal under Section 18."

13. The decision in the case of Trilok Singh & Company (AIR 1976 SC 1988) (supra) was rendered on 23rd of March, 1976 Since then the Act has been amended by U. P Act 28 of 1976. At the end of sub-section (1) of Section 16, the following proviso has been inserted in the principal Act by U. P. Act 28 of 1976 —

"Provided that in the case of a vacancy referred to in sub-section (4) of Sec 12 the District Magistrate shall give an opportunity to the landlord or the tenant, as the case may be, of showing that the said section is not attracted to his case before making an order under cl. (a)"

14. This amendment, therefore, nullifies the effect of the decision in the case of Trilok Singh & Company (supra)

15. The question which, however, remains to be answered is whether the petitioner who was neither a tenant in relation to the building in dispute nor its landlord was entitled to be informed of the date and time of the place of inspection There is nothing stated in express terms in Section 16 of the Act or Rule 8 of the Rules framed thereunder on the basis of which the petitioner can claim as a matter of right that she should have been given such an information. Never-

theless sub-rule (2) of Rule 8 extracted above specially confirms that the report of the Rent Control Inspector shall be notified on the notice board for three days for the information of the general public Section 18 of the Act states that any person aggrieved by an order under Section 16 or Section 19 may prefer a revision before the District Judge The right of filing a revision under Section 18 has been stated in broad and general terms and is not confined to a landlord or tenant, as the case may be The proceedings in the instant case commenced on an application made by the petitioner stating that the building occupied by Dr (Smt.) D Kaur should be deemed to have fallen vacant within the meaning of Section 12 (4) of the Act

It was on the basis of this application that the Rent Control Inspector made a local inspection on July 29, 1977 and the Rent Control and Eviction Officer passed the impugned order dated 30th of July, 1977 The petitioner made another application which was dismissed on the ground that it was barred by res judicata She subsequently preferred a revision against the said order which has been disposed of by the III Additional District Judge and the order passed by the said Judge is also impugned in the writ petition It was not urged before him or before this court that the petitioner was not entitled to maintain a revision under Section 18 of the Act against the decision passed on her second application by the Rent Control and Eviction Officer

16. The result of the above discussion is that the application made by the petitioner on 4th of January, 1977 stating that the accommodation in dispute should be deemed to be vacant and may be allotted in her favour gave rise to a lis to which the petitioner and Dr (Smt.) D Kaur were parties Even if there is no statutory obligation the rule of audi alteram partem made it obligatory on the Rent Control Inspector and also on the Rent Control and Eviction Officer to give an opportunity to the petitioner to substantiate her case as stated in the petition S A de Smith, in his Treatise on Judicial Review of Administrative Action," has thus stated the position —

"Natural justice generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed, so that they may be in a position,

(a) to make representations on their own behalf, or

(b) to appear at a hearing or enquiry (if one is to be held), and

(c) effectively to promote their own case and to answer the case (if any) they have to meet"

17 As already stated, the petitioner had no opportunity to present her case either before the Rent Control Inspector or before the Rent Control and Eviction Officer In these circumstances, it is difficult to hold that the order dated July 30, 1977 operated as res judicata between the parties Res judicata, said Lord Romilly, in Jenkins v Robertson, (1867) LR 1 SC & Div 177 (HL) —

"By its very word means a matter upon which the court has exercised its judicial mind and has come to the conclusion that one side is right and has pronounced a decision accordingly In my opinion, res judicata signifies that the court has, after argument and consideration, come to a decision on a contested matter In other words, in order to support a plea of res judicata, it is not enough that the parties are the same and that the same matter is in issue, it must also be shown that the matter was heard and finally decided"

18. The view which I am taking on this point also finds support from a Division Bench of this Court in Dr Chanan Singh v District Judge, Bareilly, 1979 Allahabad Civil Journal 212

19. For the reasons stated above, I am of the opinion that the order of the Rent Control and Eviction Officer passed on July 30, 1977 did not operate as res judicata in the proceedings arising out of the petitioner's second application dated August 29, 1977 The order of the Rent Control and Eviction Officer dated November 28, 1977 therefore, deserves to be quashed

20 Now as, to the order of the III Additional District Judge dated 20-3-1978, it has been contended on behalf of the petitioner that the revisional court has exercised its jurisdiction in recording findings on question of fact It was urged that after the amendment of Section 18 of the Act by the U P Act 28 of 1976 it is identical in its scope and ambit with Sec 115 of the Code of Civil Procedure An order passed under Section 16 or 19 of the Act could be revised on the ground that it suffers from an error of jurisdiction and that it was not open to the III Additional District Judge to go into the

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merits of the controversy and record its own findings on question of fact. Learned counsel appearing for Dr (Smt.) D. Kaur, on the other hand, submitted that a revisional court is under no duty to interfere with the order of a subordinate court or Tribunal except in aid of justice. He submitted that the III Additional District Judge, after a careful assessment of evidence on the record came to the conclusion that the building or accommodation in dispute was not a residential building and as such, sub-section (4) of Section 12 of the Act was not attracted when a new building known as 'Purab Pachchim' is alleged to have been constructed by Dr (Smt.) D. Kaur.

Learned counsel for the contesting respondent went a step further and submitted that this court should not interfere in the exercise of its prerogative jurisdiction under Article 226 of the Constitution when a just and proper decision has been rendered by an inferior Tribunal, even if such decision suffers from an error of law or jurisdiction. Exercise of appellate jurisdiction presupposes that the court of appeal is superior to the court, the decision of which is appealed against. An appeal, unless otherwise provided, carries with it a right of rehearing on questions of law as well as on questions of fact. When an appeal is preferred, the cause is removed from the inferior court to the superior court for the purpose of testing the soundness of the decision of the inferior court. An appeal is not a fresh suit but is only a continuation of the original proceedings and is a stage in the suit itself. Excepting those orders which have been made expressly appealable, an appeal always lies at the conclusion of the hearing. It is well settled that revisional jurisdiction is only a fact of the appellate jurisdiction and for that reason it is also vested in a superior court. Like an appeal, revision also is a creature of the statute and a court of revision can only exercise such powers which are expressly conferred upon it by the statute.

21. Like Section 115 of the Code of Civil Procedure, a revision under S. 18 of the Act lies only on a ground of an error in the exercise of jurisdiction. Section 18 of the Act is analogous to Sec. 115 of the Code of Civil Procedure and is in pari materia with it.

22. True it is that the exercise of revisional power is entirely discretionary. When adequate justice has been done between the parties to a litigation by an order which may have been passed irregularly or even improperly, the revisional court is not bound to interfere unless injustice and hardship would result from a failure to do so. The discretion vested in the court exercising revisional powers is, however, judicial discretion and has to be exercised within the ambit of Section 18 of the Act or Section 115 of the Code of Civil Procedure, as the case may be.

23. As already pointed above, the ambit of the powers of the revisional court is limited in a case falling under Section 18 of the Act or Section 115 of the Code of Civil Procedure. In the case of Bal Krishna Udayar v Vasudeva Ayyar, AIR 1917 PC 71 ((1917) 15 All LJ 645), while dealing with the scope of Section 115 of the Code of Civil Procedure, the Privy Council said —

"It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it or an illegal assumption of it. This section is not directed against conclusions of law or fact in which question of jurisdiction is not involved."

24. The principle stated above has been consistently followed by the Privy Council, the Supreme Court and also by the different High Courts in India is beyond the pale of doubt.

25. The question then is whether a revisional court can enter into question of law and fact to find out whether adequate justice has been done to the parties? The answer to this question can only be in the negative. To hold otherwise would obliterate the distinction between the exercise of appellate jurisdiction and the exercise of revisional jurisdiction. If the Statute prohibits the revisional court from going into question of fact and law while exercising its power as such revisional court, it is not permissible for it to circumvent the bar on the plea that in doing so, it is only trying to find whether adequate justice had been done to the parties by the order impugned before it. The question of exercise of discretion in deciding a revision arises only in those cases where the question of justice inter partes is evident on the record. It is trite to say that what cannot be done directly cannot be allowed to be accomplished in an indirect manner.

26. It was faintly urged on behalf of Dr. (Smt.) D. Kaur that the case was argued on facts also before the III Additional District Judge and he was, therefore, justified in recording a finding on

facts. A similar question arose before the Supreme Court in the case of Khushru S. Gandhi v. N. A. Guzder, (AIR 1970 SC 1468). In that case, besides disputed questions of fact relating to a compromise, one of the disputes between the parties was whether the court-fee paid was insufficient. The question relating to court-fee was decided against the plaintiff of the suit and he was given option either to make good the deficiency in court-fee or to amend the plaint. The plaintiff applied for an amendment of the plaint and the amendment application was allowed. Against the order allowing the amendment application the defendant preferred a revision before the High Court. A single Judge of this Court, while hearing the revision against the order allowing the amendment of the plaint, recorded findings on one of the issues relating to the disputed compromise.

Against that order, the plaintiff preferred an appeal by Special Leave before the Supreme Court. Sikri J. speaking for the court, accepted the contention of the plaintiff that the High Court had no jurisdiction to pronounce about the effect of the disputed compromise while hearing the revision. The learned Judge was of the view that the controversy in the revision was limited one and was confined to the question as to whether the trial Court committed an error of jurisdiction in allowing the amendment of the plaint. In the view of the Supreme Court, the High Court travelled outside the scope of its jurisdiction in deciding one of the issues arising in the suit itself. The Supreme Court was further of the opinion that the fact that the learned counsel for the parties in that case addressed arguments before the High Court about one of the issues in the suit itself was wholly irrelevant since the power of the High Court was strictly limited in its scope and could not be enlarged even by the consent of the parties.

27. The rationale of the case of Khushru S. Gandhi (AIR 1970 SC 1468) (supra) applies with full force to the facts of this case. For this reason also, the III Additional District Judge could not decide the issues arising in the case between the parties while exercising revisional powers under Section 18 of the Act.

28. What has been stated above was sufficient to dispose of the writ petition. I have already held that the orders of the Rent Control and Eviction Officer dated November 28, 1977 [illegible] invalid. The discussion contained in the paragraphs immediately preceding also shows that the order of the III Additional District Judge, Allahabad, dated May 23, 1978 is also [illegible] and was beyond his jurisdiction. Nevertheless there is an important question of law which still remains to be disposed of.

29. Learned counsel for the Dr. (Smt.) [illegible] Kaur relied on the case of Dr. Bashir Uddin v. District Judge (1978 All LJ 82). In that case, a Division Bench of this Court held (at p. 87):—

"It is not difficult to understand as to what is residential building is. These words can have no relation to the nature of the structure because human need is capable of converting any building for the purpose of residence. A residential building must consequently be a building which at the moment is being used primarily for the purpose of residence."

30. On the basis of the above discussion, the thrust of the argument of the learned counsel was that the irrespective of the nature of the building in dispute, as the same was being used as a clinic, it should be characterised as a non-residential building and there was no question of sub-section (3) of Section 12 of the Act applying to the said building. He referred me to the annexure filed along with the writ petition, the counter-affidavit and the rejoinder-affidavit to support his submission.

31. I have given serious thought to the reasoning advanced [illegible]. I am, however, of the view that this court, while exercising jurisdiction under Article 226 of the Constitution, should not ordinarily enter into disputed [illegible] fact. It should also not [illegible] this court to hold that the [illegible] in dispute should be deemed to be vacant or should be allotted to the petitioner. Both these functions have been squarely assigned by the statute to the District Magistrate or, in a case where he has delegated his powers to a subordinate popularly known as the Rent Control and Eviction Officer, by the said Officer. I would, therefore, have been contented by quashing the impugned orders of the Rent Control and Eviction Officer and the III Additional District Judge and would have refrained from expressing any opinion on the merits of the case.

However, a closer look at the submission urged on behalf of Dr (Smt) D Kaur reveals that matters of, fact apart, the question as to what is residential building raises a pure question of law and merits decision by this court The guidelines laid down by the court on the legal aspect will facilitate a decision by the Rent Control and Eviction Officer and shall save the parties from the troubles of undergoing a fresh round of litigation on this matter which arises in the case The gulf which separates the right from the remedy should be bridged as far as possible and the sooner a litigant is made to realise whether he is entitled to a remedy or not, the better it is for our judicial (sic) distinguishing a residential from a non-residential building because on that question will depend the facts of the dispute between the parties

32. It is a matter of common knowledge, judicial notice of which can be taken, that the population of the country has been increasing in astronomical proportions The socio-economic changes which have taken place after 1947 have contributed to an enormous increase in the urban population For reasons with which this court is not concerned, housing development in cities has not kept pace with the increase in population

33 The legislature took cognizance of the situation and enacted laws to deal with the housing problem In the first instance, the State Legislature passed the U P (Temporary) Control of Rent and Eviction Act (Act 3 of 1947) The life of this Act was extended from time to time Experience brought to the fore numerous defects in the enactment which had to be remedied In consequence the said Act was repealed and was replaced by the Urban Buildings (Regulation of Letting, Rent and Eviction) Act (Act 13 of 1972), which has already been referred to in this judgment as the Act

34. The preamble of the Act shows that the object of the enactment is to provide in the interest of the general public for the regulation of letting, rent and eviction of the tenant from certain classes of buildings situated in Urban Areas and for the matters connected therewith The Act is sub-divided into seven Chapters which [illegible] and [illegible] accommodation and [illegible] of the landlords to evict sitting tenants from the accommodation which is a subject matter of their tenancy.

35. At this stage, it would be useful to refer to Part IV of the Constitution which deals with the Directive Principles of State Policy Article 39, in so far as it is relevant for this case, reads thus :

"39 Certain principles of policy to be followed by the State - The State shall, in particular, direct its policy towards securing—

(a)

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good,

(c) That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment"

36 True, it is that Article 37 lays down that the provisions contained in Part IV of the Constitution shall not be enforceable by any court At the same time, it emphasises that the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making the laws Article 36 is the first Article under Part IV which states that in this part, unless the context otherwise requires, the "term State" has the same meaning as is given to the term in Part III, which deals with fundamental rights. It, therefore, follows that although the provisions contained in Part IV are not justiciable, the court cannot lose sight of the principles contained therein Moreover, the Directive Principles are not merely pious wishes which may be disregarded with impunity They are important and integral part of the Constitution which is the fundamental law of the land It would, therefore, be proper for the courts, while interpreting statutory provisions, to keep the said principles in view and to place such constructions on its terms, if possible, which would harmonise with the provisions of law contained in Part IV of the Constitution

37. Broadly speaking, a person may have a right to have a residential accommodation on rent and at the same time to build any number of such accommodations which he may let out on rent In the same way, a landlord may be entitled to charge any amount of rent from his tenant and to enhance it from time to time He may also possess the freedom to evict his tenant at any time according to his sweet will The freedoms enumerated above may be dear to a votary of the doctrine of laisez faire. It is nevertheless to

be remembered that freedom or liberty is not an abstraction, it does not exist in a social vacuum Rights and freedom can be enjoyed only within a concrete social milieu Our founding fathers in their wisdom have recognised this principle which cannot be reasonably disputed

38 It is precisely for this reason that the Act has imposed restrictions on the freedom of the landlord to evict the tenant at his sweet will or to enhance the rent payable by him The same principle of harmonising individual freedom with common good is enshrined in sub-s (3) of Sec 12 of the Act If a tenant who is in occupation of a residential accommodation builds or otherwise acquires an accommodation of a similar kind within the same Municipal area, the accommodation occupied by him as a tenant must necessarily be deemed to be vacant This is a necessary concomitant of an activist policy to prevent affluent becoming more affluent and the deprived getting more deprived

39. With the above background, I revert back to the distinction between a residential and a non-residential accommodation

40. The case of Dr Bashir Uddin (1978 All LJ 32) (supra) is distinguishable In that case, the Bench of this court was concerned with a residential accommodation which was alleged by the other side to be non-residential Keeping in view the conditions prevailing in this country, this court took the view that even a non-residential accommodation could be treated as a residential accommodation if it was being actually used for residential purposes With respect to the learned Judges who decided that case, it may be said that the view taken by them is plausible Nevertheless, the Supreme Court, in the case of Busching Schmitz Private Ltd v P T Menghani, AIR 1977 SC 1569, observed (at p 1576) —

"Use or purpose of the letting is no conclusive test Likewise, the fact that many poor persons may sleep under bridges or live in large hume pipes or crawl into varandahs of shops and bazars cannot make them residential premises That is a case of feductio ad absurdum"

41. In the case just referred to their Lordships categorically rejected the user or purpose test for determination of the question whether a particular building is a residential building or a non-residential building A little above the passage extracted from the case of Busching Schmitz (AIR 1977 SC 1569), the Supreme Court said (at p 1576) —

"Residential premises are not only those which are let out for residential purposes as the appellant would have it Nor do they cover all kinds of structures where humans may manage to dwell If a beautiful bungalow were let to a businessman to run a show-room or to a meditation group or music society for meditational or musical uses, it remains nonetheless a residential accommodation Otherwise, premises may one day be residential, another day commercial and, on yet a later day, religious"

42 It would be a travesty of the legislative intent if a litigant is allowed to subvert the real purpose of the statute by clever contrivance In answering the question as to whether a particular building is a residential or non-residential accommodation What is to be kept in view is the suitability of the structure for residence or business or commercial use No hard and fast rule can be laid down and it is for the court or Tribunal of fact to ultimately determine after taking into account the nature of the structure to come to a conclusion as to whether a particular building can be classified as residential or non-residential Broadly speaking, if a building is suitable for residential purposes, no amount of ingenuity should be allowed to defeat the legislative intent behind Section 12 (3) of the Act In the case of Busching Schmitz (AIR 1977 SC 1569) (supra), the Supreme Court observed (at p 1576) —

"Residential suitability being the basic consideration, this building fills the bill Nothing said in the affidavit-in-opposition puts it out of the pale of residential accommodation A building which reasonably accommodates a residential user is a residential accommodation — nothing less, nothing else"

43 As already stated, I have outlined the legal principles which should be taken into account by the court of fact in coming to the conclusion whether the building occupied by Dr (Smt) D Kaur is a residential building or not

44 A number of questions of fact have been raised on behalf of the parties in order to sustain their rival claims as to whether the building occupied by Dr (Smt) D Kaur as a tenant is a residential building or not and other matters germane to the controversy between the parties It has already been pointed out earlier that this court cannot determine the disputed question of fact in the exer-

enforcement proceedings against the tenant by the landlord shall not be instituted unless the landlord has served on the tenant a notice in writing stating that the landlord intends to institute such proceedings and specifying the ground on which he intends to rely for the purpose of obtaining an order for the recovery of possession of the dwelling-house and the date on or after which such proceedings may be instituted, being a date which is not earlier than the date on which the tenant could lawfully be required by virtue of the terms of the tenancy to give up possession of the dwelling-house in question if such a notice had been served on the tenant on the date on which the proceedings are instituted.

(2) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required as a residence for the landlord or for a member of his family, the notice shall specify the person who is to occupy the dwelling-house as a residence and his relationship to the landlord.

(3) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(4) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(5) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

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(30) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(31) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(32) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(33) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(34) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(35) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(36) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(37) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(38) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(39) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(40) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(41) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

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(44) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(45) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(46) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(47) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(48) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(49) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

(50) Where a notice under subsection (1) of this section specifies as the ground on which the landlord intends to rely for the purpose aforesaid that the dwelling-house is required by the landlord for the purpose of carrying out a scheme of development, the notice shall specify the nature of the scheme.

ORDER — By way of this petition the main relief sought is of mandamus against State for restitution of possession of 2.29 acres of land over which possession was taken by it in pursuance of the order dated 4-9-1975 passed by prescribed authority under U P Imposition of Ceiling on Land Holdings Act Subsequently fresh proceedings were started against petitioner after amendment of the Act by U P. Act 20 of 1976 and it was claimed that the petitioner was possessed of 6.29 acres of surplus land on 8-6-1973. The notice was contested and the petitioner claimed that as some of the land was unirrigated and others were single crop lands, the total area if worked out in terms of unirrigated (land) then petitioner was left with no surplus area The claim was rejected as 2.29 was already in possession of State 4.50 only was declared surplus In appeal the order was set aside The petitioner's contention that plot No 642 having an area of 17.60 acres except 89 acre was unirrigated was accepted. It was held that petitioner had no surplus land. On 19-4-1979 an application for restoring possession over 2.29 acres was filed before prescribed authority This was rejected against which petitioner filed an appeal and it was held that in the earlier order passed by appellate authority there was no declaration that even considering the earlier order the petitioner was possessed of no surplus area As the petitioner did not get it clarified his application for restitution of possession over 2.29 acres was misconceived

2. Having heard learned counsel for parties it appears that the order passed by District Judge and prescribed authority cannot be maintained The total area of plot No 642 as mentioned in the order of prescribed authority appears to be 17.60 acres If the entire area is treated to be unirrigated, as has been held by appellate authority, then in terms of irrigated one it shall stand reduced approximately to 11 acres It would thus result in diminishing surplus by nearly 6 acres It was because of this reason that appellate authority held that petitioner was left with no surplus area It is true that in the declaration made on 8-6-73 was in respect of 2.29 acres as well but from the calculation mentioned above it is apparent that it was in respect of the total area held by petitioner As the proceedings are in respect of the entire land held by petitioner the order of District Judge that petitioner held no surplus area shall be deemed to include earlier area declared as surplus. There is no substance in the argument of the learned Standing Counsel that these proceedings were in respect of 4.50 acres only The stand taken in the counter-affidavit in this respect is not very clear. In paragraph 4 it has been mentioned that in the statement sent along with notice issued under Section 31 of U P. Act 20 of 1976 related the area of 6.79 acres which was shown to be surplus and a note was added in red ink that as possession of 2.29 acres has already been taken the proposed surplus land was to be declared as 4.50. This clearly indicates that proceedings were in respect of the entire land held by petitioner Even otherwise once fresh proceedings were instituted under the amended Act they could not relate to a part of the holding It must be taken to have been in relation to the entire area held by petitioner

3. There is yet another reason for concluding that the State cannot retain possession over 2.29 acres of land Notice for redetermination of surplus area was issued under Act 20 of 1976 The significance of such notice is mentioned in Section 31 itself. It provides that once prescribed authority has issued notice for redetermination of surplus area then any order passed prior to Oct., '75 irrespective of pendency or its decision shall stand abated. It has been held by Division Bench that once proceedings for redetermination are initiated earlier proceedings which had been decided prior to October, 1975 become non-existent The possession, therefore, taken by State in pursuance of the order which was passed prior to October, 1975 could not be considered to be possession in accordance with law The State is, therefore, bound to restore possession over the land it took possession in pursuance of the order passed by prescribed authority.

4. In the result this petition succeeds and is allowed. The order passed by Additional District Judge and prescribed authority are quashed. The Prescribed Authority is further directed to calculate the excess area to which petitioner was entitled as a result of declaration that plot No. 642 was unirrigated. If the entire area which as a result of this calculation comes to 6.79 acres then the petitioner shall be entitled to restitution of possession over the entire 2.29 acres. In case it is lesser than that then after deducting that, the remaining area shall be restor-

ed The petitioner shall be entitled to costs

Petition allowed

1981 ALL. L. J 807

S D AGARWALA, J

Radhey Shyam, Petitioner v The District Judge, Allahabad and others, Respondents

Civil Misc Writ No 7394 of 1980, D/-13-2-1981

(A) Provincial Small Cause Courts Act (9 of 1887), S 15 (1) r/w Sch II Art 4 — Bar of jurisdiction — Lessee of land erecting building thereon with permission of owner — Suit for ejectment on ground of non-payment of rent — Must be deemed to be one for possession of immovable property — Small Cause Court has no jurisdiction to try such suit.

Under Art 4 to Schedule II a suit for possession of immovable property or for the recovery of an interest in such property is not cognizable by the Judge, Small Cause Court The only suit cognizable would be a suit by a lessor for eviction of a lessee from the building after the determination of the lease Therefore, under Art 4, only such suits are cognizable by the Judge, Small Cause Court where the building is the subject matter of the lease and there is a determination of the lease of the said building (Para 8)

In the instant case, vacant land had been let out to the petitioner to erect a permanent structure on the said land The petitioner did not pay the rent of the land and a suit was filed for ejectment of the petitioner from the land in dispute and also, consequently, for possession of the property which had been constructed by the petitioner on the land in dispute

Held since the land alone had been let out and not the building which was erected by the petitioner with the permission of the plaintiff, the suit by the plaintiff could not be said to be a suit by the lessor for eviction of a lessee from a building In fact, the suit would be a suit for possession of immoveable property, and, therefore, the Small Cause Court would have no jurisdiction to try the suit (Para 8)

(B) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 29A — Section protects eviction of tenant where land has been let out and, thereafter permanent structure has been constructed with landlord's consent — It has no effect on forum in which eviction suit shall lie. (Para 9)

K B Mathur, for Petitioner. D P Misra and D P Tripathi, for Respondents

ORDER — This is a petition under Article 226 of the Constitution of India

2. A Suit No 263 of 1977 was filed by opposite parties Nos 3 to 9 in the Court of Judge, Small Causes, Allahabad for ejectment of the petitioner with a relief that a decree for eviction be passed against the petitioner from premises No 65/76, Mahampana malviya Nagar, Allahabad

3 A preliminary objection was filed by the petitioner to the effect that the Judge, Small Cause Court has no jurisdiction to try the suit This objection was dismissed by the Judge, Small Cause Court, by order dated 1st February, 1980 The petitioner, thereafter filed a revision under Section 25 of the Provincial Small Cause Courts Act before the District Judge, Allahabad, against the order dated 1st February, 1980 The revision was also dismissed by the District Judge, Allahabad, by judgment dated 4th July, 1980, holding that the suit was cognizable by the Judge, Small Cause Court, Allahabad Aggrieved by the decision dated 4th July, 1980, the petitioner has filed the present petition

4 Learned counsel for the petitioner has urged that the suit was not cognizable by the Judge, Small Cause Court and the view taken by the courts below is manifestly erroneous

5 I have heard the learned counsel for the parties

6 The suit had been filed on the allegations that the plaintiff opposite party Nos 3 to 9 are the owners and landlords of a vacant land The vacant land had been let out to the petitioner to erect the permanent structure on the said land The petitioner did not pay the rent of the land and, as such, ejectment was sought from the land on the basis of the default committed by the petitioner It was further alleged that the petitioner had sublet different portions of the land to other persons who have been impleaded as opposite parties Nos 10 to 14 in this petition The property in respect of which ejectment was sought is described at the bottom of the plaint as under

"Land over which possession is sought for and on which building No 65/76, Malviya Nagar, Allahabad, bounded in the . .."

[illegible] Kanpur for the suit which has been dismissed by the petitioner on the ground of the petitioner from the land in dispute and also, confirmed him in possession of the property which had been constructed by the petitioner on the land in dispute. Section 15 (1) of the Provincial Small Cause Courts Act, 1887, provides, that [illegible] shall not take cognizance of [illegible] specified in the second schedule as suits excepted from the cognizance of the Court of Small Causes. Article 4A of the second Schedule, as amended by this State, reads as under:—

"4A. A suit for the possession of immovable property or for the recovery of an interest in such property, but not including a suit by a lessor for the eviction of a lessee from a building after the determination of the lease and for the recovery from him of compensation for the use and occupation of that building after such determination of lease."

From a reading of Article 4A, it is clear that a suit for possession of property or for the recovery of an interest in such property has been excepted, as such, it is not cognizable by the Judge, Small Cause Court. The only suit cognizable would be a suit by a lessor for eviction of a lessee from a building after the determination of the lease. Therefore, under Article 4A only such suits are cognizable by the Judge, Small Cause Court where the building is the subject matter of the lease and there is a determination of the lease of the said building. In the instant case, the allegations in the plaint are that the land had been let out and not the building. It has not been alleged that the petitioner is a lessee of the building. In fact, it is the case of the plaintiff in the suit that the building had been constructed by the petitioner with the permission of the plaintiff. It therefore cannot be held that the present suit is a suit by the lessor for eviction of a lessee from a building [illegible] would be a suit for possession of immovable property which would not be cognizable by the Court of Small Causes. [illegible] Learned counsel for the opposite parties has also relied upon the case of [illegible] in which the petitioner had constructed a building on the land which was let out to him by the plaintiff. The suit was for ejectment and for possession of the land and the building. The Court held that the suit was not cognizable by the Court of Small Causes. [illegible] the petitioner is not a lessee of the building. The case of [illegible] is therefore distinguishable. [illegible] Court. This section does not have any effect on the forum in which the suit shall lie. This section is for the purpose of protecting the eviction of a lessee [illegible] land has been let out and, therefore, permanent structure has been constructed with the consent of the landlord. The submission, therefore, made by the learned counsel for the petitioner is well founded. The view taken by the courts below is manifestly erroneous.

[illegible] learned [illegible] ed. The [illegible] which is [illegible] by the Judge, Small Cause Court, Allahabad and [illegible] and [illegible] the plaint of said Court [illegible] parties have agreed to [illegible] for the property [illegible] stamps of the case [illegible] directed to bear their own [illegible]

[illegible]

1981 All. L.J. 308

[illegible]

R. M. SAHAI J.

Dayal Singh and another, Petitioners v. State of Uttar Pradesh and others, Respondents.

Civil Misc. Writ, No. 1822 of 1979, [illegible] 21-1-1981.

U.P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 5 (b), Proviso (b) — Sales effected by ignore holder by irrevocable instrument, and for adequate consideration — Ignore holder cannot be refused benefit of Proviso (b) merely because necessity for transfer was not disclosed in sale deed.

In Section 5 (b) Proviso (b) does not require the tenure holder to establish necessity for transfer and mere is no requirement in the Act that the necessity for sale should be mentioned in the sale deed itself. Therefore, where the sale deed by the tenure holder is found to have been effected by an irrevocable instrument and for adequate consideration, the tenure holder cannot be refused benefit of Proviso (b) merely because necessity for transfer was not disclosed in sale deed. (Para 2)

Case Law discussed: [illegible] (Para 2)

Shri [illegible] Advocate, for the Petitioners.

Shri [illegible] Standing Counsel, for the Respondents.

The [illegible] has

FY/FY/C660/81/GMH.HH 18.2.81 FY/FY

ORDER :— [illegible] the appellate authority found that sale deeds dated [illegible] and 3-2-71 were [illegible] instrument and for adequate consideration [illegible] refused to grant benefit to petitioner under Proviso [illegible] to sub-section (3) of Section 5 of U. P. Imposition of Ceiling on Land Holdings Act, because the necessity for transfer was not disclosed in the sale deed itself. [illegible]

In Ram Sewak v. State [illegible] 210 it was held by this Court that the proviso of this section [illegible] a tenure holder to establish [illegible] and there is no requirement in the Act which requires that necessity for sale should be mentioned in the sale deed itself. In view of this decision the inference drawn by the appellate authority that sale deeds were not executed in good faith cannot be maintained.

3. In the result, the petition succeeds and is allowed in part. The finding that sale deeds dated 6-9-71 and 8-2-71 were not executed in good faith is quashed. The prescribed authority shall, however, decide other questions as directed by the appellate authority on [illegible]. The petitioner shall be entitled to its costs.

Petition partly allowed.

1981 ALL. L. J. [illegible]

R. B. MISRA, J.

[illegible] Kunwar Ayurvedic Pharmacy Private Limited, Kanpur, Petitioner v. 8th Additional District Judge, Kanpur and others, Respondents.

Civil Misc. Writ Petn. No. [illegible] of 1980, D/- 20-3-1981.

(A) Constitution of India, Art. 226 — Findings [illegible] — Landlord — [illegible] relevant facts considered by courts below — Such findings are findings of fact — No interference. (U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 21). (Para 4)

(B) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Ss. 21 and 34 (1) (b) — Eviction petition under S. 21 — Evidence by affidavits — Admissible. (Civil P. C. (1908), O. 19, R. 1).

Where, in a suit for eviction under S. 21, the findings recorded by the prescribed authority on the basis of evidence by affidavits, such findings, could not be said to be vitiated on ground that the evidence in the shape of affidavits was inadmissible in evidence especially when no objection was taken before the prescribed authority as to admissibility of such evidence. The provisions for taking evidence in a suit in C. P. C. do not apply to proceedings under the Act, the legislature laid down what procedure is to be adopted. S. 34 (1) (b) empowered the authorities to receive evidence on affidavits. It cannot, therefore, be said that affidavits are not admissible in evidence. (Paras 9, 12)

Further, if the procedure under C. P. C. do not apply, permission by way of order of court for tendering affidavit as required by O. 19, R. 1 would not be necessary. (Para 10)

Cases Referred : Chronological Paras

[illegible]

1981 UPLT (NOC) 111 [illegible]

1981 All Rent Cas (Short Notes) [illegible]

[illegible]

1976 All LJ [illegible] : AIR 1976 All [illegible]

V. B. Singh, for Petitioner; R. K. [illegible], for Respondents.

ORDER :— This is a petition under Article 226 of the Constitution of India arising out of proceedings for release under Section 21 (1) (a) of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U. P. Act XIII of 1972) hereinafter referred to as the Act.

2. The property in dispute is [illegible], Ram Narain Bazar, Kanpur. The petitioner is a tenant in the said premises. Opposite parties Nos. 3 and 4 are the landlords. The release application was filed on the ground that Chandrika Prasad Gupta, opposite party No. 3 has completed his technical education and wants to engage himself in self-employment by starting his own manufacturing unit of drugs in the premises. It was further alleged that the opposite parties [illegible] and [illegible] are living in tenanted house situate in a dirty and unhygienic lane and they also need the accommodation for residential purpose. The release application was allowed both for residential as well as business purposes. The release application was contested by the petitioner. Ultimately the prescribed authority by an order dated 26th November, 1979, allowed the application. Against the judgment of the prescribed authority dated 26-11-1979 an appeal was filed under Section 22 of the Act. The appeal was dismissed by the appellate Court on [illegible] July, 1980. Aggrieved by the judgment dated [illegible] 1980

the present petition has been filed in this court Both the prescribed authority as well as the appellate authority have recorded a categorical finding that the need of the landlord opposite parties for the house in question is bona fide and genuine It has been further found that greater hardship would be caused to opposite parties Nos 3 and 4 who are the landlords in case the release application is rejected One of the reasons given was that the petitioner company has already a premises in Civil Lines, Kanpur and that the office of the company which is situate in the premises in question can easily be shifted to the Civil Lines premises

3. I have heard the learned counsel for the parties Learned counsel for the petitioner has raised two contentions before me His first contention is that the findings recorded by the courts below are vitiated in law as the courts have not considered the material evidence before arriving at the finding The second submission of the learned counsel is that the evidence in the shape of affidavits was inadmissible in evidence and as such the finding recorded by the authorities is vitiated in law

4. In so far as the first contention is concerned, learned counsel for the petitioner has failed to point out any particular material document which has not been considered by the authorities below I have examined the judgment of the prescribed authority as well as the appellate authority In my opinion, both the judgments cannot be challenged as urged by the petitioner All the relevant facts have been considered by both the authorities below and thereafter findings have been recorded in regard to bona fide need and hardship The findings recorded are findings of fact and I do not find any error of law in this finding In the circumstances, so far as the first submission of the learned counsel is concerned, in my opinion is devoid of merit

5 In so far as the second contention of the learned counsel is concerned, it is necessary to examine certain relevant provisions Section 34 (1) of the Act specifically lays down the powers of various authorities and the procedure to be followed by them It reads as follows

"34. (1) The District Judge, the prescribed authority or any subordinate or revising authority shall for the purpose of holding any inquiry or hearing any appeal or revision under this Act have the same power as are vested in the Civil Court under the Code of Civil Procedure, 1908 when trying the suit in respect of the following matters namely :—

(a) summoning and enforcing the attendance of any person and examining him on oath,

(b) receiving evidence on affidavits,

(c) inspecting a building or its locality or issuing commissions for the examination of witnesses or documents or local investigation,

(d) [illegible] the discovery and production of documents,

(e) awarding, subject to any rules made in that behalf, cost or special costs to any party or requiring security for costs from any party,

(f) recording a lawful agreement, compromise or satisfaction and making an order in accordance therewith,

(g) any other matter which may be prescribed

6. Sub-clause (f) of Section 34 further provides that for the purposes of any proceeding under this Act and for the purpose connected therewith, the said authorities shall have such other powers and shall follow such procedure, principles of proof, rules of limitation and guiding principle as may be prescribed By Section 35, Ss 4 and 5 of the Limitation Act have been applied Section 38 specifically provides that the provisions of this Act shall have effect notwithstanding anything inconsistent contained in the Transfer of Property Act or the Code of Civil Procedure. In the Rules framed under the Act, Rules 22 and 23 further lay down certain powers of the authorities From a reading of the Act and Rules it is clear that the legislature wanted to give only specific powers to the authorities under the Act. Only specific provisions of the Code of Civil Procedure were made applicable to the proceedings under the Act. This intention is further clear from the fact that the power of filing revision and appeal has been provided under Section 18 and Section 22 of the Act and Section 37 gives finality to the orders passed under this section. It has consequently been provided that no order made in exercise of any power conferred by this Act shall be called in question in any court

7. In Shakuntala Devi v. 4th Addl. District Judge, 1981 All LJ 338 I have taken the view that the prescribed authority is a persona designata and not a civil court and as such no revision lies

under Section 115 Code of Civil Procedure against the order

8 In Hira Lal v Ranjit Singh, AIR 1976 All 480 (1976 All LJ 284) a Bench of this Court has held that the proceedings under Section 21 of the Act cannot be deemed to be proceeding in a suit The prescribed authority is not a civil court as contemplated under the Code as such the provisions of Section 115 of the Code of Civil Procedure do not apply The position, therefore, which emerges is that an application under Section 21 of the Act not being a suit the provisions for conducting a trial as laid down in the Code of Civil Procedure do not apply Since the provisions of the Code of Civil Procedure do not apply the legislature laid down specifically what procedure is to be adopted Section 34 (1) (b) empowered the authorities to receive evidence on affidavits It cannot therefore be said that affidavits are not admissible in evidence

9. In Smt Mayadevi v VIIIth Addl District Judge, Kanpur, 1981 (UP) RCC 96 (1981 UPLT NOC 111) I have already taken the view that the affidavits can be received in evidence Similar view has been taken by A N Verma J in Smt Kamla Devi v Vth Addl Distt and Sessions Judge, Badaun decided on 21st January, 1980. 1981 All Rent Cas (Short Notes) 14 In view of the above I am of the opinion that the provisions for taking evidence as laid down for a suit in Code of Civil Procedure do not apply to proceedings under Section 21 of the Act The case has to be decided on the basis of evidence by affidavits which the authorities have been empowered to accept In view of the above, in my opinion, affidavits were admissible in evidence and the findings recorded on the basis of such affidavits are therefore not vitiated in any manner in law

10 Learned counsel for the petitioner has, however, placed specific reliance on Order XIX, Rule 1, Code of Civil Procedure Order XIX, Rule 1 provides that the court may at any time for sufficient reason order that any particular fact or facts may be proved by an affidavit or that affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable This power has been given to the Civil Court enabling it to take evidence if it so thinks necessary for sufficient reason on the basis of affidavits The normal procedure for taking evidence is oral and documentary To prove a particular fact the court can also accept affidavit as evidence and as such a specific order has to be passed accepting evidence by affidavit So far as the proceedings under the present Act is concerned, the Legislature by virtue of clause (b) specifically contemplated that the evidence will be received in the shape of affidavits Therefore, it was not necessary to specifically pass an order accepting each affidavit before it could be treated as an evidence in the case

11 Learned counsel has placed specific reliance on an observation made by this court in Moti Lal Chajjoo Lal v Additional District and Sessions Judge, Kanpur, (1978) 1 Ren CJ 669, U C Srivastava J had observed as follows in the above case —

"Undoubtedly power to receive affidavits and evidence has been conferred, but affidavits cannot be received in evidence unless there is an order to this effect"

12 In the case of Moti Lal Chajjoo Lal (supra) this question was not specifically raised for consideration before the court In fact, the court had accepted the submission made by the learned counsel for the petitioner in that case that because there was no affidavit filed in support of the report which was sought to be relied upon, it could not be considered In any case even if the principle laid down in the case of Motilal Chajjoo Lal is accepted then too in my opinion the fact that the affidavits have been accepted and made part of the record of the case is evidence of an implied order of court accepting the affidavits as evidence It cannot, therefore, be said that there is any illegality in considering the affidavits and accepting them as evidence It may be pointed out here that when the affidavits were accepted by the court below, no objection was taken by the petitioner either before the prescribed authority or before the appellate authority In view of the above, I am of the opinion that affidavits can be received in evidence and that they were admissible in evidence and the finding recorded on the basis of the said affidavits cannot be said to be a finding vitiated in any manner in law

13 In the result, the petition fails and is accordingly dismissed with costs

14. Learned counsel for the petitioner requested for time to vacate the premises This prayer is justified I accordingly allow two months' time to the petitioner to vacate the premises

Petition dismissed.

According to the learned counsel for the petitioner when the question of jurisdiction was raised or maintainability of a suit under some provision of law was challenged, it was mandatory for the trial Court to decide that issue as a preliminary issue.

[illegible] To my mind the contentions raised on behalf of the petitioner are not well founded. Sub-clause (2) of R. 2 of O. 14 of the C.P.C. provides that the Court may try that issue first if that relates to the jurisdiction of the Court or maintainability of the suit under some provisions of law for the time being in force. When in sub-clause (1) of the aforesaid provision the word "shall" has been used whereas in sub-clause (2) the word "may" had been used, I think this is within the discretion of the Court to try an issue of jurisdiction or bar of maintainability of the suit as a preliminary issue. If the trial Court had indicated its mind that the point will also be considered at the time of judgment [illegible] [illegible] [illegible] [illegible] was within its discretion and that the order passed by the trial Court does not amount to a case decided in view of a ruling reported in AIR 1955 All 3[illegible] (1954 All LJ 718 at p. 721) [illegible] v. Mahat Chandra [illegible] Bench of this Court has observed in paragraph [illegible] of the ruling, as below: —

"It cannot be said that by determining certain issues under O. 14, R. 2 as preliminary issues, the lower Court can be said to have decided any case the record of which can be sent for by the High Court under S. 115 and corrected under the provisions of that section."

[illegible] Sub-clause (2) of Order XIV, R. 2 [illegible] [illegible] hence, in my opinion the revisional Courts have not patently erred in dismissing the revision petitions filed by the defendant petitioner.

[illegible] that in the circumstances of the present case it was imperative on the part of the [illegible] [illegible] [illegible] [illegible] is also well established that an erroneous decision between the parties is final between them and a party is estopped from challenging the correctness of erroneous decision in subsequent proceedings. However, in the present case it is necessary to mention the ruling reported in AIR 1981 SC 77 (1980 All LJ 902), Karbalai Begum v. Mohd Sayeed wherein vide paragraph 12 of the ruling it has been mentioned as below: —

"It was thus abundantly clear that [illegible] application for mutation on the basis of [illegible] [illegible] [illegible] the counsel for the parties on the said point and decide the claims of the parties strictly in accordance with law [illegible] [illegible] counsel for the petitioner that the jurisdiction of the Revenue Courts is so [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] Section [illegible] of Act No. [illegible] reads as below: —

For Section [illegible] of the Uttar Pradesh Consolidation of Holdings (Amendment) Act, 1958, the following shall be substituted and be deemed always to have been substituted, namely: —

"49 Where consolidation operations are pending in any unit at the commencement of this Act —

(i) if the operations are at the stage of examination of the land records under Section 7 of the principal Act, then the Assistant Consolidation Officer shall complete the preparation of the statement mentioned in that section as if this Act had not come into force, and such revision and preparation of statement shall thereupon be deemed to be the revision and preparation of statement mentioned in Sections 7 and 8 of the amended Act, and thereafter all further proceedings shall be conducted and concluded in accordance with the provisions of the amended Act, beginning with the proceedings under Section 9 thereof.

(ii) if the operations are at the stage of proceedings under Section 8 of the Principal Act, or at any later stage, then all further proceedings shall be continued and concluded in accordance with the principal Act as if this Act had not come into force

Explanation — In this Section "amended Act" means the principal Act as amended by this Act."

12. I have mentioned the rulings relied upon by the learned counsel for the petitioner in support of his contention and I have also mentioned the relevant law concerning the maintainability of the suit but I refrain from expressing any concluded opinion as the learned counsel for the petitioner did not want me to express the same and the trial Court has also observed that the points will be considered at the time of judgment but I am quite sure that the trial Court shall hear the counsel for the parties on the aforesaid point and decide the claims of the parties strictly in accordance with law keeping in view the observations made by their Lordships of the Supreme Court and the provisions of Act XII of 1965

13. In the result, the writ petition fails and is dismissed. The parties are directed to bear their own cost. It is expected that the trial Court shall decide the suit expeditiously as the hearing of the suit has been unnecessarily delayed

Petition dismissed

1981 A.L.J. L. J. 814

R. R. RASTOGI, J.

Smt. Shanti Devi, Petitioner v. Rahmatullah and others, Respondents

Civil Revn. No. 250 of 1978, D/- 8-5-1981.*

(A) U. P. General Rules (Civil), Vol. I, R. 89-A (4) — Transfer of case — Defendant not informed either by transferor or transferee Court — Ex parte decree passed by latter — Invalid.

Where a case was transferred without giving information to the defendant about transfer in the manner contemplated by sub-rule (1) nor the transferee Court informed him about it, the ex parte decree passed by the latter would be liable to be set aside, as R. 89-A (1) requires that the Court to which cases are transferred shall not proceed without satisfying itself that the parties or their counsel as the case may be, have been informed of the transfer. (Para 2)

(B) Civil P. C. (1908), Ss. 96, 115 — Ex parte decree — Application for setting aside decree and also filing of appeal against the decree with application for condonation of delay in filing appeal — Dismissal of appeal by rejection of application for condonation of delay — Appellate Court could not be said to have entertained appeal much less considered it on merits — There would be no merger of decree of trial Court into decree of appellate Court — Revision against decree would be competent. AIR 1974 SC 1380, Rel. on. (Paras 3, 4)

Cases Referred:	Chronological Paras
AIR 1974 SC 1380	3
AIR 1907 SC 681	5

Swami Dayal, for Petitioner

ORDER:— This is defendant's application in revision under Section 115, C.P.C. The brief facts are that the plaintiff-opposite party No. 1, Rahmatullah had filed a suit against the defendant-applicant, Smt. Shanti Devi and eight others for declaration that the execution proceedings and the sale held in the execution of the decree passed in Suit No. 230 of 1943 of the Court of the Additional Munsif, Agra, were null and void. Smt. Shanti Devi was the auction-purchaser of the disputed property. She contested the suit along with some other defendants. The trial Court had first framed and decided

*Against order of R. P. Yadava, Civil J. (Court No. 3), Agra, D/- 26-11-1977.

some preliminary issues and thereafter fixed 5-10-74 for framing the remaining issues On that date the defendants were found absent and when the Court was going to make an order that the suit would proceed ex parte, counsel for defendant No 3 appeared and in his presence the issues were framed and 19-12-74 was fixed for final hearing Thereafter there were some other dates fixed and ultimately on 21-10-75, 23rd of December, 1975, was fixed for final hearing In the meantime on 28-11-75 the case was transferred from the Court of the 1st Additional Munsif, Agra, where it had been pending, to the Court of the VIIth Additional Munsif, Agra The transferee Court took up the case on the date fixed i e 23-12-75, and since no one appeared on behalf of the defendants, the suit proceeded ex parte and it was decreed on 5-1-76 The defendant applicant, Smt Shanti Devi, then moved an application on 10-2-76 under Order 9, Rule 13, C P C for setting aside the ex parte decree That application was dismissed by an order made on 24-4-76 Aggrieved the defendant-applicant filed an appeal which met with the same fate and hence this revision

2 It was submitted before me on behalf of the defendant-applicant that the transferee Court erred in taking up the suit for hearing on 23-12-75 and in proceeding ex parte because no information was given of the transfer of the suit to the defendant-applicant from the Court of 1st Additional Munsif, Agra, to the Court of 7th Additional Munsif, Agra, as required under Rule 89A of General Rules (Civil), Vol I I find that there is considerable merit in this contention Rule 89A aforesaid provides for procedure to be followed on transfer or withdrawal of cases It says that when a case, i e a suit, appeal or other proceeding in which a date for attendance of a party or the parties in a particular court has been fixed, is transferred from that court to another, the former court shall record the order of transfer in the order sheet and get it signed by counsel of the party or parties, if any party is unrepresented information shall be sent to his registered address Sub-rule (2) says that a note to the effect that a party or the parties have been informed in accordance with sub-rule (1) shall be made on the record by the transferring Court In the present case it does not appear that any such information was given by the transferring Court of the transfer of the case on 28-11-75. The transferee Court as well did not give any such information Sub-rule (4) of Rule 89A requires that the Court to which cases are transferred shall not proceed without satisfying itself that the parties or their counsel, as the case may be, have been informed of the transfer The transferee Court did not satisfy itself before proceeding with the case that the parties or their counsel had been informed of the transfer The decision given in the case was, therefore, bad in law and should be set aside The view taken by the appellate Court that "when the case was proceeding ex parte, it was none of the duties of the transferee Court to have informed the counsel of the appellate about the transfer of the date fixed in the case," is manifestly erroneous

3. It was, however, contended on behalf of the plaintiff-opposite party No 1 that the defendant applicant not only filed an application under Order 9, Rule 13, C P C for setting aside the ex parte decree but also filed an appeal against the ex parte decree itself and since that appeal was dismissed, the decree passed by the trial Court merged in the decree of the appellate Court and hence the present revision has become infructuous In my opinion there is not much substance in this contention It is correct that the defendant-applicant not only filed an application for setting aside the ex parte decree but also filed an appeal against that decree itself That appeal was filed after the expiry of the period provided in that behalf and an application for condonation of delay was given That application was rejected by the appellate Court A photostat copy of that order dated 12-2-77 has been shown to me It would appear, therefore, that the appellate Court in rejecting the application for condonation of delay did not admit and entertain the appeal much less consider it on merits and that being so, there was no question of the merger of the decree of the trial Court into the decree of the appellate Court The juristic justification of the doctrine of merger, as observed by the Supreme Court in Gojer v Ratan Lal Singh, AIR 1974 SC 1380 (para 10), may be sought in the principle that there cannot be, at one and the same time, more than one operative order governing the same subject matter Therefore, the judgment of an inferior Court, if subjected to an examination by the superior Court, ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior

In the present case, the judgment of the [illegible] Court had not been subjected to [illegible] examination by the superior Court [illegible] it cannot be [illegible] that when the appellate Court refused to condone the delay and admit the appeal [illegible] the judgment of the inferior Court [illegible] [illegible] State of Madras [illegible] Mills, AIR 1967 SC 681 [illegible] the doctrine of merger was explained [illegible] (684) —

"But the doctrine of merger [illegible] [illegible]

[illegible]

AIR 1981 Supreme Court 1549

(From: Allahabad)

KRISHNA IYER AND CHINNAPPA REDDY, JJ.

Special Leave Petition (Civil) No. [illegible] [illegible] Petitioner v. IInd Additional District Judge and others, Respondents.

Constitution of India, Art. 136 — Special Leave petition — Maintainability — Tenants not raising point about defective notice under S. 21 of U.P. Rent Act, 1972 in trial court — Tenant also giving undertaking to High Court for vacating premises within six months — Supreme Court declined to allow tenant to raise question of legality of notice, by observing that every error, even error of law, does not justify exercise of Art. 136. [illegible]

ORDER:— We [illegible] that the judgment appealed by the Special [illegible] rise of Article 136 [illegible]

2. The notice contemplated by the proviso to S. 21 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 [illegible]

today an undertaking to the following effect.

(a) That the petitioners will hand over vacant and peaceful possession of the suit premises to the respondent without need for execution proceedings.

(b) That the petitioners will not induct anybody else into occupation of any part of the premises or otherwise assign or part with possession, and

(c) That the petitioners will continue to pay regularly a sum equal to the rent that has been fixed between parties, month by month, before the 10th of every month, by way of damages for use and occupation

Order accordingly

1981 ALL. L. J. 817

H. N SETH, J

Ram Chandar, Appellant v State, Respondent

Criminal Appeal No 1262 of 1975, D/- 13-5-1981

Criminal P. C. (2 of 1974), Sec. 446 — Executant of bond failing to fulfil condition therein — Forfeiture of bond is automatic — Imposition of penalty — Remission — No explanation offered for non-compliance in spite of ample opportunity — Remission is not warranted — Eventual acquittal of executant — Immaterial

Under Section 446 where the executant of a bond, fails to fulfil any condition laid down therein, its forfeiture is automatic and the Court can exercise its discretion to remit whole or any portion of the penalty in the light of the explanation offered by the person executing the bond Law does not contemplate such a discretion to be exercised whimsically or in an arbitrary manner For this purpose eventual result of the trial is not very material It may be that in the circumstances of a particular case the fact that the case in which the bond was executed has later ended in acquittal may, in the light of the explanation offered by the defaulter, be taken into consideration for determining the amount of penalty to be remitted but then that fact by itself, and in the absence of any explanation on the part of the defaulter to whom ample opportunity had been given to show cause why he should not be directed to pay the penalty as contemplated by Section 446 cannot provide any justification for remitting any portion of the penalty stipulated by Section 446 Further, there could be said to be no failure of justice by reason of the Court's failure to record in writing the grounds for its satisfaction that it had been proved that the bond stood forfeited

Section 446 nowhere says that opportunity to place material before the Court must necessarily be given by means of a written notice 1957 Cri LJ 235 (Raj), Rel on (Paras 3 and 5)

Cases Referred : Chronological Paras

1957 Cri LJ 235 (Raj) 7

B P Gupta, for Appellant

JUDGMENT — This appeal, under Section 449 of the Code of Criminal Procedure, is directed against the order dated 1st April, 1975, passed by IIIrd Additional District & Sessions Judge Moradabad, directing that process for recovery of a sum of Rs. 4000/- be issued against the appellant

2 Appellant Ram Chandar was being tried for an offence under Sec 302 I P C before the Sessions Judge He was released on bail on his executing a personal bond for a sum of Rs 4000/- and furnishing certain sureties The appellant was served with a notice on 28th February, 1975, requiring him to appear before the Court on 6th March, 1975, the date fixed for hearing of the case On that date he did not appear before the Court and the bond executed by him stood forfeited The Sessions Judge, therefore, called upon the appellant to show cause why the amount mentioned in the bond be not recovered from him as penalty The appellant neither showed cause for his non-appearance nor placed facts justifying reduction of the amount of penalty sought to be recovered from him The Sessions Judge concluded that the appellant had deliberately absented from appearing in the Court on the date fixed and there was no reasonable cause for his not appearing before the Court on that date. He, therefore, directed that process for recovery of the amount of Rs 4000/- should be issued against him

3. Aggrieved the appellant has come up in appeal before this Court Learned counsel appearing for him strenuously argued that at the trial, in which the appellant was required to execute the

bond, has eventually resulted in acquittal under the orders of this Court, no penalty should be recovered from him for the reason that he had on one day failed to appear before the trial Court and, in any case, the amount of penalty should be reduced. In my opinion, there is no substance in this submission. Under Section 446 of the Code of Criminal Procedure, where the executant or a bond fails to fulfil any condition laid down therein, its forfeiture is automatic and the Court can exercise its discretion to remit whole or any portion of the penalty in the light of the explanation offered by the person executing the bond. Law does not contemplate such a discretion to be exercised whimsically or in an arbitrary manner. For this purpose eventual result of the trial is not very material. It may be that in the circumstances of a particular case the fact that the case in which the bond was executed has later ended in acquittal may, in the light of the explanation offered by the defaulter be taken into consideration for determining the amount of penalty to be remitted but then that fact, by itself, and in the absence of any explanation on the part of the defaulter cannot provide any justification for remitting any portion of the penalty stipulated by Section 446 of the Code of Criminal Procedure.

4. Apart from contending that the trial has eventually ended in acquittal, learned counsel for the appellant did not place any material to show that in the circumstances of the case forfeiture of an amount of Rs 4000/- appears to be excessive.

5. I may also add that after hearing of the appeal was concluded and I had dictated the judgment but before the same could be transcribed and signed, Sri B. P. Gupta, learned counsel appearing for the appellant, again stood up to re-argue the case and contended that under Section 446 of the Code of Criminal Procedure it is obligatory upon the Court that before proceeding to recover the amount mentioned in a bond executed

(a) record in writing the grounds for its [illegible] that the bond in question [illegible] forfeited, and

(b) issue a notice to the person concerned to show cause why the amount in respect of the bond be not paid.

He urged that in this case neither of the two conditions exist and as such the order under appeal stands vitiated. So far as the first of the aforementioned two conditions is concerned, I find that in this case there is no dispute that the appellant did not, in accordance with the stipulation contained in the bond, appear before the Court on 6th of March, 1975 and that the bond stood forfeited. Even today the stand of the learned counsel for the appellant is not that the bond executed by the appellant did not in fact stand forfeited or that the Court was wrongly satisfied about forfeiture of the bond. In my opinion even if for the sake of argument it is accepted that in the instant case the Court below did not, as required by Section 446 of the Code, before calling upon the appellant to show cause why penalty be not paid recorded the grounds for its satisfaction that the bond had been forfeited, the order under appeal does not stand vitiated. In this connection reference may be made to Section 465 of the Code of Criminal Procedure relevant portion of which reads thus—

"Subject to the provisions hereinbefore contained, no— — — order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal — — on account of any — — irregularity in — — — proceedings before or during trial or in any other proceedings under the Code — — unless in the opinion of the Court failure of justice has in fact been occasioned thereby."

In the instant case the error pointed out by the appellant in not specifically recording the grounds for holding that it has been proved that the bond in question stood forfeited, if at all, would be an error in a proceeding in a Court of competent jurisdiction taken under the Code and this Court, as an appellate Court, will be entitled to reverse or alter the order under appeal only if it comes to the conclusion that such defect has in fact occasioned a failure of justice. As has been stated above, there is in this case, no dispute that the appellant did not appear before the Court on 6th of March, 1975 and consequently the bond executed by him stood forfeited. I am, therefore, of opinion that in the special circumstances of this case no question of failure of justice by reason of Court's failure to record in writing the grounds for its satisfaction that it had been proved that the bond in question stood for

ifeited and the order under appeal cannot be interfered with on this ground

6 So far as the second condition is concerned, I find that the order sheet of the case indicates that on 6th of March, 1975 the court made an order directing that a notice be issued to the appellant to show cause by 14th March '75 why the amount mentioned in the bond be not recovered from him. The case was again put up before the court on 14th of March, 1975 on which date the appellant presented himself before the court and he was taken into custody The order-sheet mentions that the notice was given to the appellant to show cause by 21st of March, 1975 why the amount mentioned in the bond be not recovered from him The case was again put up before the court on 21st of March, 1974, on which date the appellant was brought before the Court but he did not show any cause However, the Court instead of passing orders under Section 446 of the Code of Criminal Procedure on that very date directed that the case be put up on 1st of April 1975 The order-sheet further indicates that as the appellant did not file any reply to show cause notice even up to that date an order directing that warrants be issued for recovering Rs 4000/- from him by way of penalty. The proceedings noted in the order-sheet and signed by the learned Judge show that the appellant was informed by the Court on more occasions than one that he was required to show cause why the penalty mentioned in the bond that stood forfeited be not recovered from him Further the Court also adjourned the hearing of the case more than once so as to enable the appellant to show cause There is a presumption that the Court has correctly prepared the records of a judicial proceeding Learned counsel for the appellant did not invite my attention to any material on the record which may even cast a doubt about the correctness of the recital of facts contained in the order-sheet A perusal of the order-sheet accordingly shows that more than ample opportunity had been given to the appellant to show cause why he should not be directed to pay the penalty as contemplated by Section 446 of the Code of Criminal Procedure

7. Learned counsel for the appellant next urged that a notice to show cause why penalty contemplated by Sec. 446 Cr. P. C be not directed to be paid must be in writing and that no such notice

section can be said to be complied with only when it is shown that such a writing has been served upon the person concerned I am unable to accept this submission Relevant portion of Section 446 Cr P C runs thus :—

"The Court shall record the grounds of such proof and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid"

The section merely requires the Court to call upon the concerned person to show cause why the penalty in respect of the bond forfeited be not paid by him It merely contemplates that before the Court proceeds to make an order directing recovery of the penalty contemplated by sub-section (2) of Section 446 Cr P C it should inform the person concerned that the bond executed by him stands forfeited and should afford him an opportunity to place material before it and to state the reason why in the circumstances of the case either no penalty is recoverable from him or that whole or any part of it should be remitted The section nowhere says that such an opportunity must necessarily to be given by means of a written notice In my opinion Section 446 Cr P C would in this respect stand fully complied with if the record indicates that such an opportunity has in fact been given to the person concerned I am in this view fully supported by a decision of Rajasthan High Court in the case of Ganga Ram v State reported in 1957 Cri L J 235, wherein the learned Judge while considering the parallel provision in Section 514 Cr P C (old) observed thus (at p 235) —

"Section 514 Cr P C does not provide that any particular kind of formal notice should be given to the person whose bond has been forfeited Relevant part of the section runs as follows —

"— — — — — — — — — — — —"

It is clear that when the bond if forfeited, it is the duty of the Court to record the grounds of the proof on which the forfeiture is based After this, the Court may call upon the person bound by such bond to pay the penalty or to show cause why it should not be paid

What is meant to say is that the person bound by the bond cannot insist upon a particular form of notice All that is necessary is that he should be called upon and given a chance to show

cause why he should not pay the penalty".

8. As stated earlier, the recitals made in the order-sheet recorded by the Court clearly indicate that more than ample opportunity to show cause, contemplated by the section, had been given to the appellant and it was only when he failed to avail of the opportunity that the order under appeal was made.

9. In the result, I find no merit in this appeal which fails and is dismissed.

Appeal dismissed.

1981 ALL. L. J. 820

DEOKI NANDAN, J

Khushro S Gandhi, Appellant v. Nagar Mahapalika, Allahabad and others, Opposite Parties

Second Appeal No 2284 of 1968, D/- 11-5-1981 *

(A) U. P. Nagar Mahapalika Adhiniyam (2 of 1959), S. 327 — Power of ordering demolition or removal of building or work, commenced or erected without necessary permission of Mukhya Nagar Adhikari, can be exercised only in cases where building or work contravenes rules or bye-laws. (Para 17)

(B) U. P. Nagar Mahapalika Adhiniyam (2 of 1959), Sections 327 and 557 — Demolition — Notice — Building erected by land owner without prior permission of Mukhya Nagar Adhikari as required by Section 319 r w. Sections 315-317 — Held order of demolition under Sec. 557 (2) without affording owner opportunity of hearing as required by Section 327 was invalid. (Para 19)

Cases Referred: Chronological Paras
1981 All LJ 532 15

A. N Kaul, G N Kungru, for Appellant, Lal Ji Sinha, for Opposite Party.

JUDGMENT:— This is a plaintiff's second appeal in a suit for damages in the sum of Rs 6,000/- for alleged unlawful demolition of a certain construction by the respondent No 1 the Nagar Mahapalika of the city of Allahabad.

3. A notice dated 18-6-1965, purporting to be under Section 557 (1) of the U. P. Nagar Mahapalika Adhiniyam (hereafter to be referred as Adhiniyam) was issued to the plaintiff and was served on him on 21-6-1965. It states that it had come to the knowledge of the notice-giver (Nagar Abhiyanta) from the report of the Ward Inspector that the noticee (plaintiff Khushro S. Gandhi since deceased) had without obtaining the permission of the Mukhya Nagar Adhikari, under Sec 319 of the Adhiniyam, started constructing four rooms which had nearly reached the roof level at 29, Muhatma Gandhi Marg, in an unauthorised manner which was punishable according to the said Adhiniyam and that, therefore, notice was given under Section 557 of the Adhinyam that he the noticee, should within 24 hours of its receipt destroy the unauthorised construction and that failing compliance with the order, the unauthorised construction would be demolished by the Nagar Mahapalika under Section 557 (2) of the said Adhinyam and the costs of the demolition will be realised by him. This notice was promptly replied to on behalf of the deceased plaintiff Khushro S Gandhi almost immediately after its receipt on 21-6-1965 vide Ex. 2. The reply acknowledges the receipt of the notice that very evening and states "asking me to demolish some outhouses about which you have been informed by your Ward Inspector that they are being newly constructed. I beg to say that these outhouses in question are not being newly constructed but are being rebuilt on the same foundation". Further that "there were outhouses which were dilapidated and to make matters worse, a tree fell down and damaged them" and that, therefore, he the plaintiff, was "compelled to reconstruct them before the rains set in." In the end the plaintiff Khushro S. Gandhi added "I assure you that the outhouses are not newly constructed and request you to kindly cancel the notice in question. However, if you still feel that the outhouses are newly constructed, the case may please be compounded."

4. Another notice also dated 18-6-1965, was alleged to have been served by the Mukhya Nagar Adhikari on the plaintiff Khushro S Gandhi under Sec. 333/1 of the Adhiniyam. This notice stated that since the notice-giver Mukhya Nagar Adhikari was satisfied that the plaintiff Khushro S. Gandhi was unlawfully constructing four rooms which had reached the roof level, he (L. K. Nagar Mukhya Nagar Adhikari) required the plaintiff

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*Against judgment and decree of Mahavir Singh, Ist Addl. Dist. Judge, Allahabad, D/- 9-5-1968

I Y C Y 0340/81 HR RSK

Khushro S Gandhi to immediately stop the said construction

4. The record of the case was destroyed in the fire which engulfed the Civil Court building at Allahabad and the purport of the said notices has been reproduced from the copies of the documents which have been brought on record by the parties The notings on the file of the Nagar Mahapalika Ex A-5 show that notice dated 19-6-1965 under Section 537 (1) of the Adhiniyam was issued under the orders of J G Shinde and on 23-6-1965. Mr Shinde put up a note addressed to "M N A", which means the Mukhya Nagar Adhikari, to the following effect —

"The statement of the notice may kindly be seen He has admitted the under above construction The under above construction is contravening our bye-laws

Kindly pass orders to demolish under Section 337 (2)

Sd/- J G Shinde
23/6"

There is an order 'Demolish' signed by someone on 29-6-1965 and thereafter there is a note dated 16/7 of J G Shinde again addressed to M N A showing that "the U/c construction has been demolished today For kind information please" whereon the M N A has noted the word 'seen'

5. A notice dated 7-11-1965, copy of which is Ex 4, was thereafter sent by the plaintiff Khushro S Gandhi, since deceased, through an Advocate on the defendant-respondents u/s 571 of the Adhiniyam demanding payment of Rs 5,000/- on account of loss caused by the demolition of the said construction and Rs 1,000/- on account of the loss of reputation, as also Rs 33 60 as cost of the notice The plaint of the suit, giving rise to this second appeal, is verified and signed on 2-3-1966 and the suit must have been filed on that day or immediately thereafter

6. The following were the plaint allegations

The plaintiff Khushro S Gandhi was the owner of premises No 29, old Number 16/1, Mahatma Gandhi Road, Allahabad, which comprised of two main bungalows, some cottages and quarters and some outhouses, that a notice purporting to be under Section 537 (1) of the Adhiniyam, under the signatures of Tara Chand, defendant No. 4, Nagar Abhiyanta, was served on the Plaintiff The contents of the notice, already summarised hereinabove, were then referred to The notice was received by the plaintiff on 21-6-1965, but he was going out the same day and his brother Kershasp S Gandhi sent a reply dated 21-6-1965 The other notice dated 18-6-1965 was received by the plaintiff's brother Kershasp S Gandhi bearing the date 22-6-1965 below the signatures thereon It was sent under Section 353 of the Adhiniyam, which appears to be a mistake for Section 333 of the Adhiniyam It is then stated that the second notice was sent without any reply being given to one plaintiff's letter dated 21-6-1965 and without any opportunity having been given to the plaintiff to explain and to show that the constructions, complained of, were not new and were not illegal They were wrongfully demolished by the Nagar Abhiyanta, J G Shinde, defendant No 3, and the Building Inspector Nawal Kishore, defendant No 5, on 16-7-1965 purporting to act under the illegal orders of Mr L K Nagar, defendant No 2, the then Mukhya Nagar Adhikari of the Nagar Mahapalika, defendant No 1 It is then asserted that the constructions, complained of, were not constructed illegally and neither the Mukhya Nagar Adhikari nor the Nagar Abhiyanta nor anyone else, including the other defendants, had any power, right or authority under the law to issue the notice dated 18-6-1965 or to demolish the constructions The demolition was said to have been done mala fide and without affording to the plaintiff any opportunity to explain the matter and without replying to his aforesaid letter dated 21-6-1965 to cause him wrongful loss The plaintiff was said to have suffered not only monetary loss but loss of reputation also for which not only the Nagar Mahapalika but also all the defendants were it was claimed personally liable as they had acted mala fide and also against the law The service of notice under Sec 571 of the Adhiniyam is then alleged to have been effected on all the defendants, claiming Rs 5,000/- on account of loss caused to the plaintiff by the illegal demolition of the constructions on 16-7-1965 and Rs 1,000/- on account of the loss of reputation and Rs 33.60 as cost of the notice The notice was said to have been served on defendant No 3 on 4-11-1965 and on defendants Nos 1, 2, 4 and 5 on 10-11-1965 No amends were said to have been made

in spite of the expiry of two months. The plaintiff claimed a decree for Rs 5,000/- on account of loss caused by the defendants by the illegal demolition of the constructions and Rs 1,000/- for loss of reputation — total Rs 6,000/- The plaint does not contain any details of the alleged loss of Rs 5,000/- It only says that the amount of Rs 1,000/- claimed for loss of reputation was a small amount claimed only for the purposes of vindicating the plaintiff's rights and protecting his reputation

7 The defence was that the plaintiff was found constructing four rooms in premises No 28/61 Mahatma Gandhi Marg Allahabad The aforesaid construction was unauthorised and wrongful and without obtaining any previous sanction The notice dated 18-6-1965 was thereupon served for demolishing the construction within 24 hours of the receipt of notice Instead of demolishing the construction or stopping further construction on receipt of notice dated 18-6-1965, the plaintiff continued with the construction and completed the four rooms, whereupon another notice was served on him under Section 333 (1) of the Adhiniyam The plaintiff in reply to the notice submitted that the disputed constructions were not new but were built on the same foundation and that the plaintiff was reconstructing the four dilapidated outhouses It is then affirmed that under the Municipal rules and bye-laws prior permission and sanction is necessary even for reconstructing a building or part of a building, but since the plaintiff, instead of compliance with the notice, or moving for condonation of his wrongful action, persisted in hurriedly completing the aforesaid four rooms, and "therefore, they were demolished under the orders of the Mukhya Nagar Adhikari" It was said that no loss of reputation accrued to the plaintiff that he was not entitled to any damages and the monetary loss if any, caused to the plaintiff was on account of his omission to obtain a building permit from the Municipal authorities and since he was himself guilty of an illegal action he was not entitled to get any compensation The notices issued were said to have been issued legally under the signatures of competent authorities under powers delegated by the Mukhya Nagar Adhikari. The suit for damages against defendants Nos. 2, 3, 4 & 5 personally was said to be misconceived inasmuch as none of them did anything in their personal capacity or out of any malice, against the plaintiff They acted in discharge of their lawful duties in good faith and, therefore, they were not personally liable The damages claimed were said to be excessive

8. The following were the issues on which the parties went to trial. —

"1 Whether the demolition of the premises in dispute was mala fide, wrongful and illegal?.

"2. Whether the constructions demolished were made by the plaintiff without permission and sanctioned plan obtained from the defendant and, if so, were they illegal?

"3. Whether the notices issued to the plaintiff were illegal?

"4. Whether the defendant Nos 2 to 5 are personally liable for damages claimed?

"5 Whether the plaintiff is entitled to damages claimed? If so, to what amount and against which of the defendant or defendants?

"6 To what relief, if any, is the plaintiff entitled?"

9. Issues Nos. 1 to 3 were taken up together for consideration by the trial Court It found the action of demolition not mala fide, wrongful or illegal; that the constructions demolished were new and had been made illegally by the plaintiff and so the defendants were entitled to issue the notice which was not illegal and in pursuance thereof they were also entitled to demolish the constructions as the plaintiff did not demolish them in compliance with the notice under Section 557 (1) of the Act. On Issue No 4 it was held that the suit was barred by the provisions of Sec. 370 of the Nagar Mahapalika Act as whatever the defendants Nos. 2 to 5 did was not in their personal capacity out of any malice, but they did it in the due discharge of their lawful duties and they were in any case not personally liable for the damages claimed. On Issue No. 5 the trial Court recorded a finding that "in case the plaintiff had been successful in establishing that the constructions were not new and that even if the constructions were not new then too they were not liable to be demolished then certainly the plaintiff was entitled to damages of Rs. 5,000/- claimed by him as compensation for the loss caused to him by the demolition of his outhouses. Apart from it the plaintiff would certainly have been entitled to

Rs 1,000/- claimed by him on account of loss of his reputation." In the result, it was held on Issue No 6 that the plaintiff was not entitled to any relief and the suit was dismissed with costs

10 The following four points were raised before the lower appellate Court —

"1 Whether the constructions in question were unauthorised?

"2 Whether the notice for demolition under Section 557 (1) of the Nagar Mahapalika Adhiniyam given to the plaintiff-appellant was by a proper authority?

"3. Whether the order for demolition under Section 557 (2) of the Act was properly passed?

"4 What amount of damages is the plaintiff-appellant entitled to get?"

11 The lower appellate Court held on point No 1 that the constructions were unauthorised as they required permission which was admittedly not obtained, on point No 2 that the order Ex A-7, delegating powers under Section 557 of the Adhiniyam was valid and the Nagar Abhiyanta Mr Shinde was competent to order, vide Ex A-5, the issue of notice of demolition Ex A-1, which was accordingly valid, on point No 3 that the order of demolition passed by the Mukhya Nagar Adhikari under S 557 (2) of the Adhiniyam was valid and there was no illegality in the procedure adopted by the Municipal authorities, and lastly, on point No 4 that the claim of Rs 5,000/- was highly exaggerated and the action of the Municipal authorities was not mala fide and in any case the defendants Nos 2 to 5 were not personally liable In the result, the lower appellate Court dismissed the appeal and confirmed the trial Court's decree dismissing the suit

12. Mr. Gopi Nath Kunzru, Senior Advocate, assisted by Mr A N Kaul, urged that under the U P Nagar Mahapalika Adhiniyam the building regulations are contained in Chap XIII, beginning with Section 315 and ending with Section 342 The breach complained of by the respondents was of Sections 315, 316 and 317 of the Adhiniyam Assuming that was so, and assuming that the plaintiff should not have proceeded with the reconstruction of the four outhouses without obtaining the sanction of the Mukhya Nagar Adhikari, the only manner prescribed by the Adhiniyam for proceeding against the plaintiff was that prescribed by Sections 326 and 327 thereof Admittedly, that procedure was not adopted and the Nagar Mahapalika proceeded to act only under Section 557 when it issued the impugned notice dated 18-6-1965 under sub-section (1) thereof and proceeded to enforce the notice, under sub-section (2) by demolishing the four outhouses That, the respondents could not do without first issuing a notice either under Section 326 or Section 327 requiring the plaintiff to show cause, and the order for demolition could be passed by the Mukhya Nagar Adhikari only after hearing the plaintiff on such day and at such time and place as was specified in such a notice and that too if the plaintiff failed to satisfy the Mukhya Nagar Adhikari why the building or work should not be removed, altered or pulled down The argument raised by Mr Kunzru was thus twofold First, that Section 557 under which the respondents claimed specifically and deliberately to have acted, did not apply in view of the specific provision of Section 327, and secondly, the requirements of Sec 327, as to affording the plaintiff a hearing being mandatory, not having been complied with, the order of demolition that is said to have been passed by the Mukhya Nagar Adhikari on 29-6-1965, on Nagar Abhiyanta's report dated 23-6-1965 is wholly illegal and unwarranted by law Mr Kunzru reinforced this argument by submitting that even if the Mukhya Nagar Adhikari was deemed to possess the power of ordering demolition of the outhouses in question, debors Section 327, he could not have ordered it without affording the plaintiff reasonable opportunity of hearing, in keeping with the principles of natural justice and on that ground also the order of demolition was a nullity That being so, urged Mr Kunzru, the act of demolition of the plaintiff's outhouses was wholly illegal and unwarranted by law The respondents being creatures of the statute, anything done by them outside the pale of law, which created them, was an infraction of the plaintiff's fundamental rights and he was entitled to damages by way of compensation against each one of them

13 Mr Ashok Mohiley, appearing for the respondents, urged that a plea in this form was not taken before the lower courts and what was pointed out was that the person who had signed the

notice under Section 557, namely, the Sahayak Nagar Abhiyanta, respondent No 4, was not authorised to sign it In proof of the fact that he was authorised to sign it, Mr Mohiley referred me to the order of the Mukhya Nagar Adhikari dated March 7, 1960, delegating his powers and functions under Section 557 of the Adhiniyam to the Nagar Abhiyanta, I may at once observe that the copy of Ex A-4 that was filed by Mr Ashok Mohiley does not go the whole hog It authorised only the Nagar Abhiyanta's to perform the functions and powers of the Mukhya Nagar Adhikar, under the various provisions, referred to therein, including Section 557 Another copy of Ex A-4 in the Paper Book, supplied by the appellant, does not agree with the copy supplied by Mr Ashok Mohiley I take the copy supplied by Mr Ashok Mohiley, learned counsel for the respondent Nagar Mahapalika, to be more authentic and correct That being so, Tara Chand, the Sahayak Nagar Abhiyanta, who has signed the notice dated 18-6-1965, under Section 557 (1) of the Adhiniyam, was obviously not authorised to issue the notice. The fact that the notice was signed by Tara Chand, the Sahayak Nagar Abhiyanta, and not by J G Shinde, the Nagar Abhiyanta concerned, is a fact which appears from the judgment of the trial court although it appears to have been issued under the orders of J G Shinde, the Nagar Abhiyanta Assuming, therefore, that the notice under Section 557 (1) was an act of Nagar Abhiyanta, J G Shinde, and was served by him under Section 557 (1), Mr Mohiley proceeded to urge that the Nagar Abhiyanta was fully authorised not only to issue the notice under sub-section (1) of Section 557, but also to order demolition under sub-section (2) of Section 557 of the Adhiniyam, and he had by way of abundant precaution also obtained the orders of the Mukhya Nagar Adhikari on his note dated 23-6-1965 recommending demolition of the work

14. The first question which accordingly arises in this case is whether the impugned notice could be issued, or the outhouses could be ordered to be demolished under Section 557 of the Adhiniyam.

15 I feel the occasion to consider the scope of Section 557 of the Adhiniyam as-a-vis a case of enforcement of building regulations, contained in Chapter XIII of the Adhiniyam in Lalji v. Nagar Mahapalika, Allahabad Second Appeal No 1844 of 1972 decided on 18-11-80 (reported in 1981 All LJ 532). In that case the notice was issued long after the expiry of three months from the date of the completion of the unauthorised work I held that action for demolition of any building erected and completed in breach of the building regulations could not be taken more than three months after the completion of the work in view of Section 326 of the Adhiniyam, and that being so, the general power of issuing notices and enforcing provisions of the Adhiniyam conferred by Section 557 thereof, could not be availed of in a case covered by the specific provisions for enforcing the building regulations The same reasoning, adopted by me in that case, applies to the present case also The specific provision of Section 326 of the Adhiniyam for enforcement of the regulations concerning buildings and works is in the following terms —

"Where the Mukhya Nagar Adhikari at any time during the erection of the building or the execution of such work as aforesaid or at any time within three months after the completion thereof, whether as a result of his inspection or otherwise comes to know of any matter in respect of which the erection of such building or the execution of such work is in contravention of any provision of this Act or of any rule or bye-law framed thereunder, he may require the owner erecting or executing or who has erected or executed the said building or work, to cause, anything done contrary to any such provision, rule or bye-law "to be amended or to do anything which, by any such provision, rule or bye-law, may be required to be done but which has been omitted to be done." Now, therefore, whenever the Mukhya Nagar Adhikari, or the Nagar Abhiyanta, in the present case, (in view of the delegation of powers to him, vide Ex. A-4) comes to know, whether as a result of his inspection or otherwise, at any time during the erection of a building etc., or at any time within three months after its completion, that the erection of the building etc., is in contravention of any provision of the Adhiniyam or any rule or bye-law framed therein, he has to require the owner erecting the building, to cause anything done contrary to any

such provision, rule or bye-law, to be amended, or to require that to be done which the owner was bound to but omitted to do In the present case the only allegation of the respondents was that the work was commenced without obtaining the prior permission of the Mukhya Nagar Adhikari under Sec 319 read with Sections 315, 316 and 317 of the Adhiniyam It was not alleged, and it has not been shown by anything on record that the reconstruction of the outhouses was contrary to any rule or bye-law The Mukhya Nagar Adhikari could, therefore, by notice under Section 333 require the plaintiff to stop the further construction of the building in exercise of the powers conferred on him by that Section, which, I may incidentally observe, was purported to be done in the present case by the other notice Ex 3 that is said to have been served on 22nd or the 23rd June, 1965 I may here observe that the powers of the Mukhya Nagar Adhikari under Section 333 of the Adhiniyam do not appear to have been delegated under the order dated 7-3-1965, Ex A-4, to the Nagar Abhiyanta The Mukhya Nagar Adhikari could have required the plaintiff to make amends by obtaining permission and compounding the offence before proceeding on with the work or the Mukhya Nagar Adhikari could have taken steps for ordering demolition in case the building substantially contravened some rule or bye-law, by following the procedure prescribed by Section 327 which is in the following terms —

"327 Proceedings to be taken in respect of building or work commenced contrary to Act, rules or bye-laws — (1) If the erection of any building or the execution of any such work as is referred to in Section 317 is commenced or carried out contrary to the provisions of the rules or by-laws, the Mukhya Nagar Adhikari unless he deems it necessary to take proceedings in respect of such building or work under Section 328 shall —

(a) by written notice, require the person who is erecting such building or executing such work or has erected such building or executed such work on or before such day as shall be specified in such notice, by a statement in writing subscribed by him or by an agent duly authorised by him in that behalf and addressed to the Mukhya Nagar Adhikari, to show sufficient cause, why such building or work shall not be removed, altered or pulled down, or

(b) require the said person on such day and at such time and place as shall be specified in such notice to attend personally or by an agent duly authorised by him in that behalf and show sufficient cause why such building or work shall not be removed, altered or pulled down

(2) If such person shall fail to show sufficient cause, to the satisfaction of the Mukhya Nagar Adhikari, why such building or work shall not be removed, altered or pulled down the Mukhya Nagar Adhikari may remove, alter or pull down the building or work and the expenses thereof shall be paid by the said person"

I may observe here that the power of taking proceedings under Section 327 of the Adhiniyam is limited to those cases where the erection of a building, as defined under Section 315, or repairs or alterations etc, of a building, as defined under Section 317, of the Adhiniyam, is commenced or carried out contrary to the provisions of the rules or bye-laws In such a case the Mukhya Nagar Adhikari has two options — either to require by written notice to the person, who has erected or executed such work, to show cause by a statement in writing before such day as may be specified in the notice why such building or work should not be removed, altered or pulled down, or to require the person, who has erected such building or executed such work, on such day and such time and place as may be specified in the show cause notice to attend personally or by a duly authorised agent and show sufficient cause why such building or work should not be removed, altered or pulled down

16. The Mukhya Nagar Adhikari is then authorised by sub-section (2) of Section 327 to order removal alteration or pulling down of the building or work, which, ipso facto, must be such as has been erected in contravention of the provisions of the rules or bye-laws, in case the person to whom the show cause notice is issued fails to show sufficient cause or the cause shown is not sufficient to the satisfaction of the Mukhya Nagar Adhikari

17. These provisions postulate that the power of ordering demolition or removal of building or work, commenced

or erected without the necessary permission of the Mukhya Nagar Adhikari can be exercised only in those cases where building or work contravenes any specific rule or bye-law framed in that behalf which are commonly called the building bye-laws

18. However, even assuming that the proceedings for demolition could have been taken in the present case, for contravention of the provisions of Secs. 315, 316, 317 read with Section 319, the Mukhya Nagar Adhikari could not have ordered demolition without following the procedure prescribed by Section 327 of the Adhiniyam That was clearly not done in the present case Assuming that Section 557 authorised the respondents to order demolition, they could not have done so without giving the plaintiff a reasonable opportunity of being heard in the matter, which vitally affected him, merely on the basis of the report of the Nagar Abhiyanta The haste and the manner in which the proceedings were carried out leads me to think that the authorities were not acting bona fide I say so on the basis of the following finding recorded by the trial court :—

"It may be that defendant No 3 may be exaggerating so far as the date of receipt of the letter Ex A-3 on 23-19-1965 is concerned in order to show that the notice under Section 333 (1) Ex. 3 had already been issued before the receipt of the letter Ex A-3 But, whatever the position may be this much is proved from Ex A-5 that Mr Shinde had issued instruction for the issue of notice under Section 557 (1) to the plaintiff and for preparing a notice under Section 333 (1) to be issued by the Mukhya Nagar Adhikari on 18-6-1965 and both the notices were actually prepared on the same date and signatures of Mr Tara Chand for "Nagar Abhiyanta were obtained on the notice under Section 557 (1) on 18-6-1965 but it was not issued from the office till 21-6-1965 when Mr. Shinde himself took it and served it on the plaintiff"

As noticed above, one of the points raised by Mr Ashok Mohiley for the respondents was that the case now put forth in this court was not taken at the trial or before the lower appellate court, a fact that is not strictly correct. The plaint had, in paragraph 6 of the plaint, specially pleaded as under :

"That without any notice having been served to the aforesaid letter dated 21st of June, 1965 sent by plaintiff's brother in reply to first notice, to the Nagar Abhiyanta and without any opportunity having been given to him or the plaintiff to explain and to show that the constructions complained of were not new and were not illegal, the said constructions were wrongfully demolished by the Nagar Abhiyanta Sri J. C. Shinde, defendant No 3 and the Building Inspector Sri Nawal Kishore defendant No 5 on 10-7-1965 purporting to act under the illegal orders of Sri L. K. Nagar, defendant No. 2, the then Mukhya Nagar Adhikari of the Nagar Mahapalika Allahabad (defendant No 1)."

It cannot, therefore, be said that the case which has been found to be made out, on the material on record, was not within the scope of the pleadings.

19. The speed with which the action was taken in this case for demolition of the constructions, raised by the plaintiff, was rather extraordinary. It is not suggested that the Municipal Authorities acted improperly if they acted speedily and with promptitude to prevent a violation of the provisions of the Act and their action would have been commendable, but for the fact that they themselves violated the procedure established by law and proceeded to demolish the constructions raised by the plaintiff without affording him any opportunity of being heard. Their act must be struck down as invalid, unauthorised and unwarranted by law. Indeed, it was a clear case of malice in law, if that phrase has any meaning.

20. Another argument raised by Mr Ashok Mohiley for the respondents was that even so, no damages could be awarded against the defendant-respondents for the demolition of the plaintiff's constructions in the present case. First, the constructions were admittedly raised without permission, and to award damages to the plaintiffs for demolition of those constructions would be to rewarding an illegal act. Secondly, the respondents were protected by Section 570 of the Adhiniyam.

21. The points, so raised by Mr. Ashok Mohiley, would have surely carried weight in a case of this kind if the action taken by the respondents in the matter of demolition of the plaintiff's constructions had been found to be authorised by law. The order of demolition was passed without affording the

plaintiff any opportunity of being heard The constructions belonged to the plaintiff The land on which the constructions were erected also belonged to the plaintiff in the sense that he had a right of occupancy thereon, even if the land was lease-hold and not free-hold The powers of the respondent Mahapalika and its officers or authorities under the Adhiniyam are those conferred on them by the Adhiniyam itself I have found that the demolition of the plaintiff's constructions by the respondents was an unauthorised act It is not possible for me to find out from the material made available to me, whether the respondents other than the Nagar Mahapalika, were acting in good faith so as to be protected by Section 570 of the Adhiniyam Nor, does it appear expedient at this distance of time to take fresh evidence on the point I must, therefore, proceed on the assumption that the respondents, other than the Nagar Mahapalika were protected by Section 570

22. The question which, therefore, remains is whether any damages should be awarded against the respondent Nagar Mahapalika and if so, the reasonable amount thereof The finding of the trial court on this point, under issue No 5, has already been referred to above The finding is cryptic and the lower appellate court has in an equally cryptic manner set aside the finding relating to the damages, for loss suffered by the demolition, by saying that the claim was exaggerated and the plaintiff-appellant had admitted that Rupees 200/- or Rs 300/- were spent on repairs The lower appellate court has chosen not to say anything about the trial court's finding relating to the claim for damages in the sum of Rs 5,000/- on account of the loss of reputation The record in this case was destroyed in the fire which engulfed the Civil Court building The lower appellate court has held that there was no evidence in support of the claim for damages in the sum of Rs 5,000/- on account of the loss suffered by the demolition Although, copies of the statements of the witnesses have been included in the Paper Book, filed by the plaintiff-appellant, besides some other papers, it was neither possible for me sitting as a court of second appeal to assess the damages for myself, nor was it possible to place implicit reliance on the copies of the statements that have been filed In this situation, I put it across to Mr G N Kunzru, learned counsel for the plaintiff-appellant, that in case I were to find that the demolition in question was unlawful, whether his client would be satisfied with an award of token damages Realising the difficulties, Mr Kunzru stated before me that he would have no objection even if a decree for recovery of a token amount of Rs 1,000/- was passed against the respondent Nagar Mahapalika to vindicate the plaintiff's honour, who died during the pendency of the appeal in this Court, and is now represented by his legal representatives

23. On an over-all consideration of the situation I, therefore, think that the ends of justice would be met in this case if a decree for recovery of Rupees 1,000/- only is passed against the respondent Nagar Mahapalika as token damages, more for the purposes of enforcing the rule of law than for compensating the plaintiff-appellant, and the parties are left to bear their own costs

24 I, accordingly, allow the appeal, set aside the decree appealed from, and instead decree the plaintiff's suit for recovery of Rs 1,000/- (one thousand) against the respondent Nagar Mahapalika of the City of Allahabad, but leave the parties to bear their own costs throughout

Appeal allowed

1981 ALL L J 827

DEOKI NANDAN, J

Om Prakash, Appellant v The Municipal Board, Sikandrabad, Bulandshahr, Respondent

Second Appeal No 1929 of 1978, D/- 9-7-1981

U P Municipalities Act (2 of 1916), S 135 — Notification dated 19-5-1977 modifying rate of tax on cinema shows — Validity — Levy of tax at flat rate of Rs. 5 per show — Subsequently rate of cinema halls exceeding annual value of Rs. 10,000 enhanced to Rs. 10 per show — No violation of Arts 19 (1) (f) and 14 (Constitution of India, Arts. 19 (1) (f), 14).

Where the owners of cinema halls were required to pay tax at the flat rate of Rs 5 per show irrespective of the annual value of the cinema hall but by subsequent amendment owners, the annual

value of whose cinema halls exceeded Rs 10,000 were required to pay tax at the rate of Rs 10 per show, there would be no violation of Arts 19 (1) (f) and 14 simply on account of imposition of tax at the rate of Rs 10 per show AIR 1961 SC 552, Dist, AIR 1959 SC 582, Rel on

(Paras 3, 4)

So long as the right to acquire, hold and dispose of property was a fundamental right under Art 19 (1) (f) of Constitution, the State could not by an arbitrary imposition of a tax expropriate a citizen of his property, and similarly the State could not completely take away or destroy the fundamental right of a citizen under Art 19 (1) (f) to practice any profession, trade or business by an arbitrary imposition of tax Subject to these limits the taxing power of the State knew no bounds The right to acquire, hold and dispose of property is no longer a fundamental right. (Para 3)

The guarantee of equality before the law and equal protection of the laws enshrined in Art 14 of the Constitution does not require that a rational classification must be made in every case The law is that all laws must apply equally to every one and all must be treated to be equal before the law However, in view of the existing inequalities among the people a reasonable classification having a rational connection with the object of the statute is permitted for applying the law differently to different sets of people in different situations

(Para 4)

Cases Referred	Chronological	Paras
1978 All LJ 25	1978 UPTC 58	1978 Tax
LR 2182	AIR 1978 SC 306	2
1972 All LJ 279	1972 Tax LR 2022	2
AIR 1969 SC 378		4
AIR 1961 SC 552		3, 4
AIR 1959 SC 582		5

S N Agarwal, R S Verma and S S Chandravanshi, for Appellant, B. D Madhavan, for Respondent

JUDGMENT— The levy of tax at the rate of Rs 5 per show of the plaintiff-appellant's Cinema Hall at Sikandrabad by the Municipality of that town by a notification dated 16-3-1971 was challenged by the suit giving rise to the present second appeal. While the trial Court decreed the suit and restrained the defendant Municipality from recovering the tax from the plaintiff the lower appellate Court reversed the decision and dismissed the suit.

2. It is not necessary to state the facts or even to mention the grounds on which the levy of that tax was challenged by the plaintiff-appellant in this case, for the matter is no longer res integra It has been the subject-matter of a Division Bench decision of this Court in Niranjan Lal Bhargava Trust, Allahabad v State of U P (1972 All LJ 279) in which the imposition of a similar tax by the Nagar Mahapalika of the City of Allahabad was upheld and almost all the grounds on which the imposition of the tax was challenged in the present case were repelled In view of that decision, it was not possible to accept any of the contentions raised in the present case and the trial Court could not have decreed this suit if that decision had been brought to its notice. However, the matter stands further settled by the declaration of the law by the Supreme Court in Thawco Mal v Puran Chand Pandey (1978 UPTC 58) (1978 All LJ 25) In that case the levy of similar tax at the rate of Rs 15 per show by the Pilibhit Municipality was upheld by the Supreme Court

3. However, learned counsel for the appellant contended before me that the tax so imposed was at a flat rate of Rs. 5 per show and its incidence was so unreasonable that it left almost nothing with the plaintiff-appellant as would appear from the trial Court's judgment In support of the first limb of his argument, the learned counsel relied on the case of Kunnathat Thathunni Moopil Nair v. State of Kerala (AIR 1961 SC 552) and the fact that the rate of tax had been varied from the flat rate of Rs. 5 per show subsequently by a notification dated 19-5-1977 whereby the rate of tax had been fixed at Rs 5 per show on Cinema Halls having an annual value of less than Rs. 10,000 and Rs 10 per show of Cinema Halls having an annual value of more than Rs 10,000. It was also stated in this context that by a still subsequent notification and with effect from 1-12-1980 the rate of tax had been increased to Rs 10 per show in the case of Cinema Halls having an annual value of less than Rs. 10,000 and Rs. 20 per show in the case of Cinema Halls having an annual value of more than Rs. 10,000. It was further stated before me that the plaintiff's Cinema Hall falls in the second category, i.e., its annual value was more than Rs. 10,000. It is clear that the plaintiff could not have been prejudiced or could not have suffered by reason of the fact that the tax was imposed at a flat rate of Rs. 5 per show irrespective of the size of the Cinema Hall. As to the finding of

the trial Court that the incidence of the tax was unreasonable, it is sufficient to observe that reason and tax are usually poles apart All taxes may appear unreasonable to those who have to pay them There is no element of quid pro quo in a tax So long as the right to acquire, hold and dispose of property was a fundamental right under sub-clause (f) of clause (1) of Article 19 of the Constitution, the State could not by an arbitrary imposition of a tax expropriate a citizen of his property, and similarly the State could not completely take away or destroy the fundamental right of a citizen under sub-clause (g) of clause (1) of Article 19 of the Constitution, to practice any profession, trade or business by an arbitrary imposition of tax Subject to these limits the taxing power of the State knew no bounds The right to acquire, hold and dispose of property is no longer a fundamental right

4 Learned counsel argued that the Municipality ought to have classified Cinema Halls according to the capacity and correlated the tax to the capacity of a Cinema Hall rather than to impose tax at a flat rate of Rs 5 per show irrespective of the fact whether the Cinema Hall was big or small There are the two short answers to this contention First, the plaintiff's counsel fell in the category of those having an annual value of more than Rs 10,000 It was not a small Cinema Hall Secondly, the amount of tax that was levied per show was so small, being Rs 5 per show only, that even the smallest of Cinema Halls could have borne the burden It was not shown to me that the plaintiff was unable to carry on or continue his business on account of the rate of tax in question being arbitrarily high The calculations made by the learned Munsif in his judgment on this point are illusory and appear to be based on insufficient data The facts found by the learned Munsif were that the plaintiff's income from the Cinema Hall was Rs 9,020 in the year 1967-68 which worked out to Rs 750 per month while the incidence of the tax worked out to Rs 600 per month which left a balance of Rs 150/- only for the plaintiff to live on The plaintiff's income in the year in which the tax was imposed is not known If the plaintiff's case was that the incidence of the tax was exproprietory or in other words was so arbitrary as to make it impossible for him to carry on the business at all, then he ought to have led evidence to show the same His income-tax assessment for the year 1967-68 could be no basis for the finding that was arrived at by the learned Munsif The case of Moopil Nair (AIR 1961 SC 552) (supra) is also distinguishable for the same reason There inequality was writ large on the Act and was found to be inherent in the very provision of the taxing section, on the facts brought out in paragraph 10 of the report of that case For the same reason the case of State of Kerala v Haji K Kutty Naha (AIR 1969 SC 278) which follows Moopil Nair's case (supra) is distinguishable from the facts of the present case The guarantee of equality before the law and equal protection of the laws enshrined in Article 14 of the Constitution does not require that a rational classification must be made in every case The law is that all laws must apply equally to everyone and all must be treated to be equal before the law However, in view of the existing inequalities among the people a reasonable classification having a rational connection with the object of the statute is permitted for applying the law differently to different sets of people in different situations There is no such arbitrariness in the imposition of a tax at the flat rate of Rs 5 per show in the present case as was found in the imposition of the Kerala Buildings Tax Act in question before the Supreme Court in Haji K Kutty Naha's case (supra)

5 The case of Western India Theatres Ltd v Cantonment Board, Poona Cantonment (AIR 1959 SC 582) was also cited before me and my attention was drawn to the observations of the Supreme Court in Paragraph 8 of the report of that case It was held there that —

"It may not be unreasonable or improper if a higher tax is imposed on the shows given by a cinema house which contains large seating accommodation and is situate in fashionable or busy localities where the number of visitors is more numerous and in more affluent circumstances than the tax that may be imposed on shows given in a smaller cinema house containing less accommodation and situate in some locality where the visitors are less numerous or financially in less affluent circumstances, for the two cannot in those circumstances be said to be similarly situate"

These are certainly relevant criteria for making a valid classification But that does not mean that a classification must in all cases be made and tax must not be

imposed at a flat rate even if that rate be minimal and its incidence small

6. The appeal is devoid of any merit It is dismissed with costs

Appeal dismissed

1981 ALL L J 830

DEOKI NANDAN, J

Sukhdeo, Appellant v Phool Chand and others, Respondents

Second Appeal No 2718 of 1969, D/- 6-7-1981 *

U P Consolidation of Holdings Act (5 of 1954), S 11 — Consolidation proceedings — Decision given by Settlement Officer without considering applicability of principle of res judicata — Not a nullity, decision being in exercise of inherent jurisdiction, (Civil P C (5 of 1908), S. 11)

Where the Settlement Officer (Consolidation) having inherent jurisdiction to decide the question of title raised before him, decides the same by ignoring an earlier compromise decree by Civil Court between the parties as the question of res judicata was not raised before him by the parties, the decision given by him could not be said to be nullity Even if the question of res judicata had been raised before the Settlement Officer and even if he had decided the matter wrongly, it could not be said that his decision was a nullity, as he had the inherent jurisdiction to decide the matter Res judicata is not a matter touching the initial jurisdiction of a court to adjudicate upon a dispute It touches only the power of a court to decide a matter in a certain way AIR 1958 SC 886, AIR 1962 SC 1621, Rel on (Para 4)

Cases Referred	Chronological Paras
AIR 1962 SC 1621	4
AIR 1958 SC 886	4
(1841) 1 QB 66 : 113 ER 1054, Rex v. Bolton	4

JUDGMENT — The question which arises in this second appeal by the plaintiff [illegible] Civil Court, and the earlier decision operated as res judicata?

2. It is undisputed that the Settlement Officer (Consolidation) had the jurisdiction to decide the question of title raised before him in the case What is urged is that in deciding that question he wrongly disturbed the shares allotted to the parties ignoring an earlier compromise decree which operated as res judicata

3. The lower appellate Court has on the first point before it, held that since the question of res judicata was not raised before the consolidation authorities, it was not open to the plaintiff to raise that question now and urge that the decision of the consolidation authorities was a nullity on that account On the second point raised before it, the lower appellate Court held that Smt Sonpati was a widow who had only a life interest in the title under which she was litigating and, therefore, she could not enter into a compromise so as to bind her reversioners and that the earlier decision could not, therefore, be said to operate as res judicata On the third point before it, the lower appellate Court held that the suit was barred by S. 49 of the U P. Consolidation of Holdings Act.

4. The real question in the appeal is the third question, namely, whether the suit was barred by S. 49 of the U P. Consolidation of Holdings Act It is undisputed that the consolidation authorities had the jurisdiction to decide the title of the parties to the land and to adjudicate upon and determine their shares. The argument is that that decision was a nullity inasmuch as the matter was res judicata and when the matter is res judicata, a court is prohibited from hearing and deciding it as the language of S 11 of the Civil P C would itself show. It was suggested that the matter could not be said to be res judicata on account of S. 11 of the Civil P. C. It could be said to have been res judicata only on general principles. That may be so, but it is undisputed that the rule of res judicata does in a sense affect the power of a court to try and decide the same matter over again. Res judicata is, however, not a matter affecting the initial jurisdiction of a court to adjudicate upon a dispute It touches only the power of a court to decide a matter in a certain way As observed by the Supreme Court in Raza Begum v. Sarabgand, Anwar Begum (AIR 1958 SC 886) it may raise controversies as to the power of the Court in contradistinction to its inherent jurisdiction, or, in other

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*Appeal against decision of Second Addl Civil Judge Kanpur D/- 10-10-[illegible]

words, of jurisdiction in the limited sense in which it is used in S 115 of the Civil P C It cannot be said to raise a question of the inherent jurisdiction of the court in the sense in which the term is understood when it is said that the decision of a court or tribunal which is without jurisdiction is a nullity, or such as may be challenged in collateral proceedings

The Supreme Court in Smt Ujjam Bai v State of Uttar Pradesh (AIR 1962 SC 1621) observed as follows (at p 1628) —

"Whenever a judicial or quasi-judicial tribunal is empowered or required to enquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon cannot be impeached collaterally or on an application for certiorari but are binding until reversed on appeal Where a quasi-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion, whether it is wrong in law or in fact The question whether a tribunal has jurisdiction depends not on the truth or falsehood of the facts into which it has to enquire, or upon the correctness of its findings on these facts, but upon their nature and it is determinable at the commencement, not at the conclusion of the inquiry" (Rex v Bolton, (1841) 1 QB 66 at p 74) A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the injury But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required (i e has jurisdiction) to determine The strength of this theory of jurisdiction lies in its logical consistency But there are other cases where Parliament when it empowers an inferior tribunal to enquire into certain facts intends to demarcate two areas of enquiry, the tribunal's findings within one area being conclusive and within the other area impeachable The jurisdiction of an inferior tribunal may depend upon the fulfilment of some condition precedent or upon the existence of some particular fact Such a fact is collateral to the actual matter which the tribunal has to try and the determination whether it exists or not is logically prior to the determination of the actual question which the tribunal has to try. The tribunal must itself decide as to the collateral fact when, at the inception of an inquiry by a tribunal of limited jurisdiction, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether it will act or not, and for that purpose to arrive at some decision on whether it has jurisdiction or not There may be tribunals which by virtue of legislation constituting them have the power to determine finally the preliminary facts on which the further exercise of their jurisdiction depends, but subject to that an inferior tribunal cannot, by a wrong decision, with regard to a collateral fact, give itself a jurisdiction which it would not otherwise possess"

It may be that the earlier decision of the Civil Court was not pleaded before the consolidation authorities That omission could not oust the jurisdiction of the Civil Court in case it came to the conclusion that the decision of the consolidation authorities was wholly without jurisdiction and was a nullity But, as observed above, even if the question of res judicata had been raised before the consolidation authorities and even if they had decided it wrongly, it cannot be said that the decision of the consolidation authorities was a nullity, for they had the initial or the inherent jurisdiction to decide the matter

5 In view of what has been observed above, I do not consider it necessary to go into the second point raised before the lower appellate Court

6. The appeal fails and is dismissed with costs

Appeal dismissed

1981 ALL L. J. 831

P N BAKSHI, J

Gajpat Rao and another, Applicants v Smt Ladli Kunwar and others, Opposite Parties

Criminal Revn No 1848 of 1980, D/- 25-5-1981

(A) Criminal P. C (2 of 1974), S. 145 (5) — Preliminary order under S 145 (1) — Application for non-existence of apprehension of breach of peace — Can be moved at any stage of proceeding

The question of existence of an apprehension of breach of peace is a basic question There is nothing in S 145 to restrict the stage at which an objection can be filed by a party to show that no apprehension of breach of peace exists. There is no time limit fixed, nor is there any stage set for the moving of such an application of non-existence of apprehension of breach of peace, therefore when

such an application is moved it is mandatory for the Court to give the parties an opportunity of proving the truth of his allegation It cannot be contended that such objections can be taken only by a party who is required to attend at the time, when he files a written statement AIR 1981 SC 18, 1973 Cri LJ 1091 (All), Foll (Para 5)

(B) Criminal P. C. (2 of 1974), Ss 145 (5), 397 (2) — Preliminary order passed under S 145 (1) — Application to drop proceeding for non-existence of apprehension of breach of peace — Order of Court rejecting application without giving opportunity to parties — It is not an interlocutory order.

The question of existence of an apprehension of breach of peace is a fundamental question which gives rise to the jurisdiction of the Criminal Court to take action under S 145 If there is no apprehension, then the Court has no jurisdiction to proceed under that section. A wrong decision on a jurisdictional question by rejecting application for non-existence of apprehension of breach of peace without giving opportunity to the party, is not mere error of law, but an error of jurisdiction and an order erroneously deciding this question would not be an interlocutory order, but can be termed as a final order subject to the revisional jurisdiction of the High Court (Para 7)

Cases Referred	Chronological Paras
AIR 1981 SC 18	1980 Cri LJ 1278 5
1973 Cri LJ 1091 (All)	5
AIR 1968 SC 1002	1968 Lab IC 1229 5

R K Dwivedi, for Applicants, Ajai Kumar, for Opposite Parties

ORDER.— This application in revision arises out of proceedings under Sec 145, Cr. P C On 2-8-1978 a preliminary order was passed under Section 145 (1), Cr. P C. calling upon the parties to file their written statements in support of their respective claims to the disputed immovable property While the proceedings were continuing, it appears that on 14th June, 1979, an application was filed by the applicants praying that the proceedings be dropped since there was no apprehension of breach of peace The Magistrate called for a report from the police. After hearing both the parties he rejected the application on 6th July 1979 It appears that the inquiry thereafter continued under Section 145 (4) Cr P C PW 5 has been examined. On 4th September 1980 another application was filed by the applicant to the effect that the apprehension of breach of peace ceased to exist and that the proceedings be dropped. This application has been rejected by the impugned order, passed by the Magistrate on 9th October, 1980 Hence this revision

2. I have heard learned counsel for both the parties at considerable length and have also perused the impugned orders. Counsel for the applicant has argued that under the provisions of Section 145 (5), Cr. P C., it was open to the applicants to allege at any stage during the continuance of the inquiry under Section 145 (4), Cr. P. C that the apprehension of breach of peace has ceased to exist and on such allegations being made, it was mandatory for the court to allow the applicants an opportunity of showing the non-existence of the apprehension of breach of peace He argues that the court below has acted illegally in the exercise of his jurisdiction in rejecting this application forthwith. On the other hand counsel for the opposite parties has submitted that the non-existence of the apprehension of breach of peace relates to the date on which a party appears in court in pursuance of the notice issued by the Magistrate after passing a preliminary order His submission, in other words, is that if the party does not allege non-existence of an apprehension of breach of peace in the written statement filed by him, then it is not open to him at any later stage to take this stand and to pray for dropping of the proceedings. The opposite parties' counsel has also argued that there was no material or specific facts, alleged in the application dated 6th September, '80 filed by the applicant on the basis of which it can be said that the Magistrate should have given an opportunity to him to show that the apprehension of breach of peace ceased to exist.

3. Learned counsel for the opposite party has also argued that the impugned order dated 6-9-1980 rejecting the application filed by the applicant for dropping the proceedings was an interlocutory order and, therefore, no revision was maintainable

4. Counsel for the opposite parties has further submitted that the fact that the parties are litigating in proceedings under Secion 145, Cr P C indicates that the dispute still exists and that there is an apprehension of breach of peace

Merely because there is no quarrel for two years, did not mean that the apprehension of breach of peace does not exist

5 I have carefully considered the arguments advanced by learned counsel for the parties and have also carefully perused the Supreme Court decisions reported in AIR 1981 SC 18, AIR 1968 SC 1002, 1973 Cri LJ 1091 (All) These cases have been cited and discussed before several times I do not consider it necessary to deal with them in detail The principle of law laid down in these cases and others of the Supreme Court and this court is very clear that the question of existence of an apprehension of breach of peace is a basic question It is the foundation on which the jurisdiction of a Magistrate to proceed under Section 145, Cr P C can be invoked If there exists apprehension of breach of peace, the Magistrate can pass a preliminary order and proceed with the enquiry If there is no apprehension of breach of peace, he cannot proceed under Section 145, Cr P C There is nothing in Section 145, Cr P C to restrict the stage at which an objection can be filed by a party to show that no apprehension of breach of peace exists I do not agree with the interpretation of the counsel for the opposite parties that such objections can be taken only by a party who is required to attend, at the time, when he files a written statement It is true that at the stage of filing written statement, this objection can be taken and if the court is satisfied thereon, it can cancel the order But even at a subsequent stage and during the continuance of the proceedings under Section 145, Cr P C it can still be urged that the apprehension has ceased to exist now and therefore, the proceedings should be dropped To my mind, there is no time limit fixed, nor is there any stage set for the moving of such an application of non-existence of apprehension of breach of peace, therefore, when such an application is moved, it is mandatory for the court to give the parties an opportunity of proving the truth of his allegation The word showing in Section 145 (5) Cr P C has been interpreted by this court as giving an opportunity to the party to lead evidence to prove his allegations

6 In the instant case, the position appears to be that an application filed by the applicants denying the existence of apprehension of breach of peace was rejected by the court on 6-7-79 This rejection order was passed after calling for a report from the police and hearing the parties Fourteen months later on 6th September, 1980, a fresh application was filed to the effect and there had been no dispute between the parties for the last two years and that now there is no apprehension of breach of peace On this application no fresh report was called for from the police, nor was any opportunity given to the objector to lead evidence in support of the denial The impugned order indicates that the preliminary order under S 145 (1), Cr P C had already been passed and since a report had already been given by the police on the first objection filed by the applicants, therefore, the dispute still existed and the interest of justice required that the proceedings should be continued, hence the application was rejected In my view this was not a correct legal approach to the question As I have said above when such an objection is raised by the parties, of the non-existence of the apprehension of breach of peace, it must be decided by the court after giving an opportunity to the parties to lead evidence to prove his objection Proceedings under S 145, Cr P C are not concerned with the settlement of dispute between the parties far less dispute of a civil nature. Their only concern is that the dispute regarding immovable property which raises an apprehension of breach of peace must be averted If there is no apprehension of breach of peace, or if the apprehension existed at the time of the preliminary order, but has subsequently ceased to exist, it becomes incumbent upon the Magistrate to quash the preliminary order and to drop the proceedings under S 145 (5), Cr P C In my view the procedure laid down under S 145 (5), Cr P C has not been followed in the instant case and the impugned order is, therefore, liable to be set aside

7. The argument that the impugned order is interlocutory, has no legs to stand on The question of existence of an apprehension of breach of peace is a fundamental question which gives rise to the jurisdiction of the criminal court to take action under S 145, Cr P C If there is no apprehension, then the court has no jurisdiction to proceed under that section A wrong decision on a jurisdictional question is not a mere error of law, but an error of jurisdiction and an order [illegible] deciding this question

would not be an interlocutory order, but can be termed as a final order subject to the revisional jurisdiction of this Court.

8. I am aware of the fact that four witnesses have been examined in this case, and that the examination of the fifth one is proceeding There are yet a large number of witnesses, and may be witnesses for the other side, who are to be produced But since an objection has been taken on 6th September, 1980 that apprehension of breach of peace has ceased to exist, it has become necessary for the Magistrate to decide this question first before proceeding further with the case

9 I would, however, like to sound a note of caution in this case, that there may be instances where an objection regarding the non-existence of the apprehension of breach of peace is a mala fide objection If that is so then the court cannot be expected to delay the decision of the merits of the proceedings, but then a finding has to be recorded to that effect. In the instant case the Magistrate has not found that the objection is frivolous or mala fide I find from the record that after the rejection of the first application on 6th July, 1979, fourteen months have passed by The second application is filed on 6th September, 1980 Prima facie it cannot be said that the application is frivolous The Magistrate has to enquire into it and give an opportunity to the parties to support their respective cases, by such evidence, as desired by them. No party should be allowed to unnecessarily delay or prolong the proceedings The Magistrate, therefore, while deciding this objection will do so expeditiously without giving a long rope to any party to procrastinate the litigation

10 For the reasons given above, I am satisfied that there is merit in this revision which is hereby allowed The impugned order passed by the Magistrate on 6th October, 1980 is set aside and he is directed to decide the objection filed by the applicants on 6th September, 1980 in accordance with law.

Revision allowed

1981 ALL. L. J. 834

O. P. SINGH, J

Harbans and another, Petitioners v. The Board of Revenue, U. P. Allahabad and others, Respondents

Civil Misc. Writ Petition No. 3709 of 1977, D/- 23-11-1981

GY. IV/D209/ 1 AAJ DHZ

Civil P. C. (5 of 1908), S. 80 — Suit under S. 209 of U. P. Zamindari Abolition and Land Reforms Act (1 of 1951) — Suit by tenure-holders — Notice under S. 80 of Civil P. C. however served by one of them only — Suit whether maintainable.

The notice under S 80 must be reasonably construed Any unimportant error or defect in the notice cannot be permitted to be treated as an excuse for defeating a just claim One of the tenure holders can bring a suit against a trespasser under S 209 of the Act I of 1951 Since the contesting defendant is a trespasser and the State of U P only a statutorily necessary party in such a suit the defect in the notice under S 80, which was served by only one of them and not by all of them as required, is not such a defect as may entail the dismissal of the suit The court ought to examine the claim of the plaintiffs on merits ignoring the unimportant defect in the notice under S 80 AIR 1960 SC 1256, AIR 1960 SC. 1309, Rel. on. (Paras. 9, 10)

Cases Referred :	Chronological Paras
AIR 1960 SC 1256	9
AIR 1960 SC 1309	8
AIR 1927 PC 176	8

Sripal Narain Singh, for Petitioners; S. K. Subedar and Standing Counsel, for Respondents.

ORDER— By means of this writ petition the plaintiffs-petitioners have prayed for quashing the judgments of the second appellate Court and the first appellate Court and have prayed for remanding the case to the first appellate Court to decide the claims of the parties on merits

2. The plaintiffs-petitioners had filed a suit for ejectment under Section 209 of the U.P.Z.A and L. R Act (hereinafter referred to as the Act) against the contesting defendant-opposite party Gur. Charan Singh alias Gur Bachan Singh on the allegations that they were Sirdars of the land in suit and that the defendant had no concern with the same and was a trespasser, hence he was liable to ejectment In the suit, State of U. P was also impleaded and was a necessary party.

3 The claim of the plaintiff-petitioner was resisted by the contesting defendant on the allegations that he was Sirdar of the disputed land and that the plaintiffs had no concern with it. U. P. State had also contested the claim of the plaintiffs and had denied the title and right of the plaintiffs in the disputed land and had asserted that notice under Sec-

tion 80, C P C was not properly given and that the suit was not properly valued

4. On the pleadings of the parties a number of issues were struck by the trial Court and the trial Court gave judgment against the plaintiffs-petitioners and found that the plaintiffs had not succeeded in proving their claim of Sirdari right in the disputed land and that the defendant had also failed to prove his claim of Sirdari right in the disputed land However, the trial Court had held that the notice under Section 80, C P C given by one of the plaintiffs was sufficient notice (See Annexure 'A' attached with the writ petition) Aggrieved by the judgment of the trial Court the plaintiffs-petitioners had preferred an appeal which was dismissed by the appellate Court on the ground that the notice under Section 80 C P C was not a proper notice as one of the plaintiffs had not served the notice under Section 80, C P C (see Annexure 'B' attached with the writ petition) Thereafter the plaintiffs-petitioners preferred a second appeal which was also dismissed by the learned Member incharge of the Division through his judgment dated 3-10-1969 (see Annexure 'C' attached with the writ petition) Against the judgment of the second appellate Court a review petition was also filed which was also dismissed through the judgment dated 31-8-1977 on record (see Annexure 'D' attached with the writ petition) Now the plaintiffs-petitioners have approached this Court under Article 226 of the Constitution

5. The learned counsel for the petitioners has contended before me that one of the plaintiffs could bring a suit under Section 209 of the Act against the defendant trespasser hence the notice on behalf of one of the plaintiffs under Section 80, C P C was a proper notice and the first appellate Court as well as the second appellate Court have patently erred in dismissing the plaintiffs' suit due to alleged defective notice under Section 80, C.P.C

6 The learned counsel for the contesting opposite party has tried to refute the contentions raised on behalf of the plaintiffs-petitioners and has submitted that the appellate courts have correctly dismissed the plaintiffs' suit as the notice under Section 80, C P C on behalf of one of the plaintiffs was bad in law In rejoinder the learned counsel for the petitioners has reiterated the contentions and has emphasized that since the suit on behalf of one of the tenure holders under Section 209 of the Act was maintainable it was obligatory on the part of the appellate Courts to have examined the claim of the plaintiffs on merits

7 In my opinion, one of the tenure-holders can bring a suit against trespasser under Section 209 of the Act In this view of the matter the dismissal of the plaintiffs' suit due to improper notice under Section 80, C P C in the circumstances of the present case appears to me patently erroneous In a suit under Section 209 of the Act the real contest is between the plaintiff and the contesting defendans State of U P is a necessary party due to statutory provision The relief sought in the suit is mainly against a trespasser but it cannot be lost sight of that in a suit for ejectment declaration of plaintiffs' title to the disputed land is involved The finding on the question of plaintiffs' title in a suit under S 209 of the Act will be binding between the parties hence the contention of the learned counsel for the petitioners that in the circumstances of the present case notice under Section 80, C P C on behalf of one of the plaintiffs was proper notice is not acceptable to me To my mind, it was proper for the plaintiffs to have appraised the State of U P with correct facts that the notice given along with other was tenure holder of the disputed land In this view of the matter I find that the notice under Section 80, C P C was a defective notice and the State of U P was within its powers to challenge the claim of the plaintiffs by asserting that one of the plaintiffs was not a lone tenure-holder

8 In AIR 1960 SC 1309, the State of Madras v C P Agencies their Lordships of the Supreme Court have observed that

"the object of Section 80 is manifestly to give the Government or the public officer sufficient notice of the case which is proposed to be brought against it or him so that it or he may consider the position and decide for itself or himself whether the claim of the plaintiff should be accepted or resisted."

Their Lordships of the Supreme Court have further quoted the following observation in Paragraph 6 of their judgment —

"We are constrained to observe that the approach of the High Court to this question was not well-founded The Privy Council no doubt laid down in 54 Ind App 338 (AIR 1927 PC 176) that the terms of this section should be strict-

ly complied with That does not however, mean that the terms of the notice should be scrutinised in a pedantic manner or in a manner completely divorced from commonsense

9 In AIR 1969 SC 1256, Beohar Rajendra Sinha v The State of Madhya Pradesh their Lordships of the Supreme Court have made the following observation in para 4 of their judgment —

"The object of the notice under Section 80, Civil Procedure Code is to give to the Government or the public servant concerned an opportunity to reconsider its or his legal position and if that course is justified to make amends or settle the claim out of court. The section is no doubt imperative, failure to serve notice complying with the requirements of the statute will entail dismissal of the suit But the notice must be reasonably construed Any unimportant error or defect cannot be permitted to be treated as an excuse for defeating a just claim In considering whether the provisions of the statute are complied with, the court must take into account the following matters in each case (1) whether the name, description and residence of the plaintiff are given so as to enable the authorities to identify the person serving the notice, (2) whether the cause of action and the relief which the plaintiff claims are set out with sufficient particulars, (3) whether a notice in writing has been delivered to or left at the office of the appropriate authority mentioned in the section, and (4) whether the suit is instituted after the expiration of two months next after notice has been served, and the plaint contains a statement that such a notice has been so delivered or left In construing the notice the Court cannot ignore the object of the legislature, viz, to give to the Government or the public servant concerned an opportunity to reconsider its or his legal position If on a reasonable reading of the notice the plaintiff is shown to have given the information which the statute requires him to give, any incidental defects or irregularities should be ignored."

10. In the present case I think that the notice given under Section 80 of the Civil Procedure Code to the State of U P was not a proper notice as the notice was not given on behalf of both the plaintiffs but it cannot be ignored that one of the plaintiff can bring a suit under S 209 of the A... against the defendant-trespasser In the present case even if the plaint is treated as filed by one of the plaintiffs it is to be seen whether the suit can be dismissed due to defective notice to the State of U P. Since the contesting defendant is a trespasser in a suit under Section 209 of the Act and the State of U P. is only a statutorily necessary party the defect in the notice is not such which may entail the dismissal of the suit. Since the claim of the plaintiffs has been negatived by the first appellate Court and the second appellate Court only on the ground that the notice under Section 80 of the Civil Procedure Code was not a proper notice I think their judgments deserve to be quashed The first appellate Court should examine the claim of the plaintiffs in the light of the pleadings and evidence on record whether the plaintiffs can get a decree of ejectment against the [illegible] defendant in the present case or not. Due to defect in notice under Section 80, C.P.C. the plaint may be treated on behalf of one of the plaintiffs who had given the notice and it should be examined whether a decree against the defendant trespasser can be passed. Since the appellate Court and the second appellate Court have negatived the plaintiffs' claim on technical ground, I think it proper to quash the judgment of the second appellate Court and that of the first appellate Court and ask the first appellate Court to examine the claim of the plaintiffs in the light of the observations made above as well as in accordance with law ignoring unimportant defect in the notice under Section 80 of the Civil Procedure Code to the State of U. P. in the circumstances of the present case.

11. According to the views of the Board of Revenue U. P. as well as this Court a tenure-holder can bring a suit for ejectment against a trespasser hence to cut short the litigation between the parties I think it proper to ask the first appellate Court to examine the question whether any of the plaintiffs can get a decree for ejectment against the defendant trespasser in the circumstances of the present case. Since the appellate Courts have failed to examine controversy between the parties on merits, their judgments need be quashed.

12. In the result, the writ petition succeeds and the impugned judgment of the second appellate Court and that of the first appellate Court are hereby quashed and the first appellate Court is

directed to decide the claims of the plaintiffs-petitioners in accordance with law and in the light of the observations made above Parties are directed to bear their own costs

Petition allowed

1981 ALL. L. J. 837

P N BAKSHI, J

Jagat Narain and others, Applicants v The State of U P, Respondent

Criminal Revn No 1872 of 1980, D/- 20-2-1981 *

Oaths Act (44 of 1969), Ss. 6 (2), 7 — Criminal P.C (2 of 1974), Ss 465, 200 — Allahabad High Court General Rules (Civil), R. 48 — Examination of witnesses — Orderly administering oath to witnesses instead of Court — Irregularity, curable under S 7 of Oaths Act — Miscarriage of justice not caused by irregularity — Irregularity also protected by S 465, Cr. P C — Rule directory — Non-compliance does not affect legality of evidence recorded. AIR 1952 SC 54, Foll. (Paras 7, 9, 10)

Cases Referred	Chronological Paras	
AIR 1952 SC 54	1952 Cri LJ 547	6
AIR 1929 Bom 136	30 Cri LJ 593	5

H S Misra, for Applicants

ORDER:— This application in revision arises out of an order passed by the Magistrate summoning the accused It appears that a complaint was filed against the applicant for an offence under Section 379 I P C The statement of the complainant and his witnesses was recorded Thereafter, the impugned order has been passed by the Magistrate summoning the applicant Hence this revision

2. The sole point which has been argued in this revision is that the oath which was given to the witnesses in the examination under Section 200 Cr P C was given by Khayali Ram orderly (Chaparasi), and therefore, these statements are not admissible in evidence It is hence argued that there is no material before the trial Court for summoning the applicant On the other hand, the Government Advocate Sri Giridhar Malaviya has submitted that even if the oath was administered to the witnesses by the Chaparasi of the Court, at the worst it would be an irregularity curable under Section 7 of the Oaths Act and will not vitiate the proceedings

3. I have carefully considered the submissions which have been made by the counsel for the parties Section 4 of the Oaths Act refers to oath or affirmation to be made by the witnesses, interpreters and jurors Section 6 (1) of the Act is to the effect that all oaths and affirmations made under Section 4 shall be administered in one of the forms given in the Schedule Sub-section (2) of Section 6 of the Oaths Act states that all such oaths and affirmations shall, be administered by the Presiding Officer of the court himself The argument which has been raised by the applicant's counsel is that since in the instant case the oath was not administered by the Presiding Officer but by the Chaparasi, therefore, the statement so recorded is not legally admissible in evidence

4 Reference has also been made to Section 3 of the Oaths Act which relates to power of courts to administer oaths Section 3 (1) (a) speaks of all the courts entitled to receive evidence, as being empowered to administer oath, either by themselves or by an officer, empowered by them Under this Section it is obvious that the power to administer oaths can be exercised either by the court or by duly empowered officer. Reading Sec 3 along with Sections 4 and 6 of the Oaths Act, the inference seems to be unavoidable that in cases where the statements of witnesses have to be recorded on oath, the oath should be administered by the Presiding Officer, but in other cases it may also be administered by an Officer empowered by the Court

5. Counsel for the applicant has in support of his submission cited a decision of Ganpat Dewaji Patil v Emperor, reported in AIR 1929 Bom 136 He has relied upon the following observation of that court "Section 13 cures the form of the oath and even an entire omission to take the oath, but does not cure the absence of authority in the officer administering the oath On this plea it was held in the Bombay case that the statements made by the accused before the Naib of a Subordinate Court of Yaval, was not legal evidence, because the said statement had been made before an officer without any authority to record the case It is noticeable that the present case before us does not relate to an affidavit There can be no two opinions that when an affidavit is

*Against order of Munsif Magistrate No 4, P S Dibiapur of Dist. Etawah, D/- 17-10-1980

sworn before an authority which in law is not authorised to record the same, then such an affidavit can have no legal sanctity and would be nothing more than waste paper But in the instant case the factual position is that the statement of the witness is being recorded in the presence of the court which is empowered to record the statement The only criticism which can be made in this connection is that though the statement has been recorded in the presence of the court yet the oath has not been administered by the court, itself, which should have been done under Section 6 (2) of the Oaths Act Taking the conditions of subordinate courts and the procedures which are being followed day to day therein, it cannot be doubted that the practice of permitting Chaparasis to administer oaths to witnesses who have come to depose before the court, is a most abominable practice It is likely to lead to an abuse of the process of the court, it can be misused Instances are not wanting when the statements of 3 to 4 witnesses are being recorded at a time in the presence of a court, almost simultaneously After oaths had been administered to all of them by the Chaparasis of the courts, it is practically impossible for the Presiding Officer to be attentive enough and to make sure that the statements so recorded are genuine and true statements, made by the deponents Such an irregularity can even lead to a serious miscarriage of justice In my opinion, the sooner, this practice is discontinued, the better, it would be for a clean administration of justice

6. The Government Advocate, has however, argued that in the instant case though the statement of the witnesses was recorded on the oath being administered by the Chaparasi, there is at present no material on the record to indicate that any prejudice has been caused to the accused His another limb of the argument is that Section 13 (old) which [illegible] of the new Oaths Act 1969 comes to the rescue of h[illegible] Placing reliance upon it he urges that the [illegible] of oath by the Chaparasi is a mere irregularity and would not be sufficient to make the statement inadmissible in evidence For this submission he relied upon the [illegible] of Section 7 Oaths Act supported by an observation of the Supreme Court reported in AIR 1962 SC 34 (Rameshwar Kalyan Singh v. State of Rajasthan) [illegible] -

"In my opinion, an omission to administer an oath, even to an adult, goes only to the credibility of the witness and not his competency..... Now the Oaths Act does not deal with competency Its main object is to render person, who gives false evidence liable to prosecution It is true a subsidiary object is to bring home to the witnesses the solemnity of the occasion and to impress upon him the duty of speaking the truth, but in view of Section 13 these matters only touch credibility and not admissibility"

7. Having regard to the aforesaid observation made by the Supreme Court, there appears to be good ground for holding that even though the administration of oath by the Chaparasi of the court may be an irregularity, yet so far as the statement of the witness is concerned, it does not become inadmissible As a matter of fact, Section 4 of the Oaths Act is to the effect that oaths or affirmations shall be made by the following persons, namely all witnesses, ... In other words it refers to the making of a statement by the witness concerned. There is no doubt that the oath has been made by the person whose statement has been recorded. Thus the failure of the Presiding Officer to administer the oath would at the most amount to an irregularity As I have mentioned above, there is no material in this case to indicate that this irregularity had caused a miscarriage of justice, but there may be instances where such irregularity does result in injustice to the accused In those instances such irregularity will vitiate the proceedings and statement so recorded shall not be taken into account, while considering the case of the delinquent. Reference in this connection may also be made to Section 465 Cr. P. C., which runs as follows:—

Sec 465 (1).—

"subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of

justice has in fact been occasioned thereby."

8. Counsel for the applicant has also brought to my notice Rule 48 of the General Rules (Civil) which regulates the procedure of Courts subordinate to the High Court of Judicature at Allahabad This rule runs as follows —

"Rule 48 Note to be made of the official giving oath When an oath or affirmation is administered, the name of the official who administers the oath or affirmation shall be noted upon the deposition of the witness or other person to whom it is administered"

9 This rule merely ensures that the oath which is taken by the witness and his statement so recorded is done in the presence of an official, who has administered the oath to him It is a procedural clause which regulates the manner in which the statement is to be recorded No further inference can be drawn from the rule It can merely be treated as directory and failure to comply with that procedure would not by itself affect the legality of the statement so recorded, unless prejudice is caused

10 Having considered all the circumstances of the case, as above, I am of the opinion that this is not a fit case for interference in revision True, an irregularity has been committed by the court in not administering the oath to the witness, by himself, but that irregularity would be cured under Section 7 of the Oaths Act, and unless it is proved that such irregularity has caused a failure of justice, it would be protected by Section 465 Cr P C

11 For the reasons given above, this application in revision is hereby dismissed The interim order passed by this Court staying proceeding is hereby vacated

Revision dismissed

1981 ALL L. J. 839

K P SINGH, J

Anant Ram, Appellant v Sheikh Mohammad Ishaq and others, Respondents

Second Appeal No 774 of 1974, D/- 14-5-1981 *

*Against decree and judgment of D L Agarwala, Civil and S J, Saharanpur, D/- 18-3-1974

F Y/G1, C914/81, AAJ/MVJ

(A) Evidence Act (1 of 1872), S. 116 — U P Zamindari Abolition and Land Reforms Act (1 of 1951), S. 156 — Suit on basis of lease — Lease void being in contravention of S. 156 — Defendant-lessee cannot be estopped from challenging title of lessor — Court commits error in recognising claim of plaintiff by invoking S 116. AIR 1964 All 395 Rel. on. (Para 6A)

(B) U P Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 167 (2), 189, 209 — Ejectment of lessee — Lease contrary to provisions of law — Gaon Sabha not taking any steps in this regard — Lessors' interest would not be extinguished.

The right of a Sirdar, who had let out the holding in contravention of the provisions of U P Z A and L R Act is not extinguished until he has been ejected by the Gaon Sabha under S 167 (2) Therefore where a lessor filed a suit for ejectment against the lessee, alleging to be a Sirdar, the interest of lessor would not be said to be extinguished when no steps against both of them were taken by the Gaon Sabha notwithstanding that the lessee admitted that lease was void

(Para 8)

(C) U P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 209, 210 — Lease of land found to be void — Possession of lessee cannot be against consent of tenure-holder — Claim of lessee for Sirdari rights on basis of illegal continuous possession for more than statutory period — Claims cannot be allowed

(Para 9)

(D) U. P Zamindari Abolition and Land Reforms Act (1 of 1951), S 331 (1) (4) — Civil P C (5 of 1908), S. 100 — Suit by plaintiffs, tenure-holders for possession of lands and damages — Trial Court allowing claim — Objection as to jurisdiction of Civil Court to decide matter taken at time of second appeal by defendant — Failure of justice by decision of trial Court not established — Lower Court's decision would not be illegal and without jurisdiction. 1978 All LJ 1316, Followed

(Para 11)

(E) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 1 (2) — Disputed plot situated outside Municipal limits on 7-7-1949 when Act was made applicable — Subsequent transfer of plot from Gaon Sabha to Municipality — No declaration by State Govt. transferring any right in disputed plot — Right accrued to tenure-holder will continue and provisions of Act would govern situation.

(Para 17)

Cases Referred:	Chronological Paras
1973 All LJ 1316	10
1970 All LJ 824	16
1967 All WR (HC) 161	7
1966 All LJ 963	7
AIR 1964 All 395	8

Bharatji Agrawal, for Appellant, M A. Qadeer, for Respondent

JUDGMENT— This is a defendant's second appeal arising out of a suit for possession and damages.

2. The plaintiffs were occupancy tenants of the disputed land and after the enforcement of Act No. 1 of 1951, they claimed ahumidhari right in the disputed land and had alleged that the defendant had taken 8 Bighas 7 Biswas from the plaintiffs through lease deed dated 25-8-52 for a period of five years On the expiry of the aforesaid period also the defendant continued in possession and paid yearly rent of Rs 140 up to 31-8-59 and thereafter he did not pay the rent and became defaulter, hence the plaintiffs served a notice of ejectment on the defendant on 26-8-1964 and thereafter brought the suit giving rise to the present second appeal for the reliefs mentioned above

3. The defence in the suit was that the Civil Court had no jurisdiction to try the suit and that the suit was barred by time and that the plaintiffs had got no right to execute the lease and that the defendant had become Sirdar of the disputed land as the lease deed in favour of the defendant dated 25-8-52 was void under the provisions of U P Z A and L R Act, and that the defendant was not liable to pay any damages and various other pleas were taken

4. Both the courts below have decreed the plaintiffs' suit and aggrieved with the judgments of the courts below the defendant has appealed to this Court under Section 100 of the Code of Civil Procedure

5. The learned counsel for the defendant-appellant has assailed the judgments of the courts below on the ground that the courts below have acted illegally in declaring the title of the plaintiffs [illegible] the provisions of Section [illegible] of the Indian Evidence Act. According to the learned counsel the lease deed in favour of the defendant was a void document [illegible] provisions of the U P Z A and L R. Act, hence the defendant-appellant could not be estopped from challenging the title of the plaintiffs in the disputed land yet the courts below have illegally held that the defendant-appellant was estopped from challenging the title of the plaintiffs to the disputed land.

6. In this connection my attention has been drawn to the ruling reported in AIR 1964 All 395, Shamsher Bahadur v. State of Uttar Pradesh wherein a learned single Judge of this Court has held that:

"If there is no legal sub tenancy, the so-called sub-tenant cannot be estopped from challenging the status of the tenant."

6-A. Viewed from this angle it appears that the courts below have committed mistake in recognising the claim of the plaintiffs taking help from the provisions of Section 116 of the Indian Evidence Act, but it is noteworthy that the defendant-appellant claims right from the plaintiffs-respondents who were occupancy tenants of the disputed land The defendant-appellant claims sirdari right in the disputed land on the basis of his illegal possession for more than statutory period. The defendants-appellant also claims extinction of the plaintiffs' interest in the disputed land on the ground that the plaintiffs had let out the disputed land to the defendant in contravention of the provisions of Section 156 of the U.P.Z.A. and L R Act Thus the interest of the plaintiffs in the disputed land became extinguished in view of the provisions of Section 190 of the U.P.Z.A. and L.R. Act. If the defendant-appellant does not succeed in acquiring sirdari right in the disputed land and does not succeed in establishing that due to letting of the disputed land by the plaintiffs to him the interest of the plaintiffs became extinguished in view of the provisions of U P Z A and L R Act The conclusions arrived at by the courts below holding the claim of the plaintiffs in the disputed land cannot be held vitiated in law

7 To my mind the interest of the plaintiffs-respondents in the disputed land shall not be extinguished under the provisions of U P Z A and L R Act The answers to the contentions raised in behalf of the defendant-appellant in this regard are contained in the rulings reported in 1966 All LJ 963 Permanand v Board of Revenue and 1967 All WR (HC) 161 Lal Benari Ram v Board of Revenue, U P Allahabad. Right of a sirdar, who had let out the holding in contravention of the provisions of U P Z A and L R Act shall not be extinguished until he has been ejected by the Gaon Sabha

under Section 167 (2) of the U P Z A and L R Act

8 In the present case it is admitted by the parties before me that Gaon Sabha had taken no steps against the transferor or transferee for ejectment, hence in my opinion when the defendant-appellant admits that he had taken the disputed land from the plaintiffs even the lease being against the provisions of law, the interest of the plaintiffs would not be extinguished In this view of the matter the courts below have arrived at a correct conclusion that the plaintiffs were tenure-holders of the disputed land and were entitled to the reliefs claimed

9 As regards the contention of the defendant-appellant that he became sirdar of the disputed land due to illegal and continuous possession for more than statutory period, it is noteworthy that in case of a void lease the possession of the lessee would be against the provisions of law, but it cannot be without the consent of the tenure-holder, hence in my opinion the lessee cannot acquire sirdari right in the land leased to him against the provisions of law under Sections 209 and 210 of the U P Z A and L R Act To my mind the possession of the so-called lessee would be with the consent of the tenure-holders, hence the provisions of Sections 209 and 210 of the U P Z A and L R Act would not be attracted to the case of the lessee Thus the defendant-appellant fails to acquire sirdari right in the disputed land on the basis of his illegal and continuous possession over the disputed land

10 Another argument raised on behalf of the defendant-appellant is that the Civil Court had no jurisdiction to try the suit as the plaintiffs were tenure-holders under the provisions of U P Z A and L R Act and they were claiming possession and damages over the disputed land against the defendants, hence the revenue courts were only competent to grant relief to the plaintiffs in the suit giving rise to this second appeal I think the contention cannot be accepted in this second appeal in view of the ruling reported in 1978 All L J 1316 Nasiruddin v Ram Swarup The Division Bench of this Court has emphasised that before the appellant can be heard on the question of jurisdiction, he has to show that a wrong decision by the trial Court on the question of jurisdiction has occasioned failure of justice

11. In the present case the learned counsel for the defendant-appellant has not been able to satisfy me that any failure of justice has taken place, hence his attack on the judgments of the courts below for want of jurisdiction fails and in my opinion the judgments and decrees passed by the courts below cannot be held illegal and without jurisdiction

12 During the course of arguments the learned counsel for the plaintiffs-respondents contended that on the date of the suit the disputed land was situate within the municipal limits, hence the provisions of U P Z A and L R Act would not apply to the facts and circumstances of the present case, and the contentions raised on behalf of the defendant-appellant based on the provisions of U P Z A and L R Act should not be entertained According to the learned counsel for the plaintiffs-respondents the courts below rightly held the title of the plaintiffs in the disputed land and decreed the suit

13 The learned counsel for the defendant-appellant has tried to refute the contentions raised on behalf of the plaintiffs-respondents and has contended that in view of the provisions of Section 1 (2) of the U P Z A and L R Act the disputed land was out of the municipal limits on 7th day of July 1949 hence the provisions of U P Z A and L R Act were attracted and the contentions raised on behalf of the plaintiffs-respondents should fail In my opinion the contentions raised on behalf of the defendant-appellant have force

14 In the present case the disputed land was outside the municipal limits when the U P Z A and L R Act was made applicable and the provisions of the U P Z A and L R Act became applicable to the land in question Nothing has been shown to me how the provisions of the U P Z A and L R Act became inoperative due to the circumstance that the disputed land was included within the municipal limits much after the enforcement of the provisions of U P Z A and L R Act to the land in question

15. The only contention raised on behalf of the plaintiff-respondents is that when the disputed land was included within the municipal limit the provisions of U.P Z A and L R Act became inoperative and the defendant-appellant could not acquire any right in the disputed land due to his illegal and continuous possession for more than statutory period It is difficult for me to accept the contention of the learned counsel for the plain-

tiff-respondents that the provisions of U P Z A and L R Act became inoperative when the area was included within the limits of the municipality

16. A Division Bench of this Court in 1970 All LJ 824 Mohd. Shafi v. Gram Sabha, village Bisauli has observed as below though in a different situation (at p. 831) —

"Even though a particular plot of land may go outside the territorial limits of a Gaon Sabha, yet the Gaon Sabha is entitled to continue to perform, discharge or exercise the functions, duties and powers under the mentioned Act, in spite of such transfer on the footing that part of the village lay within its circle. So, so long as the State Government does not make a declaration, transferring the rights in a particular plot as well as the powers and functions in relation to that land to another local body, the pre-existing Gaon Sabha would continue to exercise its rights and perform its functions as previously. Mere transfer of the territory from a Gaon Sabha to a Town Area shall not divest the Gaon Sabha of its rights in such lands."

17. On the analogy contained in the above quotation I think that unless the State Government make a declaration transferring the right in a particular plot, the right accrued to the tenure-holder shall continue and the provisions of the U P Z A and L R Act shall govern the situation. Mere transfer of territory from Gaon Sabha to municipality will not divest the tenure-holder of his right nor the provisions of U P Z A and L R Act would become inoperative

18. However, in the present case, I have already indicated above that the defendant-appellant has not succeeded in [illegible]

19. In the circumstances of the present case when the defendant-appellant fails to establish his claim in the disputed land and accepts that he got the disputed land from the plaintiffs, the plaintiffs' title continues to subsist and the decrees granted by the court below to the plaintiff-respondents cannot be characterised illegal in any manner.

20. In the result, the second appeal fails and is accordingly dismissed. The judgments and decrees passed by the courts below are hereby confirmed. Parties are directed to bear their own costs.

Appeal dismissed.

1981 All. L. J. 842
M. P. MEHROTRA, J.

Tej Singh, Petitioner v. 2nd Addl. Dist. Judge, Bulandshahr and others, Respondents

Civil Misc. Writ Petn. No. 1932 of 1980, D/- 15-7-1981

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), Ss. 12-A (d), 5 (6) (as amended in 1972) — Petitioner, tenure holder of certain land on 8-6-1973 — Decree of 20-12-1973 holding the decree holder to be tenure holder of said land — Surplus land of petitioner — Consideration of — Said land could not be excluded — Question as to choice under S. 12-A — Determination — Decree of 1973 was immaterial. (Paras 4 to 6)

Cases Referred: Chronological Paras
1978 All LJ 1090 4

S. C. Asthana and Standing Counsel, for Petitioner; R. Dwivedi, for Respondents

ORDER:— This petition under Art. 226 of the Constitution arises out of the proceedings under the U. P. Imposition of Ceiling on Land Holdings Act, hereinafter referred to as the 'Act'.

2. The facts, in brief, are these:

The petitioner was treated as the tenure holder in the ceiling proceedings and the notice under S. 10 (2) of the Act was issued to him. Certain land was declared as surplus. Thereafter an appeal was filed and the same was decided by the appellate Court. Then a writ petition was filed by the said tenure holder but the same was dismissed.

3. During the pendency of the aforesaid writ petition, opposite party No. 4, Amichand filed an objection before the [illegible]

Prescribed Authority contending that certain land of which he was the tenure holder situated in plot No 511 was wrongly declared as surplus The said objection of Amichand was allowed without notice to the tenure holder, Tej Singh Then Tej Singh, tenure holder filed an appeal, which was also allowed on the ground that Amichand's objection should have been heard after notice to the said tenure holder, Tej Singh The case was accordingly remanded to the Prescribed Authority with a direction that the matter should be heard in the presence of the said tenure holder, Tej Singh The Prescribed Authority dismissed the objection of Amichand Thereafter Amichand filed an appeal and the same was allowed by the appellate Court by its impugned judgment dated 28-4-80 a true copy whereof is Annexure 3 to the petition A certified copy of the said judgment is also on the record Feeling aggrieved, the petitioner has now come up in the instant petition and in support thereof, I have heard the learned counsel for the petitioner In opposition, the learned Standing Counsel and the learned counsel for respondent No. 4 have made their submissions

4 It should be seen that the appellate Court has directed that certain land situated in the north-western portion of plot No 511 of which Amichand was held to be the tenure holder in the decree of the Revenue Court passed on 20-12-1973, should not have been allowed to be given in choice by the tenure holder in view of cl (d) of the proviso to S 12-A of the Act In my view, the appellate Court was wrong in thinking that cl (d) of the proviso to S 12-A was applicable to the instant case In Kunwar Rani Sushila Devi v State of U P (1978 All LJ 1099) it has been laid down by this Court that S 5 (b) of the Act is applicable to transfers made between 24-1-71 and 8-6-73, which is the date of commencement of the U P Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, mentioned in sub-section (1) of S 5

In view of the said interpretation of the law, it is obvious that cl (d) of the proviso to S 12-A which refers to transfers under sub-section (b) of S 5, will not be applicable and the appellate Court was wrong in thinking that the same was applicable in the instant case It is obvious that on 8-6-1973 the tenure-holder was held to be the tenure holder of the portion of the land of plot No 511, which subsequently in December, 1973 was held by the Revenue Court to be the land of Amichand It is obvious that the said Revenue Court's decree was passed after 8-6-1973 and the same could not be taken into consideration as the ceiling area and the surplus land had to be determined under S 5 (1) where as I have stated above, the relevant date is 8-6-73

Therefore, the land in question was undoubtedly and rightly included in the holding of the tenure holder Tej Singh Under S 12-A the tenure holder had a right to give in choice any portion of the land of his holding as surplus land and the Prescribed Authority was bound to accept the same as far as possible The Prescribed Authority rightly dismissed the objection of Amichand because there was no difficulty in accepting the choice of the tenure holder and the consideration that in the decree passed in 1973 Amichand had been held to be the tenure holder of the land in dispute, was wholly immaterial while deciding the question of choice under S 12-A The appellate Court, on the other hand, was wrong in thinking that under cl (d) of the proviso to S 12-A the said land which was the subject matter of the Revenue Court's decree in December, 1973, was liable to be excluded from the surplus land of the tenure holder

5 Dr Dwivedi, learned counsel for respondent No 4, Amichand strenuously contended that in the special jurisdiction under Art 226 of the Constitution, no interference should be made with the appellate Court's judgment because the equities of the case do not warrant such an interference Learned counsel is right in submitting that the jurisdiction under Art 226 is not to be exercised when it leads to inequitable results and merely on the ground that some legal infirmities lurk in the impugned judgment However, I am mindful of that aspect of the matter and I feel that such considerations should not stand in my way in interfering with the impugned judgment in this case

Allowing a decree passed after the relevant date to be taken into consideration was something which was wholly against the policy of the ceiling law When the clear policy of the ceiling law is that certain events taking place after certain specified dates should not be taken into consideration, it would not be right that an illegality should be allowed to be perpetrated by the courts or the authorities below In my view, it is not such a case where it can be said

hat on the ground of equity the choice of the tenure holder should not have been accepted

6 This petition is accordingly allowed and the judgment of the appellate Court dated 28-4-1980 (Annexure III to the petition) is hereby quashed The order passed by the Prescribed Authority rejecting the objection of Amichand shall remain valid and effective order In the circumstances, there will be no order as to costs

7. However, I should like to make it clear that this judgment of mine has been rendered with reference to the proceedings of the ceiling law and I am not called upon to decide the respective rights, if any, of the tenure holder, and Amichand, which they may otherwise possess Obviously I cannot make any pronouncement on that aspect of the matter but I wish to make it clear that if the parties have otherwise certain rights, in law in respect of the disputed land then the same shall not be affected by my pronouncement under the ceiling law

Petition allowed

1981 ALL. L. J. 844

N D OJHA, J

Om Prakash Singhal, Petitioner v Smt. Sheela Bhatia and others, Respondents.

. Writ Petn No 7102 of 1979, D/- 6-7-1981

(A) U. P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 30 (1) — Deposit of rent in court — Whether or not amount was tendered to landlord before making deposit and was refused by landlord is a question of fact — Cannot be raised for first time under Art. 226 (Constitution of India, Art. 226). (Para 4)

(B) U. P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 30 — Acceptance of deposit by Court — Presumption under S. 114 (e), Evidence Act. (Evidence Act (1872), Section 114 (e)).

When the court accepts the deposit made by a tenant under S 30 of the Act it will be deemed that the court was satisfied that the requirement of S 30 had been fulfilled In view of S 114 (e) of the Evidence Act it can be presumed that judicial acts have been regularly performed Of course, the presumption is rebuttable but the burden to rebut that presumption by raising the necessary plea and proving it, lies on the landlord. (Para 4)

(C) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 39 — "Depositing entire amount of rent" — Meaning.

When S 39 talks of depositing the entire amount of rent, it apparently refers to that amount of rent which is still payable by the tenant to the landlord on the date on which the deposit under S 39 is being made (Para 6)

Where certain amount deposited by tenant under S 30 was deemed to have been paid to the landlord it could not be said that subsequently when the deposit under S 39 of U P Act XIII of 1972 was being made by the tenant, that amount was still payable by him to the landlord. (Para 6)

S M Dayal, for Petitioner.

ORDER:— One Sri Sant Ram Bhatia was landlord of an accommodation of which the petitioner is the tenant. Sri Sant Ram Bhatia filed a suit for ejectment and recovery of arrears of rent and damages against the petitioner in the court of Small Causes at Kanpur During the pendency of the litigation Sri Sant Ram Bhatia died and is now represented by his legal representatives, respondents 1 to 8. The case of Sri Sant Ram Bhatia was that the accommodation in question was constructed in the year 1964 and consequently neither U. P Temporary Control of Rent and Eviction Act (hereinafter referred to as U. P Act No III of 1947) nor U P Urban Buildings Regulation of Letting, Rent and Eviction Act 1972 (hereinafter referred to as U. P Act No. XIII of 1972) applied to the said accommodation. The defence of the petitioner, however, was that the said accommodation had been constructed in the year 1962 and consequently U. P. Act No. XIII of 1972 became applicable to it in the year 1972. His further case was that he had deposited a sum of Rs. 240 on 6th July, 1973 under S. 30 of U. P. Act No. XIII of 1972 and another sum of Rs. 1140 on 13th February, 1975 under the same section According to him, if there deposits were taken into account, he was not in arrears of any rent when the suit was instituted The petitioner further deposited a sum of Rs 1482 on 17th September, 1975 purporting to be in compliance of S 39 of U P Act No. XIII of 1972 and after making the said deposit he claimed immunity from a decree for eviction being passed against him.

At this place it may be pointed out that Sri Sant Ram Bhatia had already given credit to the sum of Rs 240 deposited by the petitioner under S 30 on 6th of July, 1973 and there was no dispute in regard to that amount The deposit which was made on 17th Sept 1975 by the petitioner under S 39 of U P Act No XIII of 1972 had been made after adjusting the sum of Rs 1140 deposited by him on 13th Feb. 1975 under S 30 aforesaid On the question as to when the accommodation in dispute was constructed, the Judge, Small Cause Court accepted the plea raised by the landlord and held that the said accommodation had been constructed on 1st Oct 1964 within the meaning of U P Act No XIII of 1972 On this finding, he held that U P Act No XIII of 1972 was not applicable to the accommodation in question prior to 1st Oct 1974 He further seems to have taken the view that since the suit was filed in the year 1973, the petitioner was not entitled to adjust the sum of Rs 1140 deposited on 13th Feb 1975 Even though it has not been so stated in his order, it appears that the Judge, Small Cause Court was of the view that benefit of S 39 of U P Act No XIII of 1972 could be given to the petitioner only if he had deposited the sum of Rs 1140 also on 17th Sept 1975 along with the sum of Rs 1432 deposited by him. On this finding the suit both for recovery of arrears of rent as well as mesne profits and for ejectment of the petitioner from the accommodation in question was decreed A revision was filed by the petitioner before the District Judge which was dismissed by the IIIrd Additional District Judge, Kanpur on 2nd Nov 1976 It is these two orders which are sought to be quashed in the present writ petition

2 Before dealing with the respective submissions made by the counsel for the parties, it may be pointed out that the petitioner had earlier preferred a civil revision in this Court against the order of the IIIrd Additional District Judge dated 2nd Nov 1976, which I am informed by the counsel for the petitioner, has after the institution of the writ petition been dismissed on the ground that it was not maintainable

3. It was urged by the counsel for the petitioner that since on the own finding recorded by the Judge, Small Cause Court, U P Act No. XIII of 1972 had become applicable to the accommodation in question on 1st Oct 1974, the deposit made by the petitioner of the sum of Rs 1140 towards rent on 13th Feb 1975 was a valid deposit and in view of sub-sec (6) of the said section that amount will be deemed to have been paid to the landlord It was further urged that on the finding recorded by the Additional District Judge if the sum of Rs 1140 deposited by the petitioner under S 30 of U P Act No XIII of 1972 on 13th Feb 1975 was given due credit, the deposit made on 17th Sept 1975 under S 39 of the said Act fulfilled the requirements of the said section and no decree for eviction of the petitioner could be passed in view of the statutory requirement of S 39 For the landlord, respondents 1 to 8, it was urged that the benefit of the deposit under S 30 could not be availed of by the petitioner inasmuch as there was nothing to indicate that the petitioner had tendered the sum of Rs 1140 to the then landlord and it had been refused by him Counsel for the landlords, with reference to sub-sec (1) of S 30, submitted that a deposit under S 30 could be made only if the requirement of the said sub-section was complied with

4 Having heard counsel for the parties. I am of opinion that the impugned orders suffer from a manifest error of law in so far as they have held that the petitioner was not entitled to adjust the sum of Rs 1140 deposited by him on 13th Feb 1975 under S 30 of U P Act XIII of 1972 and have deprived him of the benefit of S 39 on that ground As seen above, U P Act XIII of 1972 became applicable to the accommodation in question on 1st Oct 1974 As such, if there was no other impediment, the petitioner was entitled to make the deposit under Sec 30 on 13th Feb 1975 if the said amount had been tendered to the landlord and refused by him Further, there can be no manner of doubt that if the said deposit was valid, the sum of Rs 1140 so deposited would be deemed to be due payment of the said amount to the landlord in view of sub-sec (6) of S 30 In so far as the submission made by the counsel for the landlord respondents is concerned, it may be pointed out that the then landlord himself gave due credit to the sum of Rs 240 deposited by the petitioner on 6th July, 1973 under the same section That deposit, according to the petitioner, had been made because the landlord had refused to accept the rent. From a perusal of the impugned orders it is apparent that the landlord never raised this plea before either the Judge, Small Cause Court or the Additional District Judge

that after the deposit dated 6th July, 1973 he had expressed his willingness to accept the rent if it was tendered to him directly. Further, it was also not asserted by the landlord that the petitioner had not made any tender of the sum of Rs 1140 to him before depositing the said amount under S 30 on 13th Feb 1975. Whether or not the amount was tendered by the petitioner to the landlord before making the deposit and refused by the landlord, is a question of fact. Such a question cannot be permitted to be raised for the first time under Article 226 of the Constitution. Had this plea been raised before the Small Cause Court after the petitioner had claimed the benefit of S 39 of U. P. Act XIII of 1972, an issue would have been framed on the point and the matter could have been thrashed out after taking evidence. The same having not been done, this question of fact cannot be permitted to be raised now. As the court accepted the deposit of Rs 1140 under S 30 on 13th Feb 1975 it will be deemed that the court was satisfied that the requirement of S 30 had been fulfilled. In view of S 114 (e) of the Evidence Act it can be presumed that judicial acts have been regularly performed. Of course, this presumption was rebuttable but the burden to rebut that presumption by raising the necessary plea and proving it, lay on the landlord. In the instant case he failed to do so. Since in view of the finding of the Additional District Judge, if the deposit of Rs 1140 made by the petitioner on 13th Feb 1975 under S 30 of U. P. Act XIII of 1972 is given due credit, the deposit made on 17th September, 1975 under S 39 of the said Act was sufficient to [illegible] petitioner to the benefit of [illegible] said section, I am of opinion [illegible] cree in so far as it relates [illegible] of the petitioner from the accommodation in dispute suffers from [illegible] error of law and cannot be sustained.

[illegible]

8. At this stage it may also be pointed out that [illegible] Additional District Judge [illegible] provisions of the said section [illegible] the petitioner [illegible] 28 on August [illegible] deposit [illegible] section 30 or section 39 of U. P. Act XIII of 1972 [illegible] Section [illegible] case of the [illegible] petitioner [illegible] question. Nothing has been brought [illegible] which may [illegible] the petitioner had [illegible] knowledge of the [illegible] any time earlier [illegible]

8. It was then urged by the counsel for respondents 1 to 8 that the petitioner was not entitled to the benefit of any deposit made under S 30 of the Act after the institution of the suit for ejectment and in such a contingency, the entire amount contemplated by S 39 had to be deposited under the said section. I find no substance in this submission either. When S 39 talks of depositing the entire amount of rent, it apparently refers to that amount of rent which is still payable by the tenant to the landlord on the date on which the deposit under S 39 is being made. If in view of sub-sec (b) of Section 30 of U. P. Act XIII of 1972 the effect of the deposit of Rs. 1140 on 13th Feb 1975 by the petitioner under sub sec. (1) of S 30 would be that it shall be deemed that the tenant has paid it on the date of such deposit to the landlord, it cannot be said that on 17th Sept 1975 when the deposit under S 39 of U. P. Act XIII of 1972 was being made by the petitioner, that amount was still payable by him to the landlord.

7. In the result, the writ petition succeeds and is allowed in part to the extent that the impugned orders dated 2nd January, 1976 and 2nd Nov 1976 passed by the Additional Judge, Small Cause Court, Kanpur, and the IIIrd Additional District Judge, Kanpur, respectively in so far as they decree the suit of the landlord for the ejectment of the petitioner from the accommodation in question are quashed. It is further ordered that while executing the decree for arrears of rent and mesne profits including pendente lite and future mesne profits the amounts deposited by the petitioner either under Section 30 or Section 39 of U. P. Act XIII of 1972 aforesaid as also the deposits made by him during the course of litigation shall be adjusted. The landlord, respondents 1 to 8, shall be entitled to withdraw all the sums that may have been deposited by the petitioner as aforesaid. In the circumstances of the case the parties shall bear their own costs.

Petition partly allowed.

1981 ALL. L J 847

J M L SINHA AND
S J HYDER, JJ

Subhash Chandra Gupta, Applicant v The State of Uttar Pradesh and another, Respondents

Civil Misc Writ No 4078 of 1979, D/-7-5-1981

(A) U P. (Temporary) Accommodation Requisition Act (25 of 1947), Sec 3 — Existence of public purpose is a sine qua non for passing order of requisition under S 3 — Requisition order automatically terminates when public purpose ceases to exist — It does not terminate only under order of derequisition passed under S. 8.

The essential pre-requisite which empowers the District Magistrate to pass an order of requisition under Section 3 is the existence of a public purpose The moment the public purpose ceases to exist, the substratum on which the order of requisition is based automatically disappears. Therefore, Section 8 of the Act is not exhaustive of the means by which an order of requisition under Section 3 can be terminated Section 8 may be called in aid when the public purpose continues to exist If the public purpose for which the order under Section 3 was passed continues to exist, yet, for certain reasons, the District Magistrate may consider it advisable to de-requisition' a particular accommodation (Para 12)

Held, assuming that the order of requisition passed on 4-9-1973 in favour of a public servant, was an order to requisition the accommodation for the residence of public servants in general it followed that when "R" was transferred in 1976, the accommodation was rightly allowed to be occupied by "S", also a public servant, in the year 1976 However, on the transfer of "S", when premises were no longer required by a public servant, the accommodation should have been deemed to have been free from the effect of the order of 1973 Therefore, the District Magistrate was in error in rejecting the application of the owner for the release of the accommodation The owner who was a practising Advocate at Meerut, had no accommodation at his disposal. He had purchased the accommodation for his personal requirement These were all circumstances which should have been taken into account in passing an order of release in favour of the owner The accommodation could not be treated as still governed by the provisions of the Act (Paras 11, 16)

(B) U P. (Temporary) Accommodation Requisition Act (25 of 1947), Sec. 3 — Order of requisition — Legal bias — Accommodation requisitioned by District Magistrate in favour of his Stenographer merely on ground that it carried lesser rent than one in which Stenographer resided — Held order of requisition was void and was hit by doctrine of legal bias since quantum of rent was foreign to purpose of S. 3, viz., public purpose, and had no reasonable nexus with it. AIR 1979 SC 1628, Ref (Paras 12, 15)

Cases Referred · Chronological Paras
AIR 1979 SC 1628 14

Kuldeep Saxena, S A Gilani, L P Naithani and M D Singh, for Applicant, Standing Counsel, for Respondents

S. J HYDER, J — The dispute in this writ petition relates to a house situated at P L Sharma Road, Begum Bagh, in the city of Meerut The said house originally belonged to one Ganga Prasad Bhatnagar who died on June 18, 1960 The house was requisitioned under Section 3 of the U P (Temporary) Accommodation Requisition Act, 1947, hereinafter referred to as 'the Act', for the residence of one Sita Ram Pandey, Dy Collector, as far back as the year 1951

2 Subsequently, some of the heirs of Ganga Prasad Bhatnagar transferred the house to one Nand Kishor The petitioner, who is a practising Advocate at Meerut, alleges that by means of transfer, he has become the owner of the entire house On behalf of the respondents namely, the State of U P and the District Magistrate, Meerut, it is averred in the counter-affidavit that the petitioner has only acquired 7/8th share in the said house It is, however, unnecessary to go into this controversy for the purpose of this writ petition

3 Sri Sita Ram Pandey, Deputy Collector, was transferred from the district and the District Magistrate passed a fresh order of requisition dated 4-9-1973 and delivered possession of the house to Sri Ram Bharosey Lal Sharma, Regional Transport Magistrate, Meerut In due course, Shri Sharma was also transferred from the district and the District Magistrate, opposite party No 2, passed an order dated 21st of August, 1976 al-

lothing the accommodation in favour of Sri Alauddin Siddiqi On the transfer of Sri Alauddin Siddiqi, the District Supply Officer, Meerut, submitted a report to the District Magistrate inter alia stating that Sri D C Jain, Stenographer of the District Magistrate, was living in a house in respect of which he was paying a rent of Rs 100/- per mensem which was much in excess of his paying capacity and that it would be proper if the house in dispute which carried a lower rent, may be allotted in his name On this report, the District Magistrate passed a short order in the following words —

"As proposed"

4. In consequence of the above order of the District Magistrate dated 4-12-1976, the accommodation was occupied by Sri D C Jain The retirement of Sri D C Jain was due in January, 1980.

5. It may be stated that the petitioner had become a co-sharer in the house in dispute as early as 1974 Since then he had started making applications to the District Magistrate that the accommodation in dispute may be released from requisition and that he may be permitted to occupy the same. As the retirement of Sri D C Jain drew nearer, the petitioner made frantic efforts and made repeated applications to the District Magistrate for the said purpose The petitioner was informed by the District Supply Officer by his order dated 15th of May, 1979 that after considering the entire circumstances, the District Magistrate has reached the conclusion that it was not possible to accede to his request

6. The petitioner thereupon filed the present writ petition. He claimed the relief that a writ of mandamus be issued to opposite party No. 2 commanding him to handover vacant possession of the accommodation to the petitioner. He further prayed that a suitable writ, order or direction may be issued to the District Magistrate prohibiting him from making any further order of requisition in the writ petition, it has been averred that the petitioner is an Advocate practising at Meerut since the year 1973 and that he has no accommodation, except the accommodation in dispute, which had been purchased by him for valuable consideration to meet his personal requirements. It is alleged that the order of requisition dated 4-9-1973 passed by the District Magistrate for the residence of Sri Ram Bharosey Lal Sharma had exhausted itself after his transfer in 1976 and the District Magistrate could not allow the accommodation to be occupied by Sri Siddiqi and thereafter by his own Stenographer, Sri D C Jain. It is further averred that the orders permitting the accommodation to be occupied by Sri Siddiqi and Sri D. C Jain as well as the order rejecting the petitioner's request for the release of the accommodation are mala fide

7. It may be noticed that the Act was passed as a temporary statute in 1947 and its life had been extended from time to time by the Legislature. The preamble of the Act states that whereas shortage of the accommodation in Uttar Pradesh has become very acute due to influx of refugees, it is expedient to provide during a limited period for powers to requisition accommodation. Section 3 of the Act, in so far as it is relevant for the purpose of the case, is quoted below :

"If in the opinion of the District Magistrate it is necessary to requisition any accommodation for any public purpose, he may by order in writing requisition such accommodation and may direct that possession thereof shall be delivered to him within such period as may be specified in the order.

Provided that the period so specified shall not be less than 15 days from the date of the service of the order."

8. Section 8 of the Act deals with the powers of the District Magistrate to release an accommodation from requisition and it inter alia provides that where an accommodation requisitioned under the Act is to be released from requisition, he shall release it in favour of the person from whom it was requisitioned and deliver possession thereof to him.

9. The existence of a public purpose is a sine qua non for the exercise of the powers under Section 3 of the Act. The Act does not define the expression 'public purpose'. However, the expression has been judicially considered in a catena of decisions concerning enactments which deal either with acquisition or requisition of property for public purpose It is now well recognised that public purpose is one which is essential for the public in general The expression includes a purpose i.e. an object or aim in which the interest of the com-

munity as opposed to a particular interest of an individual or individuals is directly and vitally concerned Public servants posted at a particular place are required to take up residence at the place to which they are posted Unless they reside at that place, they cannot discharge effectively the public duties entrusted to them On account of shortage of accommodation, such public servants are put to great inconvenience which impaire their efficiency in discharge of public functions It is, therefore, a public purpose to requisition accommodation for the residence of public officials who are placed in such a predicament It cannot, therefore, be gainsaid that an order of requisition under Section 3 of the Act can be passed requisitioning an accommodation for the residence of a public servant provided such order complies with the other requirements of the Act with which we are not concerned in this case An accommodation requisitioned under Section 3 can be derequisitioned in accordance with the provisions of law contained in Section 8 of the Act

10 Learned counsel appearing for the petitioner has pressed upon us two grounds in support of the writ petition, one of which shall be referred to by us as the broader ground and the other as the narrower ground The broader ground urged is that an order of requisition under Section 3 of the Act can only be passed for the residence of a particular public servant and not for the residence of public servants as a class The narrower ground is to the effect that the accommodation could not have been allowed to be occupied by Sri D C Jain and that the order of requisition passed on 4-9-1973 in favour of Sri Ram Bharosey Lal Sharma exhausted itself when the accommodation was vacated by Shri Siddiqi In support of the narrower ground it is submitted that an order of requisition passed under Section 3 does not terminate only when an order of derequisition is passed under Section 8 The said order may also spend itself out once the public purpose for which it was passed has come to an end.

11. Since this petition must succeed on the narrower ground, we do not consider it necessary to pronounce upon the broader ground urged by the learned counsel For the decision of this case, we assume that the order of requisition passed on September 4, 1973 in favour of Sri Ram Bharosey Lal Sharma was an order to requisition the accommodation for the residence of public servants in general It, therefore, follows that when Sri Ram Bharosey Lal Sharma was transferred in 1976, the accommodation was rightly allowed to be occupied by Sri Alauddin Siddiqi in the year 1976 However, on the transfer of Sri Alauddin Siddiqi, the accommodation was not made available to its owners Instead, the District Supply Officer put up a report before the District Magistrate stating that it may be allowed to be occupied by Sri D C Jain, Stenographer of the District Magistrate On that application, the District Magistrate passed an order which has already been quoted above In consequence, in spite of the protest of the petitioner, the accommodation was occupied by Sri Jain The report of the District Supply Officer for the occupation of the accommodation by Sri D C Jain was based only on the ground that the accommodation which was then in the occupation of Sri D C Jain was carrying more rent and that he would have to pay lesser rent for the accommodation in dispute

12. We are in agreement with the learned counsel for the petitioner that Section 8 of the Act is not exhaustive of the means by which an order under Section 3 can be terminated As already stated by us, the essential pre-requisite which empowers the District Magistrate to pass an order of requisition under Section 3 is the existence of a public purpose The moment the public purpose ceases to exist, the substratum on which the order of requisition is based automatically disappears Section 8 of the Act may be called in aid when the public purpose continues to exist If the public purpose for which the order under Section 3 was passed continues to exist, yet, for certain reasons, the District Magistrate may consider it advisable to derequisition a particular accommodation. The repository of a power conferred upon an authority by the statute must exercise it strictly in accordance with the conditions under which such power has been made exercisable The exercise of power is bad where the true object of such exercise substantially differs from the one for which the power was entrusted. The purported exercise of power under a

provision of law conferring that power must be based on some rational and relevant principles which have a close nexus with the object for which power has been conferred on the authority On the other hand, if the power is exercised for considerations which are foreign to the object for which the power has been conferred, the result would be that the power exercised would be a nullity and would be liable to be struck down on the ground that it is mala fide

13. Legal mala fide or legal malice is to be distinguished from personal bias or personal malice An authority on whom power has been conferred may act honestly and with the best of motives In such a case, it cannot be said that it is guilty of any personal bias or personal vice However, if the action taken by such authority is based on extraneous considerations, which are wholly irrelevant for the purpose for which power has been conferred upon it, the resultant action would be hit by the doctrine of legal bias or legal malice

14. In Ramana v I A Authority of India, AIR 1979 SC 1628, it has been observed as follows (at p 1635) —

"It is well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them"

15. We have already seen that Sri D C Jain was in occupation of an accommodation before he was allowed to occupy the accommodation in dispute. He was permitted by the District Magistrate to reside in the accommodation in dispute only on the ground that it carried a lesser rent Now the question of quantum of rent, in the circumstances of this case, was foreign to the purpose of Section 3 of the Act and has no reasonable nexus with it. It may be that payment of rent at a lower rate may have been more advantageous to Sri D C Jain as it would be to any other person. In the circumstances of this case, it cannot be said that Sri D C Jain was wholly without any accommodation or that it was absolutely beyond his capacity to pay the rent of the accommodation formerly occupied by him. The order of the District Magistrate did not accept the suggestion made by the District Supply Officer was, therefore, void and is hit by the doctrine of legal malice or legal bias

16. After the transfer of Sri Alauddin Siddiqui, the accommodation must be deemed to have been free from the effect of the order dated September 4, 1973 In these circumstances, the District Magistrate was in error in rejecting the application of the petitioner for the release of the accommodation. The petitioner is a practising Advocate at Meerut He has no accommodation at his disposal He has stated that he had purchased the accommodation for his personal requirement These are all circumstances which should be taken into account in passing an order of release in favour of the petitioner The accommodation cannot be treated as still governed by the provisions of the Act

17 The result is that this writ petition succeeds and is hereby allowed A writ in the nature of mandamus is issued against the District Magistrate, Meerut, commanding him to deliver vacant possession of the house in dispute to the petitioner We allow three months' time from today to the District Magistrate to comply with this order The respondents shall pay the costs of the petition.

Petition allowed

1981 ALL. L. J. 850

= AIR 1981 Supreme Court 1582

(From 1975 Cri LJ 1777 (All))

R S. PATHAK AND

O. CHINNAPPA REDDY, JJ

Criminal Appeal No 552 of 1976, D/- 21-7-1981.

Firm Ramdeo Onkarmal and another, Appellants v State of U P. and another Respondents

Forward Contracts (Regulation) Act (74 of 1952), Section 18 (3) — Issue of notification under Section 18 (3) — Conditions precedent for — Non-specification of area in notification — Operation, throughout the territory covered by Act is implied — Construction by implication — When open. (Interpretation of Statutes) — (General Clauses Act (1897), Sec. 20).

Before issuing a notification under Section 18 (3) the Central Government must satisfy itself that the regulation and control of non-transferable specific

contracts in a particular area are in the interest of the trade or in the public interest. The determination of the area over which the regulation and control will extend is a vital component to which the Central Government must apply its mind when deciding to issue a notification. Section 18 (3) does not require that the area must be expressly specified in the notification. It is possible to define the area by necessary implication, that is sufficient compliance with the requirement of sub-section (3) of Section 18

(Para 10)

Ordinarily whether the notification extends over part only of the territory or throughout the territory would be specified in the notification. When it contains no express signification of the area it may be implied that it is intended to operate throughout the territory covered by the Act. That is a construction by implication. It is not mandatory in such a case that the notification should specify that it operates throughout the territory to which the Act extends. When a large volume of material was produced before the High Court to show that the Central Government did apply its mind to that fact, it could be said that notification was intended to cover the entire country. 1975 Cri LJ 1777 (All), Affirmed

(Paras 11, 12)

Mr Pramod Swarup, Advocate, for Appellants, Mr R K Bhat, Advocate (for No 1) and Mr P A Francis, Sr Advocate (Mr R N Podar, Advocate with him) (for No 2), for Respondents

R S. PATHAK, J :— This appeal by certificate granted under sub-clause (c) of clause (1) of Article 134 of the Constitution by the Allahabad High Court is directed against a judgment of that Court dismissing the appellants' petition for quashing criminal proceedings against them under the Forward Contracts (Regulation) Act, 1952

2 The appellants are being prosecuted for various offences under Section 20 and Section 21 of the Forward Contracts (Regulation) Act, 1952 on the ground that three transactions of purchase of Tur (Arhar) were entered into by them in violation of Notifications Nos 1384-B, 1384-C and 1384-D, all dated July 17, 1958, issued by the Central Government under that Act During the proceedings before the Sub-Divisional Magistrate, the appellants challenged the validity of the three notifications. The Sub-Divisional Magistrate, and thereafter the learned Sessions Judge in revision took the view that it was premature to decide the question They applied to the Allahabad High Court under Section 561A read with Section 435, Code of Criminal Procedure, raising the same question and praying for the quashing of the criminal proceedings The learned single Judge of the High Court hearing the petition considered the question to be of substantial importance and accordingly the case was referred to a larger Bench.

3 A Division Bench of the High Court by its judgment dated May 22, 1975* upheld the validity of the notifications and dismissed the petition It saw no substance in the plea of the appellants that the notifications did not specifically mention the area over which they were to operate and, therefore, were invalid. On application by the appellants the High Court granted a certificate under sub-clause (c) of clause (1) of Article 134 of the Constitution that the case was fit for appeal to this Court.

4. The point on which the certificate has been granted is whether the only method of specifying the area in a notification issued under sub-section (3) of Section 18 of the Forward Contracts (Regulation) Act, 1952 is to expressly describe it in the notification itself or whether such a specification can be inferred from other circumstances as well as notifications issued simultaneously That is the only point on which this appeal is pressed, and we need consider no other aspect of the case

5 It is desirable to appreciate first the statutory matrix within which the controversy is embedded Sub-section (1) of Section 18 declares that the provisions of Chapters III and IV (Chapter IV includes Section 17) shall not apply to non-transferable specific delivery contracts for the sale or purchase of any goods But by virtue of sub-section (3) of Section 18 if the Central Government is of opinion that in the interest of the trade or in the public interest, it is expedient to regulate and control such contracts in any area, it may by notification in the Official Gazette, declare that all or any of the provisions of Chapters III and IV shall apply to such class or classes of non-transferable specific delivery contracts in such area and in [illegible] goods or class of goods as [illegible] in the notification

*Reported in 1975 Cri LJ 1777 (All)

and may also specify the manner in which and the extent to which all or any of the said provisions shall so apply

6. In other words, by a notification under sub-section (3) of Section 18 the Central Government may make the provisions of Section 17 applicable to a class or classes of non-transferable specific delivery contracts in an area and in respect of specified goods or class of goods By itself, Section 17 deals with forward contracts for the sale or purchase of any goods or class of goods On a notification under sub-clause (3) of Section 18 it is made applicable to non-transferable specific delivery contracts On making Section 17 thus applicable a notification can follow in exercise of the powers under sub-sec (1) of S 17, prohibiting such contract save with the permission of the Central Government, and the issue of such a notification, by reason of sub-sec (3) of Section 17, brings into play the provisions of Sec 16

7 Now on July 17, 1958, the Central Government in the Ministry of Commerce and Industry issued three notifications under the Forward Contracts (Regulation) Act, 1952 The first notification, S O 1384-B was issued under Section 17 read with Section 16 of the Act, and prohibited forward contracts for the sale or purchase of certain specified goods, including Tur (Arhar) The second notification, S O 1384-C was issued under sub-section (3) of Sec. 18 and declared that Section 17 would apply to non-transferable specific delivery contracts in respect of the goods specified in the notification, and these included Tur (Arhar) In consequence, the third notification, S O 1384-D, was issued under sub-section (1) of Section 17 declaring that no person could, save with the permission of the Central Government, enter into any non-transferable specific delivery contracts for the sale or purchase of the goods specified therein, and predictably these included Tur (Arhar)

8. As a result of the three notifications, there was an intergrated scheme, prohibiting forward contracts as well as non-transferable specific delivery contracts for the sale or purchase of Tur (Arhar)

9. The contention of the appellants is that the power conferred by sub-sec. (3) of S. 18 to apply the provisions of Chapters III and IV to non-transferable specific delivery contracts must necessarily be exercised in terms of a specific area, and the area must be specified in the notification They urge that that is what sub-section (3) of Section 18 mandates And they say as the Notification S O. 1384-C does not expressly specify any area, it is not in accordance with sub-section (3) of Section 18 and is incomplete and therefore invalid In consequence they submit, the Notification S. O 1384-D must also fail

10. It seems to us that what sub-section (3) of Section 18 requires is that before issuing a notification under that provision the Central Government must satisfy itself that the regulation and control of non-transferable specific delivery contracts in a particular area are in the interest of the trade or in the public interest The determination of the area over which the regulation and control will extend is a vital component to which the Central Government must apply its mind when deciding to issue a notification And when a notification is in fact issued the area must be communicated by specifying it in the notification The area specified may be comprehended from material expressed or implied in the notification The sub-section does not require that the area must be expressly specified in the notification. If it is possible to define the area by necessary implication, that is sufficient compliance with the requirement of the sub section In the present context, when the notification does not expressly specify the area, one of two conclusions is possible. Either the notification is intended to operate throughout the territory over which the Act extends, or the omission indicates that the authority required to apply its mind to the "area" ingredient did not do so These are two distinct, separate and alternative possibilities.

11. A notification may operate over part only of the territory to which the Act extends, or it may be intended to operate throughout that territory. Ordinarily, whether the notification extends over part only of the territory or throughout the territory would be specified in the notification. If the notification is intended to operate over part only of the territory to which the Act extends, the notification must necessarily define that limited area. When it contains no express signification of the area, it may be implied that it is intended to operate throughout the territory

covered by the Act That is a construction by implication It is not mandatory in such a case that the notification should specify that it operates throughout the territory to which the Act extends

12 The alternative possibility is that the authority required to determine the "area" ingredient did not do so when issuing the notification If such a contention is raised, and we point out that it was not raised before us, it is open to the authority to show that it did in fact apply its mind to the matter In the present case, the absence of any express reference to a specific area constituted a ground in the High Court for alleging that the Central Government did not apply its mind to the "area" ingredient when deciding on the notification But a large volume of material was produced by the respondents before the High Court to show that the Central Government did apply its mind to that fact and it was intended that the notification should cover the entire country

13 In the result, the appeal fails and is dismissed

Appeal dismissed

1981 ALL L J 853

M P MEHROTRA AND
K C AGRAWAL, JJ

Pramod Kumar Gupta, Petitioner v The Vice-Chancellor, Rohilkhand University, Bareilly and others, Respondents

Civil Misc Writ No 10018 of 1975, D/- 24-2-1981

U. P State Universities Act (President's Act No 10 of 1973), Section 31 (3) (a) and (b) — Scope of section.

Where a person was appointed on a temporary post, after reference to the selection committee, for more than six months his case would be covered by Section 31 (3) (a) and he would not be entitled to benefit under Section 31 (3) (b) in case of vacancy as the subsequent expression "falls vacant" cannot be applied to a case of appointment of a teacher to a temporary post likely to last for more than six months which contingency is covered by the earlier portion of the said clause (Para 8)

V K Khanna, for Petitioner, Standing Counsel, for Respondents

M. P MEHROTRA, J.— This petition under Article 226 of the Constitution of India seeks reliefs for the petitioner in the following words —

(a) A writ in the nature of Mandamus or other suitable writ or direction, directing the respondents not to fill in the post occupied by the petitioner as Lecturer in the Zoology department and to issue a direction to the respondent not to interfere with the working of the petitioner as lecturer in the zoology department of Hindu College, Moradabad

(b) A writ in the nature of mandamus or other suitable writ or direction, directing the respondent No 1, Vice-Chancellor to decide the matter of approval of the petitioner at an early date

(c) A writ in the nature of Mandamus or other suitable writ or direction, directing the chancellor to decide the representation of the petitioner forthwith.

(d) Such other writ or writs, orders and directions as this Hon'ble Court may deem just and proper in the circumstances of the case

2 The facts, in brief, are these The Hindu College Moradabad, in 1970, was a Post-Graduate Degree College affiliated to Agra University The petitioner was appointed on a temporary basis on 4th September, 1970 His temporary appointment was from 9th September, 1970 to 15th March, 1971 There was a break, and again on 3rd August, 1971, the petitioner was appointed as a lecturer in Zoology by means of a fresh appointment letter on a temporary basis and this appointment was for the duration from 3-8-1971 to 15-3-1972 In the next session again a temporary appointment was given to the petitioner which lasted from 1st September, 1973 to 31st March, 1974 In the academic session 1974-75, in pursuance of an advertisement published in the newspaper, lecturers were appointed in the Zoology Department and other Departments and the petitioner was also appointed as a lecturer on a temporary post in the Department of Zoology and this appointment was to last upto 15th March, 1975 It is claimed that this appointment was made on the basis of the recommendation of the Selection Committee Dr O P Raghuvanshi was a teacher in the Zoology Department in the said College and he held a permanent post He resigned sometime in March, 1975, and, thereafter, the petitioner began to set up a claim that he should be held to be entitled to the said permanent post formerly held by

Dr O P Raghuvanshi It seems that the petitioner approached the Committee of Management with the aforesaid claim and the aforesaid Committee passed the following resolution on 16th July, 1975 —

"The application of Sri P K Gupta of the Zoology department requesting conversion of his temporary appointment into one on probation was read and considered

Resolved that the Management has no objection to the conversion if the Vice-Chancellor approves the same and Government pays his salary in accordance therewith (w e f the date of approval by the V C)"

3 It seems that the U P State Universities Act, 1973 had come into force sometime in September, 1973 It was subsequently replaced by the U P Universities (Re-enactment and Amendment) Act 1974 The aforesaid educational institution stood affiliated to the Rohilkhand University, Bareilly and, therefore, the petitioner took the claim along with the aforesaid resolution of the Managing Committee to the Vice-Chancellor, Rohilkhand University, Bareilly It has been averred in paragraph 25 of the petition that the petitioner was told by the said Vice-Chancellor that the petitioner's claim was not acceptable to the latter, and that the permanent post was going to be advertised and a fresh selection would take place The petitioner, thereafter, represented to the Chancellor under Section 68 of the aforesaid Act, but the said authority rejected the said representation on 5th January, 1976 A copy of the order passed by the Chancellor is Annexure 2 to the counter-affidavit It seems that even before the Chancellor passed the aforesaid order, this petition had been filed in this Court on 12th September, 1975

4 The petitioner's claim is that in consequence of the resignation of Dr. O. P Raghuvanshi since he (the petitioner) was working on a temporary vacancy in the department, he became entitled to the said permanent post by virtue of the provisions contained in Section 31 (3) of the aforesaid Act Sri G N Verma, learned counsel for the petitioner, addressed us at length on what he contended to be the true scope of the said [illegible] contained in S 31 (3) (b) of the [illegible]

5 For the facility of reference and discussion, the aforesaid provision contained in Section 31 (3) (b) is reproduced below —

"Where before or after the commencement of this Act, any teacher is appointed (after reference to a Selection Committee) to a temporary post likely to last for more than six months, and such post is subsequently converted into a permanent post or to a [illegible] post in a vacancy caused by the grant of leave to an incumbent for a period exceeding ten months and such post subsequently becomes permanently vacant or any post of same cadre and grade is newly created or falls vacant in the same department, then unless the Executive Council or the Management, as the case may be, decides to terminate his services after giving an opportunity to show cause, it may appoint such teacher in a substantive capacity to that post without reference to a Selection Committee

Provided that this clause shall not apply unless the teacher concerned holds the prescribed qualifications for the post at the time of such substantive appointment, and he has served continuously for a period of not less than one year after his appointment made after reference to a Selection Committee

Provided further that appointment in a substantive capacity under this clause of a teacher who had served, before such appointment, continuously for a period of less than two years, shall be on probation for one year which may be extended for a period not exceeding one year and the provisions of sub-section (2) shall apply accordingly"

6. According to the learned counsel for the petitioner, on the true interpretation of the said provision, it should be held that when the permanent post held by Dr. Raghuvanshi fell vacant, the petitioner became entitled to the said post because he had been working for more than six months and his appointment was as a result of the recommendation made by the Selection Committee which recommendation was accepted by the Managing Committee. Sri L P Nathani, learned counsel for the [illegible] has contended that the interpretation which Sri G N. Verma has placed on the aforesaid provision is not the correct one. It seems that apart from the said aspect of the matter, there can be little doing (doubt?) that in view of the First Proviso to the aforesaid provision, the petitioner will not be found to be entitled to any relief from the Court The [illegible]

is clear that the teacher concerned who is desirous of getting an appointment in a substantive capacity must possess the prescribed qualifications for the post in question and he must possess such qualifications at the time of the substantive appointment.

7. In view of these provisions contained in Section 50 of the said Act, it cannot be disputed that the statutes framed by the Agra University will govern the case of the petitioner Statute 3-C of Chapter XVIII prescribed the qualifications which should be possessed by the teachers of Post-Graduate Classes In the instant case, the petitioner admittedly got only a second class in his M Sc and on the date on which he says he was entitled to be appointed in a substantive capacity to the permanent post, he did not possess any Research Degree Sri G N Verma contended that the petitioner was doing his Research work and succeeded in obtaining his Ph D Degree sometime in 1977 However, it should be seen that the petitioner's claim is that in March, 1975, when Dr Raghuvanshi resigned he became entitled to the substantive appointment and the resolution of the Managing Committee, which the petitioner claims is in the nature of his appointment in the substantive capacity by the Managing Committee, was also passed some-time in July, 1975 Therefore, the fact that subsequently such qualification was obtained in 1977 cannot help the petitioner At the relevant time undoubtedly, he did not possess the qualifications which have been laid down in the aforesaid statute

8 In view of this position, it is really not necessary to examine the contention of Sri G N Verma in respect of the true scope of the main part of Section 31 (3) However, since the post has been filled and Sri Naithani contested the interpretation which the learned counsel for the petitioner expressed, we could like to express in brief our opinion In our view, the petitioner cannot claim that he was entitled to the post of Dr Raghuvanshi on the ground that it fell vacant and that he was working then in a temporary capacity for more than six months In our view, the petitioner's case is really covered by the first contingency where it is laid down that if a teacher is appointed (after reference to the Selection Committee) to a permanent post likely to last for more than six months, and who is subsequently converted into a permanent post Admittedly, the petitioner had been appointed to a temporary post, but the said post was not converted into a permanent post and therefore, the petitioner's case is not covered by Section 31 (3) (b) of the Act In our view, the subsequent expression 'falls vacant' cannot be applied to a case of appointment of a teacher to a temporary post likely to last for more than six months which contingency is covered by the earlier portion of the said clause

9 Sri Naithani further emphasised that in the instant case, there was no appointment by the Managing Committee of the petitioner in a substantive capacity such as is covered in the aforesaid clause (b) of Section 31 (3) Rather an extraordinary type of recommendation was made by the Managing Committee and the aforesaid resolution of the Managing Committee, which has been reproduced above, cannot be said to be an appointment of the petitioner in a substantive capacity for the post held by Dr Raghuvanshi We feel much force in the contention of Sri Naithani However, it is really not necessary to say much about this aspect of the matter because the petitioner has failed in his effort to get the relief in view of the First Proviso to Section 31 (3) (b)

10. This petition, accordingly, fails and is dismissed But, there will be no order as to costs

Petition dismissed

1981 ALL. L J. 855

R M SAHAI, J

Smt Rajkumari Gopika and another, Petitioners v State of Uttar Pradesh and others, Respondents

Writ Petn No 1528 of 1979 D/- 23-2-1981

U P. Imposition of Ceiling on Land Holdings Act (1 of 1961), Section 5 (6) — — Gift of his land by father of tenure-holder to his daughter after 24-1-1971 — Provisions of Act not applicable to father — After his death gifted land cannot be clubbed in son's holding

Father of the tenure-holder who was a Bhumidhar and to whom the provisions of the U P Ceiling Act did not apply, gifted his land to his daughter after the relevant date i e, 24-1-1971 While determining the ceiling area of his son,

land gifted by the father was clubbed in his holding by ignoring the gift.

Held (i) it is the transfer made by the tenure-holder that can be ignored under Section 5 (b) and not transfer made by another person (Paras 4, 5)

(ii) that the gift was valid and on execution of the gift deed the father ceased to be a tenure holder On death of the father the gifted land could not be the subject matter of devolution or succession, therefore, while determining the ceiling area of the son the land gifted by his father could not be clubbed in son's holding (Para 3)

ORDER. — This petition raises an important question of jurisdiction of prescribed authority to consider transfer made by a person to whom provisions of U P Imposition of Ceiling on Land Holdings Act (here referred to as Act) do not apply while determining surplus area of another Facts in brief giving rise to it are that notice under Sec 10 (2) of the Act was issued to petitioner No 2 which was contested and one of the objections was that his father had executed registered gift on 22-6-1972 in favour of his sister, petitioner No 1 therefore, the land covered by it could not be clubbed in his holding On 21-1-1977 the objection was rejected In appeal the order was set aside and by its order dated 26-3-1977 the appellate authority directed the prescribed authority to decide the objection afresh While the matter was pending on remand petitioner No 1 also appeared and filed an objection claiming to be tenure-holder of the land gifted to her She was supported by petitioner No 2 The objection was not decided as prescribed authority felt that he was bound by directions of appellate authority and could not go beyond it In appeal it was held that transfer made after 24-1-71 is liable to be ignored under sub-section (g) (6?) of Section 5 of the Act whether it was made by tenure-holder or any other person The appellate authority further found that the gift was not for adequate consideration, therefore, neither petitioner No 2 nor petitioner No 1, were entitled to any benefit

2 In Fateh Mohd v State* it has been held that in a gift no monetary consideration is involved therefore it cannot be subject matter of consideration under proviso to Section 5 (6) of the Act.

*Citation not given in certified copy

3 The primary question, however, is whether transfer by a third person could also be ignored under this sub-section On facts found it is established that Raghuraj Singh, father of petitioner, was a tenure-holder of 3 Bighas and odd only To him provision of Ceiling Act, therefore, did not apply He was a 'bhumidhar' and under provisions of Act he was entitled to transfer the land in dispute by gift, will or sale As gift was made by him it was valid and the appellate authority rightly recorded a finding in favour of the petitioner The effect of execution of the gift deed was that Raghuraj Singh ceased to be a tenure-holder since 1972 Thus land, therefore, could not be subject matter of devolution or succession on his death in 1975 In law it could not be inherited by petitioner No 2

4 The view taken by appellate authority on applicability of sub-sec (6) to transfers made by third person does not appear to be correct The sub-sec reads as under

"(6) In determining the ceiling area applicable to a tenure-holder, any transfer of land made after the twenty-fourth day of January, 1971, which but for the transfer would have been declared surplus land under this Act, shall be ignored and taken into account.

Provided that nothing in this sub-section shall apply to

(a) a transfer in favour of any person (including Government) referred to in sub-section (2)

(b) a transfer proved to the satisfaction of the prescribed authority to be in good faith and for adequate consideration and under an irrevocable instrument not being a 'benami' transaction or for the immediate or deferred benefit of the tenure-holders or other members of his family.

Explanation No 1 For the purposes of this sub-section the expression 'transfer of land made after the twenty fourth day of January, 1971' includes

(a) a declaration of a person as a co-tenure-holder made after the twenty-fourth day of January, 1971, in a suit or proceeding irrespective of whether such suit or proceeding was pending on or was instituted after the twenty fourth day of January, 1971.

(b) any admission, acknowledgement relinquishment or declaration in favour of a person to the like effect, made in

any other deed or instrument or in any other manner

Explanation No 2 The burden of proving that a case falls within clause (b) of the proviso shall rest with the party claiming its benefit"

It is true that the expression 'any transfer of land made after 24th day of January, 1971' does not refer the transfer made by the tenure-holder yet from the context in which it has been used and a reading of the sub-section indicates that it is the transfer made by tenure holder which is liable to be ignored under this provision while determining his ceiling area In sub-sec (1) no tenure holder is entitled to hold land in excess of ceiling area applicable to him The two explanations appended to Section 5 relates to the tenure holder mentioned in sub-section (1) From these it is clear that the transfer referred to in sub-section (6) has to be read along with the word tenure holder In other words transfer made by tenure holder only after 24th day of January, 1971, could be ignored

5 The expression 'which but for the transfer would have been declared surplus' cannot be read in isolation It should be read as part of the entire subsection if transfer made by a third person and cannot be a subject matter of consideration in sub-section (6) The appellate authority, therefore, committed an error in recording a finding that the gift made by father was to be ignored while determining ceiling area of the son

6 In the result, this petition succeeds and is allowed The order passed by appellate authority is quashed The prescribed authority is directed to exclude plots Nos 506, 1012, 279/6, 1012, 1039 and 412 area 3-10-15 which were gifted by Raghuraj Singh in favour of petitioner in June, 1972 The petitioner shall be entitled to costs

Petition allowed

1981 ALL L. J 857

R R RASTOGI, J

State of U P, Petitioner v Brindavan Das and others, Respondents

Civil Misc Writ Petns Nos 1831 of 1979 and 11577 of 1980, D/- 15-7-1981

(A) U P. Imposition of Ceiling on Land Holdings Act (1 of 1961), Ss. 38, 13 — Appeal — Procedure — Respondent can file cross-objections (Civil P C. (1908), O 41, R. 22).

In an appeal under the Act the respondent is entitled to file cross-objection (Case law discussed)

(Para 6)

Section 38 provides for the powers of the appellate Court and the procedure to be followed by it It says that in hearing and deciding an appeal under this Act the appellate Court shall have all the powers and the privileges of a Civil Court and follow the procedure for hearing and disposal of the appeals laid down in Civil P C In other words the Act itself makes the procedure for the hearing and disposing of appeals laid down in the Civil P C applicable to the appellate Court while deciding an appeal under this Act It is now well established that once a case reaches a Court, further procedure is determined by the procedure of that Court (Para 6)

(B) Constitution of India, Art 226 — Writ jurisdiction — Exercise of — Substantial justice done — High Court will refrain from interfering in exercise of jurisdiction under Art 226 on ground of technical defect or irregularity. AIR 1980 All 231, AIR 1978 All 241 and AIR 1957 SC 227 Rel on.

(Para 11)

(C) U P Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 13 — Appeal by State — Ground that Prescribed Authority restored the case without notice to the State not taken in memorandum of appeal — Tenure-holder stating that order of restoration was passed after hearing Naib-Tahsildar — Ground will not be allowed to be agitated in writ petition. (Constitution of India, Art 226). (Para 15)

Cases Referred Chronological Paras

AIR 1980 All 231 11

(1980) FAFO No 203 of 1976, D/- 25-7-1980 (All) Smt Janki Devi v H P S T R C 10

HY/HY/D493/81/SNV

AIR 1978 All 241	11
1978 (4) All LR 862	10
AIR 1975 Punj & Har 318	13, 14
AIR 1964 Raj 140	8
AIR 1957 SC 227	11
AIR 1955 SC 425	8, 9
AIR 1955 Punj 190	12, 14
AIR 1953 SC 357	6
AIR 1953 Mys 57	8
AIR 1948 PC 12	6
AIR 1944 Lah 76 (FB)	12
AIR 1936 PC 93	6
(1916) 14 All LJ 1114 AIR 1916 PC 21	b
(1882) ILR 5 All 163 (FB)	8

A P Singh, for Petitioner. Krishna Mohan Misra, for Respondents

ORDER — These two writ petitions arise out of proceedings taken under the U P Imposition of Ceiling on Land Holdings Act (hereinafter the 'Act') They can be conveniently taken up together

2. The facts briefly stated are that one Mahant Ram Dass was served with a notice under Section 10 (2) of the Act along with the statement showing that he had 40 94 acres of land and after allowing the ceiling area admissible to him at 18 04 acres, he had 22 90 acres surplus Before the notice could be served on him he died After his death Brindavan Das made an application for being impleaded in the proceedings as heir and legal representative of Mahant Ram Dass deceased The prescribed Authority allowed that application and served a notice under Section 10 (2) of the Act on him Brindavan Dass filed an objection to that notice Subsequently, one Baleshwar Dass as well made an application for impleadment in the case claiming himself to be the heir and legal representative of Mahant Ram Dass deceased The prescribed Authority allowed that application as well Baleshwar Das also filed an objection in the case Thereafter evidence was led by the State On the date fixed for the evidence of the objectors they did not turn up on 29-1-1977 The prescribed Authority made an order declaring 22 72 acres as surplus land

3 On 18-2-1977 Baleshwar Dass made an application for setting aside the ex parte order dated 29-1-1977 That application was allowed on that very date. On 22-2-1977 Brindavan Dass made a similar application which was allowed on 4-3-1977 Thereafter these persons gave their evidence and the Prescribed Authority by its order dated 31-3-1977 held, that only the land recorded in the name of Mahant Ram Dass could be treated as belonging to him while the land recorded in the name of deities could not be so treated and on that view 19 43 acres of irrigated land was held as belonging to Mahant Ram Dass and out of the same 1 39 acres of irrigated land was declared as surplus

4 Aggrieved, the State filed an appeal against that decision on 30-5-1977 which was numbered as Misc Ceiling Appeal No 30 of 1977 Prior to that on 20-5-1977 Baleshwar Dass had filed a time barred appeal along with an application under Section 5 Limitation Act, for condoning the delay No order appears to have been passed on that application When the State's appeal No 30 of 1977 came up for hearing before the Third Additional District Judge, Etawah, an application was given by Baleshwar Dass in which it was stated that since his appeal was pending for admission before the District Judge the appeal of the State may not be heard and decided The additional District Judge took the view that the appeal of Baleshwar Dass could be treated as a cross-objection to the appeal of the State and after hearing the parties decided the aforesaid appeal and cross-objection on 9-12-1978 The appeal of the State was dismissed while the cross-objection was allowed and it was held that there was no surplus land in the holding of late Mahant Ram Dass

Aggrieved, the State of Uttar Pradesh has filed writ petition No 1831 of 1979, challenging the orders of the prescribed Authority dated 18-2-1977, 4-3-1977 and 31-3-1977 and those of the appellate court dated 9-9-1978 and 9-12-1978 Subsequently, Baleshwar Dass moved an application before the District Judge stating that no order need be passed on the aforesaid application which he had given for condonation of delay since his appeal had been treated as a cross-objection and decided by the Third Additional District Judge The State of U P. endorsed the stand of Baleshwar Dass but the learned District Judge, by his order dated 19-3-1979, rejected this prayer Thereafter, after hearing the parties, the aforesaid application was

dismissed by order dated 15-5-1979 These two orders form the subject matter of challenge in writ petition No 11577 of 1980 filed by Baleshwar Dass

5 The main question which falls for consideration in these writ petitions has got two limbs, firstly, whether it was open to the appellate Court to treat the time barred appeal of Baleshwar Dass as cross objection to the appeal filed by the State of Uttar Pradesh and secondly whether it is a substantial question so as to require an interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India

6 Coming to the first limb of this question reference may be made to Order 41, Rule 22, C P C which provides for filing of the cross-objection by a respondent Sub-rule (1) says that any respondent, though he may not have appealed from any part of the decree may not only support the decree but may also state that the finding given against him in the court below in respect of any issue ought to have been in his favour, and may also take any cross-objection to the decree which he could have taken by way of appeal provided he has filed such objection in Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal or within such further time as the Appellate Court may see fit to allow There are two termini provided in this sub-rule for filing of the cross-objection One is the date of service of notice on the respondent of the day fixed for hearing the appeal and the second is one month from the date of service of such notice or such further time as the appellate court may see fit to allow It is correct that in the present case such a situation did not arise because Baleshwar Dass had filed his appeal on 20-5-1977 while the State's appeal was filed on 30-5-1977 Strictly speaking, therefore, this provision would not be attracted It was contended in this connection by the learned Standing Counsel that a right to file cross-objection by a respondent cannot be assumed unless such a right is specifically provided, like the right to file an appeal, in the statute under which the proceedings have been taken It was urged that the Ceiling Act provides only for a right to file an appeal and does not make any provision of a right to file a cross-objection, and, therefore the respondent is not entitled to file a cross-objection I am not inclined to agree with this contention because Section 38 of the Act provides for the powers of the appellate Court and the procedure to be followed by it It says that in hearing and deciding an appeal under this Act the appellate Court shall have all the powers and the privileges of a Civil Court and follow the procedure for hearing and disposal of the appeals, laid down in Civil P C In other words the Act itself makes the procedure for the hearing and disposing of appeals laid down in the Civil P C applicable to the appellate Court while deciding an appeal under this Act It is now well established that once a case reaches a Court, further procedure is determined by the procedure of that Court In Secretary of State v Rama Rao AIR 1916 PC 21 (14 All LJ 1114) the claim of respondent was rejected by the Forest Settlement Officer An appeal by the respondent was, thereupon, made to the District Court and a decision was pronounced. There was a further appeal taken to the High Court of Madras and then to the Privy Council and one of the contentions urged before the Privy Council on behalf of the appellant was that all further proceedings in Courts in India or by way of appeal were incompetent, these being excluded by the terms of the statute aforesaid That contention was repelled and it was observed —

"In their Lordships' opinion this objection is not well founded Their view is that when proceedings of this character reach the District Court that Court is appealed to as one of the ordinary courts of the country, with regard to whose procedure, orders, and decrees the ordinary rules of the Civil P C apply"

This decision was followed by the Privy Council in another decision in Hem Singh v Basant Das, AIR 1936 P C 93, which was a case under the Punjab Sikh Gurdwara Act 1925 Reference may also be made in this connection to another decision of the Privy Council in Adakappa v Chandrasekhara, AIR 1948 P C 12 It was observed in this case that where a legal right is in dispute and the ordinary courts of the

country are seized of such dispute, the courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which not in terms, confer a right of appeal It would, thus, be seen that even if it be said that the Ceiling Act does not confer a right of cross-objection, a respondent can file a cross-objection because of the rules of procedure applicable to the Court hearing the appeal under the Ceiling Act Reference may also be made to a decision of the Supreme Court in this behalf in N S Thread Co v James Chadwick & Bros, AIR 1953 SC 357

7 This aspect can be considered from another angle and it is that it is the duty of a Judge to extend his jurisdiction to do justice to a party who can make his claim to redress, appear to be just and lawful While discussing the duties of Judicial Officers it has been stated in Broome's Legal Maxims (10th Edition 1939 at pages 34-35) —

"Duty of a Judge to extend the jurisdiction to do justice Boni judicisest ampliocre jurisdictionem It is the duty of a Judge to extend this jurisdiction" It may be said that the proposition has been stated a little widely but in my opinion it can be safely said that the courts seized of a dispute in regard to a legal right are governed by ordinary rules of procedure applicable thereto and it is their duty to do justice within the framework of such rules and procedure

8 In this connection it was also urged by the learned counsel for the tenure holder that even while interpreting the Civil P C, all procedure should be accepted as permissible unless it is prohibited by the Codes, expressly or by necessary implication There appears to be substance in this contention as well In Narsingh Das v Mangal Dubey (1882) ILR 5 All 163 (FB), it was observed —

"The consideration of the questions involved in this reference virtually amounts to a matter of construing some of the sections of the Civil Procedure Code I may therefore at the outset state that, according to my view of the rules of construction applicable to statutes like the Civil Procedure Code, the courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law"

The same principle has been subsequently laid down by the Supreme Court and other High Courts of our country (See Thakar Lal v Nathu Lal, AIR 1964 Rajasthan 140, Sangram Singh v Election Tribunal, AIR 1955 SC 425 and C G Devaraju Naidu v T N Prabhuviah, AIR 1953 Mysore 57) In Thakar Lal it was observed (at p 144)

"Indeed, even in matters relating to procedure, it seems to us to be recognised that all procedure should be accepted to be permissible unless it is prohibited by the Code of Civil Procedure either expressly or by necessary implication"

Similarly in Devraju's case (Supra) it was observed that the Code of Civil Procedure is not exhaustive, and procedure is mere machinery and its object is to facilitate and not to obstruct the administration of justice The Code should therefore be construed liberally and as far as possible merely technical objections should not be allowed to defeat substantial justice

9 Similar view was taken in Sangram Singh (AIR 1955 SC 425) (supra) and it has been laid down that Civil P C "is procedure, something designed to facilitate justice and further its ends not a penal enactment for punishment and penalties, not a thing designed to trip people up Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (Provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it"

10. The learned Standing Counsel in support of his contention that where right to file cross-objection has not been given by the statute concerned, such a right cannot be availed of by a respondent in proceedings under the same, relied on a Division Bench decision of this Court in Virendra Singh v Smt Phoolmati, 1978 (4) All LR 862. That decision was given in a case under the M V Act and the question was whether the respondent can file a cross-objection to an

appeal filed under Section 110-D of that Act. The answer was given in the negative I find that in a later decision of a Bench of this Court in F A F O No 293 of 1976, Smt Janki Devi v U P S T R C decided on 25-7-1980 a different view has been taken and this question has been referred to a larger Bench, I do not think that the reference of this question has any bearing in the present case because of the fact that Section 38 of the Ceiling Act specifically confers on the appellate Court all the powers and privileges of a Civil Court and also says that the procedure for hearing and disposal of appeals laid down in the Civil P C is to be followed in hearing and deciding an appeal under this Act.

11 There is considerable merit in the contention of Sri V K S Chaudhary, learned counsel for the tenure-holder that the jurisdiction of this Court under Article 226 is to advance substantial justice and not to remedy a technical defect According to the learned counsel the delay caused in the filing of the appeal was for obvious reasons and on a consideration of the same it would be condoned and therefore, no useful purpose would be served if the matter is remanded for reconsideration of that application and decision of the appeal It was submitted that substantial justice has been done in the case after considering the material on record and, therefore even if there is any technical error or irregularity, this Court should not interfere I am inclined to agree with these contentions In Smt Hubrain v The Authorised Chief Settlement Commissioner AIR 1980 All 231 a Bench of this Court did not consider it necessary to decide the controversy whether the revision preferred by the opposite parties 2 to 4 is competent or not because it was found that by the order impugned the opposite party No 1 had done justice in the matter It was observed

"The order of opposite party No 1 is pre-eminently just and correct and we therefore decline to exercise our jurisdiction under Art 226 of the Constitution"

Similar was the position in Moin Uddin v Dy Director of Consolidation, AIR 1978 All 241 It was found that the order restoring the revision was against law but since it was conducive and more amenable to sense of justice, a learned Judge of this Court refrained from quashing it It is, thus, established that notwithstanding the right of getting an illegal order or an order passed without jurisdiction quashed, the remedy is discretionary The Supreme Court had occasion to observe in A M Allison v B L Sen, AIR 1957 SC 227 (at p 231)

"The High Court of Assam had the power to refuse the writs if it was satisfied that there was no failure of justice and in these appeals which are directed against the orders of the High Court in applications under Art 226, we could refuse to interfere unless we are satisfied that the justice of the case requires it"

In the instant case since, in my opinion, it cannot be said that substantial justice has not been done, I refrain to interfere in exercise of jurisdiction under Article 226 of the Constitution

12. Now there remains the question as to whether a time-barred appeal could be treated as cross-objection to the appeal filed by the other side subsequent to the filing of the time barred appeal There are two decisions of the Punjab High Court in this behalf to which my attention was invited by the parties In Smt Nripjit Kaur v Satinder Singh AIR 1955 Punjab 190, relying on a Full Bench decision of Lahore High Court in Labhu Ram v Ram Partap AIR 1944 Lahore 76, it was laid down (at p 191)

"If the respondent could appear on the day when the appeal is admitted and cross-object, is it not possible for him to ask after an appeal is admitted to treat his time barred appeal as cross-objection In my opinion, there is nothing in law which says to the contrary"

13 That was a Division Bench case In later case which has also been decided by a Bench, a different view has been taken In S M Singh v Punjabi University, AIR 1975 Punjab & Haryana 318 relying on the same aforesaid Full Bench decision of the Lahore High Court it has been observed (at p 319)

"According to this judgment, the cross-objections are preferred to an appeal which means that the appeal must have been filed prior to the filing of the cross-objections In the instant case, the claimant had filed his appeal be-

fore the State of Punjab and the Punjabi University filed their appeal, and, therefore, his appeal cannot be treated as cross-objections to the appeal of the Punjab State and the Punjabi University"

14 It would be seen that both these decisions rely on an earlier Full Bench decision of the Lahore High Court, but they have interpreted the same somewhat differently In S M Singh v The Punjabi University (supra) Nripjit Kaur's case (AIR 1955 Punj 190) has not been referred The present case however, is akin to S M Singh's case An attempt was made by Sri Chaudhary to distinguish this decision on the ground that the opinion expressed on the legal aspect is obiter because the appeal was considered on facts and it was found that it had no merits Be that as it may I need not pursue this question any further because in my opinion, as discussed above, cross-objection can be filed to an appeal arising out of proceedings under the Ceiling Act and though the time-barred appeal was filed prior to the filing of the appeal by the State of Uttar Pradesh, at best there was a procedural irregularity in treating it as a cross-objection and since substantial justice has been done, there is no justification to interfere under Article 226 of the Constitution

15. So far as the merits of the case are concerned, the findings recorded are based on the material on record and cannot be interfered with As for the contention that the Prescribed Authority set aside the order dated 28-1-1977 on the applications of Brindaban Das and Baleshwar Das without giving any notice to the State is concerned, the learned Standing Counsel cannot be allowed to agitate it because no such ground was taken in the grounds of appeal before the appellate Court. A copy of those grounds of appeal is on record Apart from that in para 6 (b) of the counter affidavit the respondent Brindaban Das stated that the order was passed after hearing the Naib Tahsildar (Ceiling) and, therefore, it would not be correct to say that the order was passed without giving any opportunity of hearing to the State of Uttar Pradesh

16. In the result, therefore Writ Petition No 1838 of 1979 is dismissed while Writ Petition No 11577 of 1980 is allowed and the impugned order of the District Judge, Etawah, dated 16-5-1979 is quashed In the circumstances I make no order as to costs

Order accordingly

1981 ALL. L. J. 862

M P MEHROTRA J

Debi Singh, Petitioner v State of U P and others, Respondents

Civil Misc Writ Petn No 6267 of 1980 D/- 15-7-1981

U. P Imposition of Ceiling on Land Holdings Act (1 of 1961), Sections 12A and 14 — Proceedings under Act — Tenure holder's choice regarding surplus land — He has right to revise his choice.

In Section 12-A there is nothing to suggest that it is not open to the tenure-holder to revise his choice But if due to the proceedings under Section 14 of the Act his rights have become extinguished then obviously he cannot be allowed to give a fresh choice Even if the proceedings under Section 14 have not taken place and yet there are cogent reasons for the Prescribed Authority for not accepting the revised choice then under Section 12-A the Prescribed Authority can reject the revised choice on the ground that it is not possible to accept the same in terms of Section 12-A However, the mere fact that a second choice has been given in revision of the first choice and the view that the law does not permit it to be done is not a good ground for rejecting the subsequent choice 1977 All LJ 375 and 1978 All LR (SOC) 92, Foll (Para 3)

Cases Referred: Chronological Paras

1978 All LR (SOC) 92 3
1977 All LJ 375 1977 All WC 407 3

R R Shivahare, for Petitioner, Standing Counsel, for Respondents.

ORDER:— This petition arises out of the proceedings under the U. P Imposition of Ceiling on Land Holdings Act.

2. The facts, in brief, are simple The petitioner is the tenure-holder and he was proceeded against under the Ceiling law It seems that he gave his choice regarding the surplus land at an earlier occasion on 20-6-1979 Subsequently, on 30-10-1979 the petitioner moved another application praying that he

wanted to revise his choice The said application was rejected by the Prescribed Authority and thereafter an appeal was filed and the same was dismissed by the appellate court by its judgment dated 7-4-1980, a certified copy whereof is on the record Now the tenure-holder has come up in the instant petition and in support thereof I have heard Sri R R Shivhare, learned counsel for the petitioner In opposition the learned Standing Counsel made his submissions

3 It seems to me that in view of the law declared by this Court in Bharat Singh v State of U P (1977 All WC 407) (1977 All LJ 375) and the Division Bench pronouncement in Meharban Singh v Sub Divisional Magistrate (1978 All LR (SOC) 92), the view of the appellate court and the Prescribed Authority is not correct Obviously, in Section 12-A there is nothing to suggest that it is not open to the tenure-holder to revise his choice It seems to me that unless there be some such difficulty as makes it not possible for the Prescribed Authority to accept the revised choice, the petitioner should have a right to revise his earlier choice by giving a fresh choice subsequently till such time his rights as a tenure-holder subsist in the land in dispute Of course, if due to the proceedings under Section 14 of the Act his rights have become extinguished then obviously he cannot be allowed to give a fresh choice Even if the proceedings under Section 14 have not taken place and yet there are cogent reasons for the Prescribed Authority for not accepting the revised choice, then under Section 12-A the Prescribed Authority can reject the revised choice on the ground that it is not possible to accept the same in terms of Section 12-A However, the mere fact that a second choice has been given in revision of the first choice and the view that the law does not permit it to be done is not a good ground for rejecting subsequent choice

4. Accordingly, I allow this petition and quash the judgment of the appellate court dated 7-4-1980 (Annexure 4) and the order of the Prescribed Authority dated 12-1-1979 (Annexure 3) and direct that the Prescribed Authority shall decide the petitioner's application dated 30-10-1979 on merits under Section [illegible] and [illegible] that if HY/HY/D501 01 SM \ DVT the same was legally not maintainable In the circumstances, there will be no order as to costs

Petition allowed.

1981 ALL L. J 863

N D OJHA, J

Shri Pal Jain and another, Petitioners v Raj Kumar Jain and others Respondents

Writ Petn No 8604 of 1979 D/- 13-7-1981

U P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act (13 of 1972), Sections 12 (1) (b) and 3 (g) — Accommodation allotted in name of a member of joint Hindu family, an employee — Another member living with allottee from inception of tenancy — Transfer of allottee — Such other member continuing occupation of premises — Allottee does not cease to occupy the accommodation because of his transfer.

A member of the joint Hindu family had been in occupation of the tenanted accommodation from the inception of the tenancy along with another member of the family an employee of the Reserve Bank of India, Agra Branch in whose favour the accommodation was allotted The rent was paid to the previous owner in the name of the employee even after his transfer from Agra to Delhi After the accommodation was purchased by the landlord the rent was deposited under Section 7 in the name of the tenant The landlord filed an application for allotment of the accommodation in their favour on the allegation that as the employee shifted from Agra to Delhi and permitted another member of the joint Hindu family to occupy the accommodation he would be deemed to have ceased to occupy the accommodation inasmuch as the member of the joint Hindu family was not a member of his family within the meaning of the said term contained in Section 3 (g)

Held that Section 12 (1) (b) is not attracted to the facts of the instant case even though retrospective in its operation What el (b) of Section 12 (1) contemplates is an action of a tenant subsequent to the commencement of the tenancy in allowing the accommodation let out to him or a part thereof

to be occupied by a person who is not a member of his family The said clause does not bring within its sweep even such persons who have been occupying an accommodation along with the tenant from the very inception of the tenancy as members of a joint Hindu family and not in their own rights or sub-tenants Section 12 (1) (b) does not contemplate that on the commencement of the Act the tenant should turn out from the house all such persons who are members of his joint Hindu family but are not included in the restricted definition of the term "family" contained in Section 3 (g) of that Act 1960 (U P) R C C 143 (FB), Distng

(Paras 4 and 5)

Cases Referred: Chronological Paras
1960 (U P) R C C 143 (FB) 3, 4, 5

Ashok Gupta and Shambhu Chopra, for Petitioners. Ashok Kare, Standing Counsel, for Respondents

ORDER:— The petitioners are the landlords of an accommodation which they assert to have purchased in the year 1965 They made an application in October, 1973 for allotment of the said accommodation in their favour on the allegation that this accommodation had been let out to one Sardar Mal Jain in the year 1956 when the predecessor-in-interest of the petitioners was its owner, that Sardar Mal Jain, who was an employee of the Reserve Bank of India, Agra Branch, shifted from Agra to Delhi in the year 1968 and permitted respondent No 1 to occupy the said accommodation and that in view of Section 12 (1) (b) of the U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U P Act 13 of 1972) Sardar Mal Jain will be deemed to have ceased to occupy the accommodation inasmuch as respondent No 1 was not a member of his family within the meaning of the said term contained in the definition clause in Section 3 (g) of U P Act 13 of 1972 The case of the petitioners was that their need for this accommodation was bona fide and since it was to be deemed to be vacant it may be allotted in their favour.

2. The application was contested by respondent No 1 inter alia on the ground that one Panna Lal had four sons, Phool Chand, Gulab Chand, Jawahar Lal and Man Chand, that Sardar Mal Jain was the son of Manik Chand whereas respondent No. 1 was the son of Jawahar Lal and that in the year 1956 when the accommodation in question was allotted to Sardar Mal Jain all the aforesaid persons constituted a joint Hindu family but the allotment order was passed in favour of Sardar Mal Jain inasmuch as he was in the service of the Reserve Bank of India, Agra Branch, at that time The case of respondent No 1 accordingly was that the accommodation in question had never been permitted to be occupied by him by Sardar Mal Jain within the meaning of Section 12 (1) (b) of U. P Act 13 of 1972 Indeed he had been in occupation thereof from the very inception of the tenancy as a member of the joint Hindu family He also asserted that the petitioners had sufficient accommodation at their disposal and their need was not at all bona fide After considering the evidence produced by the parties the Rent Control and Eviction Officer, respondent No 2, accepted the case of respondent No 1 and dismissed the application for allotment made by the petitioner A revision was filed by the petitioners against that order under Section 18 of U. P. Act 13 of 1972 which was dismissed by the Vth Additional District Judge, Agra, respondent No 3 It is these two orders which are sought to be quashed in the present writ petition.

3 Before dealing with the submissions made by counsel for the petitioners it will be useful to point out the findings recorded by respondent No 2 on the question as to whether the case was covered by Section 12 (1) (b) of U P Act 13 of 1972 It has been held by respondent No 2 that respondent No 1 had been occupying the accommodation in question right from 1956 when it was allotted to Sardar Mal Jain as a member of the joint Hindu family Reference has inter alia been made to relevant extracts of the Nagar Mahapalika, Agra, indicating that even Jawahar Lal, father of respondent No. 1 was recorded as the tenant of the accommodation in question in the tenants' column and after his death the name of respondent No 1 was recorded as such Several other documents have been relied on by the Rent Control and Eviction Officer in support of the aforesaid finding In regard to the bona fide need of the petitioners it has been held that the accommodation at their disposal in house Nos. 9/103 and 9/104 was sufficient for

their needs It was urged by counsel for the petitioners that in view of the decision of a Full Bench of this Court in Smt Keshar Bai v District Judge Mathura (1980 (U P) RCC 143) holding that Section 12 (1) (b) of Act 13 of 1972 was retrospective the impugned orders could not be sustained

4. Having heard counsel for the parties I find myself unable to agree with this submission Section 12 (1) (b reads as follows —

"12 Deemed vacancy of building in certain cases.—

(1) A landlord or tenant of a building shall be deemed to have ceased to occupy the building or a part thereof if—

(a)

(b) he has allowed it to be occupied by any person who is not a member of his family or

(c) "

What Cl (b) in my opinion, contemplates is an action of a tenant subsequent to the commencement of the tenancy in allowing the accommodation let out to him or a part thereof to be occupied by a person who is not a member of his family To me it appears that the said clause does not bring within its sweep even such persons who have been occupying an accommodation along with the tenant from the very inception of the tenancy as members of a joint Hindu family and not in their own rights as sub-tenants S 12 (1) (b) of U P Act 13 of 1972 does not contemplate that on the commencement of the said Act the tenant should turn out from the house all such persons who are members of his Joint Hindu Family but are not included in the restricted definition of the term "family" contained in Section 3 (g) of that Act The facts of Smt Keshar Bai's case are given in Paragraphs 2 and 3 of the report They clearly indicate that it was a case where persons who were not continuing to occupy the shops along with the original tenants from the very inception of the tenancy as member of a joint Hindu family were subsequently allowed to occupy the shops

5. In the instant case as seen above the Rent Control and Eviction Officer has accepted the case of respondent No 1 that he had been in occupation of the accommodation in question as a member of Joint Hindu Family along with Sardar Mal Jain right from the inception of the tenancy in 1956 when the said accommodation was allotted in the name of Sardar Mal Jain It has not been disputed by counsel for the petitioner that the rent of the accommodation in question continued to be paid to the previous owner in the name of Sardar Mal Jain even after his transfer from Agra to Delhi Counsel for the petitioners has himself pointed out that after the accommodation was purchased by the petitioners the rent has been deposited under Section 7-C of U P Act 3 of 1947 in the name of Sardar Mal Jain In view of the findings, referred to above, recorded by the Rent Control and Eviction Officer I am of opinion that Section 12 (1) (b) of U P Act 13 of 1972 is not attracted to the facts of the instant case even though retrospective in its operation as held in Smt Keshar Bai's case (1980 (UP) RCC 143) (FB) (supra)

6. It was then urged by counsel for the petitioners that the finding that respondent No 1 had been living in the accommodation in question right from the inception of the tenancy along with Sardar Mal Jain as a member of Joint Hindu Family was erroneous inasmuch as it was based on no evidence I find myself unable to agree with this submission either A copy of the affidavit filed by respondent No 1 before the Rent Control and Eviction Officer has been filed by the petitioners themselves as Annexure 6 to the writ petition Apart from the fact that respondent No 1 has substantiated his claim in this behalf in the said affidavit, Annexure A to that affidavit is a writing by Sardar Mal Jain himself dated 9th March, 1974 In this document Sardar Mal Jain has inter alia stated that the accommodation in question was let out by Bainath who was the then owner of the property in 1956 to Sarvasri Phool Chand, Gulab Chand, Jawahar Lal and Manik Chand but the accommodation was allotted in favour of Sardar Mal Jain as he was in the service of the Reserve Bank of India, Agra Branch at that time He has further stated that he was the son of Manik Chand Jain whereas respondent No 1 Raj Kumar Jain was the son of Jawahar Lal Jain A copy of the statement of respondent No 1 has also been filed as Annexure 8 to the writ

petition In his statement respondent No. 1 has specifically stated that he had been living in the accommodation in question right from 1956 as a member of the Joint Hindu Family In view of this clear evidence it cannot be said that the finding of the Rent Control and Eviction Officer was based on no evidence

7 Lastly it was urged that the finding recorded by respondents 2 and 3 that the need of the petitioners was not bona fide was also vitiated inasmuch as the evidence produced by the petitioners to prove their case in this behalf has not been considered by those authorities and they have just in one sentence stated that the accommodation at the disposal of the petitioners in the two houses referred to above was sufficient for their needs The Rent Control and Eviction Officer has while recording the said finding started by saying that on a consideration of the material on the record he was of the view that the accommodation at the disposal of the petitioners was sufficient It is true that no detailed discussion of the evidence produced is to be found in the two impugned orders However, I am not inclined to interfere with these findings on this technical ground inasmuch as it will serve no useful purpose When the accommodation in question is not available for allotment, Section 12 (1) (b) of U P Act 13 of 1972 being not applicable, the question of its allotment to petitioners does not arise even if for the sake of argument it may be assumed that their need is bona fide

8. In the result I find no merit in this writ petition It is accordingly dismissed but there will be no order as to costs

Petition dismissed

1981 ALL. L. J 866

S D AGARWALA, J

Laxmi Chand, Petitioner v 3rd Additional District and Sessions Judge, Mathura and others Respondents

Civil Misc Writ Petns. Nos 10208 and 10599 of 1980. D/- 22-5-1981

(A) U. P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Sec. 16 — Application by landlord for release of shop — Shop occupied by heirs of previous tenant — Court has no jurisdiction to consider bona fide need of landlord on basis of accommodation not actually vacant.

The bona fide need of a landlord cannot possibly be considered on the basis of an accommodation which is already occupied by another person, may be that the said person is a licensee, an unauthorised occupant or a tenant. This principle would, however, not apply to a case where a licensee, unauthorised occupant or tenant has been inducted by the landlord with a mala fide object of establishing bona fide need (Para 6)

(B) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Sec. 21 (1) (b), 4th Proviso — Eviction of tenant — Circumstances set up by tenant showing hardship that would be caused, not considered by authority — Order vitiated. (Para 7)

Prakash Gupta, for Petitioner; A Kumar for Respondents

ORDER :— These are two petitions directed against the judgment of the III Additional District and Sessions Judge, Mathura dated 10th November 1980 Briefly the facts giving rise to the present petitions are as follows:—

2. The property in dispute is a shop situate in Mathura Laxmi Chand is the landlord of the said shop Originally one Bubon Lal was the tenant but now his heirs Krishna Behari and Sri Narain are the tenants of the property The landlord filed an application for release on the ground that his son had passed M B B S examination and besides doing physician's work he also wanted to establish a pathological clinic with X-ray machine plant This application was contested by the tenant Initially the prescribed authority allowed the application and directed release of the premises in favour of the landlord Against the said judgment an appeal was filed by the tenant. The appellate court did not grant the stay order in favour of the tenant and consequently the possession of the property in dispute was handed over to the landlord during the pendency of the appeal in the court below. The appellate court also dismissed the appeal by an order dated 27th January, 1977. The order dated 27th January, 1977 was challenged by the tenant in writ petition No.

243 of 1977 This petition came up for hearing before U C Srivastava, J on 20th March, 1978 U C Srivastava, J allowed the petition, set aside the order dated 27th January, 1977 and remanded the case back to the District Judge to be decided in accordance with law and in the light of the observations made in the judgment After remand the IIIrd Additional District and Sessions Judge, Mathura by an order dated 10th November, 1980 allowed the appeal in part The room behind the shop was released in favour of the landlord while the shop on the main road was permitted to remain with the tenant Aggrieved by this decision the landlord filed writ petition No 10206 of 1980 while the tenant filed writ petition No 10599 of 1980 Since both the petitions challenge the same order and common questions of fact and law arise both the petitions were argued together

3 Learned counsel for the landlord has urged that the finding recorded in regard to the bona fide need is vitiated in law as the appellate court has taken into consideration the accommodation which is not actually vacant

4. Learned counsel for the tenants is also aggrieved by the order passed by the appellate authority and has urged that in spite of specific order passed by this Court on 20th March, 1978, the appellate court has not considered the circumstances which would establish that greater hardship would be caused to the tenants, in case the release application has been allowed In my opinion the submission made by the learned counsel for the petitioner in both the cases are well founded

5. In so far as the submission made on behalf of the landlord is concerned it has come in evidence that Ram Kumar is the brother of Laxmi Chand and he is a licensee of Laxmi Chand It is, therefore, clear that Ram Kumar is actually occupying the property The appellate authority while considering the bona fide need of the landlord has observed as follows —

"If these two rooms in possession of the said Ram Kumar were fit enough for his residence for quite a long time it is not conceivable why the same should not be fit enough for a dispensary or a clinic visited by patients only casually and that too for a short while It may also be noted that it is always desired that X-ray plants are kept in dark so that there may not be any trouble in screening and other works"

6 The bona fide need of a landlord cannot possibly be considered on the basis of an accommodation which is already occupied by another person, may be that the said person is a licensee, an unauthorised occupant or a tenant In case the accommodation is actually vacant then only the landlord's need could be disposed of on the basis of the said accommodation, but since the said accommodation is not actually available, the landlord's need cannot be disposed of on the basis of an imaginary vacancy Consideration of the room occupied by Ram Kumar would have been relevant in case for some reason Ram Kumar had vacated the premises Since admittedly Ram Kumar is residing in the rooms since much before the moving of the application for release, in my opinion the court below acted illegally and with material irregularity in the exercise of its jurisdiction in considering the bona fide need of the landlord on the basis of an accommodation not actually vacant This principle would however, not apply to a case where a licensee unauthorised occupant or tenant has been inducted by the landlord with a mala fide object of establishing bona fide need

7. While considering an application under Section 21 of the Act the authorities have to first consider whether the need of the landlord is bona fide or not and thereafter the authorities have to consider the comparative hardship of the landlord and tenant and thereafter to determine as to whom greater hardship would be caused in case the application for release is allowed From a reading of the impugned order it is clear that the circumstances set up by the tenants showing the hardship which would be caused to them have not been considered by the appellate authority at all In the circumstances, as I have already held above, this non-consideration of the case of the tenants vitiates the impugned order

8 Since the appellate authority has not considered remand order passed by this Court on 20th March, 1978, it is necessary that the appellate authority should properly consider all the questions involved in the case and there-

after record a finding on the basis of the relevant evidence

9. In the result, both the petitions are allowed The order of the appellate court dated 10th November, 1980 is quashed The case is remanded to the appellate authority for decision afresh in the light of the observations made in this judgment The parties are directed to bear their own costs

Petitions allowed

1981 ALL. L. J. 868

YASHODA NANDAN AND S J HYDER, JJ

Ayub Hasan and another, Petitioners v Zilla Parishad, Muzaffarnagar and others, Respondents.

Civil Misc Writ No 5075 of 1981, D/- 8-5-1981

(A) U. P. Kshettra Samitis and Zilla Parishads Adhiniyam (33 of 1961), Section 239 and S. 33 (v), Sch. II — Bye-laws in question relating disposal etc. of dead animals does not create monopoly in favour of anyone — It is not violative of Art. 19 (1). (Constitution of India, Art. 19 (1) (f).) 1981 All Civil Laws Journal 1 (FB) Followed.

(Para 4)

(B) U. P. Kshettra Samitis and Zilla Parishads Adhiniyam (33 of 1961), Section 239 and Sec. 33 (v), Sch. II — Zilla Parishad — Framing of bye-law regarding disposal of dead animals by Zilla Parishad — Gaon Sabha aggrieved by bye-law — Third party has no locus standi to challenge validity of bye-law by writ petition. (U. P. Panchayat Raj Act (26 of 1947), Sec. 16 and Rules framed thereunder Rules 145-A and 146-A). (Constitution of India, Art. 226).

(Para 8)

Cases Referred: Chronological Paras

1981 All Civil Laws Journal 1 (FB) 3

AIR 1975 All 135 3, 4

S Mahmood, for Petitioners.

HYDER, J.— Petitioner claims that he carries on the profession of skinning the carcasses of dead animals and also deals in their hides, bones, hoofs, horns and skins His contention is that he has been engaged in the said business from a long time and that the said business is the means of his livelihood. He is once in the Zila Parishad Muzaffarnagar has framed a bye-law No. 113/SKKIS-12/7 (78-80) published in the U P Government Gazette on 15th March 1980 He assails the validity of the said bye-laws and prays that writ of certiorari should be issued quashing the same

2. Learned counsel appearing for the petitioner has urged twofold ground in support of the relief claimed by the petitioner In the first place he submitted that the offending bye-law created a monopoly in favour of particular individuals and as such the petitioner shall be deprived of the opportunity to carry on his trade, profession and calling In short it is submitted that the bye-law offends the guarantee furnished by Article 19 of the Constitution The counsel next submitted that the power of regulating collection, removal and disposal of the carcasses of dead animals is vested under the U P Panchayat Raj Act and the Rules framed thereunder on the Gaon Sabha and the Zilla Parishad has no power to frame bye-laws on the subject

3. In so far as the first submission of the learned counsel is concerned it may be stated that a Division Bench of this Court in Jagatdhari v Zilla Parishad (AIR 1975 All 135) and a number of other cases had taken the view that bye-laws framed by the various Zilla Parishad which were before the Court in those cases created a monopoly in favour of one person. They were also of the view that the Kshetra Samiti and Zilla Parishad Adhiniyam and the bye-laws which were impugned before this Court did not furnish any guideline for controlling the activity of disposal of the carcasses and as such they imposed unreasonable restrictions on the rights of the petitioners before this Court This Court therefore held the said bye-laws to be invalid and inoperative The matter was reconsidered by a Full Bench of this Court in the case of Jagtu v. Zilla Parishad Gonda (1981 All. Civil Laws J 1). The Full Bench by a unanimous judgment reached a different conclusion and overruled the decision in Jagatdhari (supra) and other cases

4. Even on merits we find that in the instant case no monopoly is created in favour of anybody by the Zilla Parishad. Stating briefly the bye-laws inter alia provide that every owner of carc-

cass or any person who is in its possession shall remove the carcass without delay and in no case such time shall exceed six hours During this period the owner of the carcass shall remove it to a place specified either by the Zila Parishad or the Gaon Sabha for the purpose and if no such place has been specified to any other place which is at a distance of more than 500 meters from the residential area of the village and at a distance of not less than 200 meters of a public road lane or any other public place Certain other duties are also enjoined on the owner of the carcass to which we need not refer The bye-law further lays down that no person shall remove the carcass from any place within the rural area of the district or utilise it unless he has obtained a license provided by the bye-law The bye-law also lays down that the license fee for the local area of each Gaon Sabha shall be Rs 200/- per annum We have not been shown anything in the impugned bye-laws which has a tendency of creating a monopoly in favour of any particular individual In the case of Jagatdhari (AIR 1975 All 135) (supra) and other cases decided by this Court the bye-laws provided for grant of licence to the highest bidder The bidding was to be made for the whole district or part thereof The bye-law in the instant case is substantially different from the bye-laws considered in the case of Jagatdhari (supra) and other similar cases

5 The second contention advanced on behalf of the petitioner is equally unsubstantial Section 33 of the Zila Parishad Adhiniyam inter alia lays down that every Zila Parishad shall exercise and perform the powers and functions enmuerated in its six clauses Clause (v) of Section 33 provides that the Zila Parishad shall have all powers and functions which are specified in Part A of Schedule II Under clause (viii) of paragraph 3 of Schedule II Part A, one of the powers enumerated is "Regulation of offensive dangerous or obnoxious trades, calling or practices"

6. Section 239 confers on the Zila Parishad power to make by-laws Subsection (2) of Section 239 lays down that in particular and without prejudice to the generality of the power conferred by sub-section (1) a Parishad in the exercise of the said power may make any bye-laws described in the list After this sub-section various items in respect of which bye-laws may be made by the Zila Parishad are enumerated under headings A to H. Heading E is entitled "Offensive Trades" sub-clause (x) under this heading confers on the Zila Parishad power to frame bye-laws for any other purposes if a particular trade or calling is likely to cause public nuisance Under heading G it is inter alia provided that bye-laws may be framed prohibiting or regulating with a view to sanitation or the prevention of diseases any act which occasions or which is likely to occasion a public nuisance and for prohibition or regulation of which no provision is made under the heading Heading H of Section 239 deals with miscellaneous matters Clause (o) therefore lays down that bye laws may be framed for the destruction of unclaimed diseased or rabid dogs and noxious animals The preamble of the impugned notification shows that it has been issued by the Zila Parishad in the exercise of its powers under Section 33 and the different parts of Section 239 which have been referred to above It cannot therefore be doubted that the Zila Parishad had powers in ample measure under the Adhiniyam to frame the impugned bye-laws

7 Learned counsel however contended that Section 16 of the U P Panchayat Raj Act read with Rule 145-A and Rule 146-A of the Rules framed under that Act confer the power to frame bye-laws regarding disposal of dead animals on the Gaon Sabha alone

8 Now Section 16 of the Panchayat Raj Act enumerate the discretionary function of the Gaon Sabha A Gaon Sabha may or may not exercise the functions enumerated therein It is unnecessary to pursue the matter any further Section 256 of the Zila Parishad Adhiniyam lays down that should a dispute arise between a Parishad and Kshettra Samiti and any other local authority on any matter in which they are generally interested such matter shall be referred to the State Government whose decision shall be final In case the Gaon Sabha concerned in the instant case had been aggrieved by the bye-law framed by the Zila Parishad

st could ventilate its grievance before the State Government Petitioner has no locus standi to take up cudgels on behalf of the Zila Parishad before this Court

9 For the reasons discussed above we find no merit in this writ petition which is dismissed in limine

Petition dismissed

1981 ALL L J 870

R M SAHAI, J

Rakesh Petitioner v State of Uttar Pradesh and others Respondents

Civil Misc Writ Petns Nos 1625 and 1626 of 1980, D/- 2-1-1981

(A) U P Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 11 and U P Imposition of Ceiling on Land Holdings (Amendment) Act (20 of 1976), Sec 31 (2) and (3) — Applicability — Order determining surplus land made by prescribed authority under principal Act before 10th October, 1975 — Appeal — Amendment Act coming into force during pendency of appeal — Held, it was sub-sec (3) and not sub-section (2) that was applicable.

(Para 3)

(B) U P Imposition of Ceiling on Land Holdings Act (1 of 1961), Sec. 11 and U. P Imposition of Ceiling on Land Holdings (Amendment) Act (20 of 1976), Section 9 Proviso — Order determining surplus land under Principal Act before 10-10-1975 — Appeal — Amendment Act coming into force during pendency of appeal — Fresh notices issued in July 78 for redetermination of surplus land — Held, 1978 proceedings cannot be treated as continuation of old proceedings which came to an end by operation of law and could not be revived by invoking proviso to Section 9.

(Para 5)

H. S Nigam, for Petitioner, Standing Counsel, for Respondents

ORDER — Notices issued, under sub-section (3) of Section 31 of the U. P Imposition of Ceiling on Land Holdings (Amendment) Act 1976 (U. P Act No. 20 of 1976) on 18th July 78 for redetermination of surplus land were challenged as without jurisdiction because they were issued after two years from 10th October 1975 the date on which Ordinance No 31 was issued empowering prescribed authority to redetermine surplus land within two years of the aforesaid Act in cases where determination had been done prior to it Both the appellate and prescribed authority repelled the contention and held that petitioner's case was covered by sub-section (3) as the appeal against the order of prescribed authority determining surplus area of petitioner, under the principal Act, was abated The appellate authority held that as appeal was abated, sub-section (3) of Section 31 was not attracted as it applied only to those cases where surplus area was determined prior to 10th October, 1975 or the appeal was filed prior to this date which could not abate under sub-section (2) He further held that the proceedings were in fact for determination and not for redetermination under the newly added proviso to Section 9 by U P Act 20 of 1976

2. Before considering the legal question the circumstances in which the controversy arose may be noticed On 9th December, 1974 the prescribed authority decided the objection of petitioner filed under Section 10 (2) and determined the surplus area Against this order petitioner filed appeal and during pendency of appeal U P Imposition of Ceiling on Land Holdings Amendment Ordinance No 31 of 1975 was issued Sub-section (2) of Sec 27, provided for abatement of appeal preferred on or after 17th January, 1975 and pending immediately before commencement of the Ordinance This Ordinance was replaced by Act 20 of 1976 Sub-sections (2) and (3) of Section 31 read as under

"2 where an order determining the surplus land in relation to a tenure holder has been made under the principal Act before January 17, 1975 and the prescribed authority is required to redetermine the surplus land under Section 31, of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1974, then notwithstanding anything contained in sub-section (2) of Section 19 of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, every appeal under Section 13 of the principal Act or other proceedings in relation to such appeal, preferred against the said order, and pending immediately before the tenth day of October,

1975 shall be deemed to have abated on the said date

3 Where an order determining surplus land in relation to a tenure-holder has been made under the principal Act before the tenth day of October, 1975, the prescribed authority (as defined in the principal Act) may at any time within a period of two years from the said date, redetermine the surplus in accordance with the principal Act as amended by this Act whether or not any appeal was filed against such order and notwithstanding any appeal (whether pending or decided) against the original order of determination of surplus land"

3 Both the sub-sections deal with two different situations The former deals with abatement of appeals and clears the way for exercise of jurisdiction, in the latter, by abatement the finality of decisions by Prescribed Authority is taken away if Prescribed Authority is of opinion that redetermination of surplus area is required By sub-section (3) the Prescribed Authority is empowered to exercise such jurisdiction within two years from 10th of October 1975 that is the day on which Ordinance 2031 was issued Sub-section (2) by itself was not sufficient for initiation of any proceedings for redetermination of surplus area The appellate authority therefore committed an error in recording the finding that it was sub-section (2) of Section 31 which applied to the petitioner and not sub-section (3)

4 His finding on applicability of proviso to Section 9 also is not well founded It was added by Act 20 of 1976 and runs as under

"Provided that at any time after October 10, 1975, the Prescribed Authority, may, by notice, call upon any tenure-holder holding land in excess of the ceiling area applicable to him on the said date to submit to him within thirty days from the date of service of such notice a statement referred to in sub-section (1) or any information pertaining thereto"

5 It only empowers prescribed authority to issue notice to tenure-holder This has to be read along with Section 31 of Act 20 of 1976 That section confers jurisdiction to determine surplus area and the proviso lays down the procedure It does not entitle prescribed authority to call upon tenure-holder to furnish statement under Section 10 in proceeding initiated prior to Oct 1975 Before jurisdiction is exercised under this proviso case for redetermination has to be made out The appellate authority was not justified in treating the proceedings started in 1978 as continuation of old proceedings The earlier proceedings had come to an end by operation of law It could not be revised or continued in the proviso

6 Limitation for initiating action for redetermination has been provided in sub-section (3) of Section 31 It is two years from 10th October, 1975 As fresh notices for redetermination were issued in 1978 it was beyond time and therefore without jurisdiction

7. In the result this petition succeeds and is allowed The order passed by Additional District Judge and prescribed authority are quashed The petitioner shall be entitled to costs

Petition allowed

1981 ALL L. J. 871

(LUCKNOW BENCH)

M MURTAZA HUSAIN, J

Ashfaq Ahmed and others, Appellants v The State Respondent

Criminal Appeal No 64 of 1979 D/- 4-10-1980 *

(A) Criminal P C. (2 of 1974), Section 197 (1) — "Public servant not removable from his office save by or with the sanction of the Government". — Meaning of

Section, applies only to such public servants as are not removable from office save by or with the sanction of the State Government or of the Central Government In other words the bar of previous sanction imposed by the section will apply only when the public servant is removable from office by or with the sanction of the State Government or Central Government and not by any other authority A S Inspector and Police Constables do not come within the phrase "public servants not removable from his office save by or with the sanction of the

*Against judgment and order of R P Pande, 4th Addl S J, Unnao, D/- 15-1-1979

EY/EY/C376/81/AAJ/DHZ

Government" within the meaning of Section 197 (1) Hence sanction for their prosecution is not necessary AIR 1964 SC 269, Rel on (Para 12)

(B) Evidence Act (1872), Sec. 9 — Witness identifying accused not known to him for first time in court — Absence of test identification parade — Value of evidence of such witness. (Criminal P. C (1974), S. 162).

Where a witness identifies an accused, who is not known to him, in the court for the first time, his evidence is absolutely valueless unless there has been a previous test identification parade to test his power of observation, because the idea of holding test identification parade under Section 9 is to test the veracity of capability to identify an unknown person whom the witness may have seen only once AIR 1979 SC 1127 Followed (Para 13)

The cases wherein statements of the witnesses fixing the identity of an accused for the first time in Court are disbelieved are those where, apart from the ipse dixit of the witnesses, there is nothing also to fix the identity of the accused persons There, it is established by the admissions of the accused made in the trial Court, and by the relevant entries of the general diary of P S that the accused were the only policemen who could possibly participate in the occurrence The participation of the accused in the occurrence cannot be doubted if the eye-witnesses examined by the prosecution are believed and it is held that the occurrence had taken place in the manner alleged by the prosecution (Para 14)

(C) Evidence Act (1872), Sections 3, 154 — "Hostile witness" — Testimony of — Worthiness how to be judged.

After having been declared hostile the statement of a witness does not cease to remain a part of the record and it can be judged by the Court upon its own value and can be relied upon if it has any worth AIR 1976 SC 294 and AIR 1979 SC 1848, Followed (Para 16)

(D) Penal Code (1860), Sec. 218 — Conviction under — Entry made in General Diary of A. S. I showing that he was incorrectly prepared — If contained wrong facts mentioned in that entry in order to suppress crimes committed by policemen at time of occurrence — Conviction of A. S. I. sustained. (Para 23)

(E) Criminal P. C. (1974), Sec 197 (1) — "While acting or purporting to act in the discharge of his official duty" — Meaning of.

Forming of unlawful assembly for extracting confession, beating of persons or looting of property by police officers during the course of investigation, cannot be said to be an act committed by them while acting or purporting to act in discharge of their official duties (Para 12)

Cases Referred: Chronological Paras

AIR 1979 SC 1127 1979 Cri LJ 706 13
AIR 1979 SC 1848 1979 Cri LJ 1374 16
AIR 1976 SC 294 1976 Cri LJ 295 16
AIR 1964 SC 269 1964 (1) Cri LJ 161 12

S D Misra, for Appellants; Badri Prasad, for the State

JUDGMENT:— The six appellants of this appeal, namely, Ashfaq Ahmad, Madan Pal, Sheo Mohan Mishra, Ganga Ram, Ram Kumar and Ram Bahadur Singh have been convicted under Sections 147, 325/149 (two counts), and 323/149 I P. C. by the IV Additional Sessions Judge, Unnao They have been awarded six months' R. I under Section 147, I P C. 3 years' R I and a fine of Rs 100 on one count and two years' R. I. and Rs. 100/- as fine on the other count under Section 325/149, I P C. and 6 months' R. I under Section 323/149, I P C Ashfaq Ahmad has been further held guilty under Section 218, I P C and awarded two years' R I. Different sentences of each appellant have been ordered to run concurrently Three other persons, namely, Gulab Singh, Ishwar Din Singh and Chandrika were also facing their trial in the court below along with the appellants. They were held not guilty of the charges framed against them and they have been acquitted by the trial Judge

2. There is a police station in the district of Unnao known as Fatehpur Chaurasi. Ashfaq Ahmad appellant No 1 was posted to that police station as A. S. I. at the time of occurrence whereas the other five appellants were posted there as constables. One of the acquitted accused Gulab Singh was the Station Officer and the other acquitted

accused Ishwar Din was posted as Head Constable at that police station when the occurrence took place Village Mundaha lies within the circle of the said police station and is at a distance of about four miles from there Babu Lal P W 1, Shitla Prasad P W 2, Sukhdeo Prasad P W 3 and Surja P W 8 are residents of that very village Nanha, who lost his life in the occurrence complained of was a son of Surja He was mostly residing at Kanpur but had undisputedly come to his village sometime before the occurrence and was staying with his father at the time of occurrence One Chheda is a real brother of Surja P W 8 Phool Chand P W 4 belongs to another village He is the brother-in-law of Chheda At the time of occurrence he was staying at Chheda's house as he had come to invite him in connection with some function which was going to be held at his house

3 It has not been disputed before me that at 3 30 p m on 4-2-1976 Chandrika, an acquitted accused, lodged a report under Sections 147, 148, 322 and 364 I P C against Nanha deceased, Phool Chand, Chheda and four others at P S Fatehpur Chaurasi Investigation of that case was entrusted to A S I Ashfaq Ahmad appellant and he immediately left for Mundaha along with the other five appellants At 10 30 p m in the same night the aforesaid police party returned back to the police station along with three persons on a bullock cart who had injuries on their person They were Nanha deceased, Chheda and Phool Chand Entry about the return of the police party to the police station was made by Ashfaq Ahmad appellant at report No 27 in the General Diary of that police station which original general diary is on record Ex Ka, 11 is its relevant entry At about 3 O'clock in the same night Nanha died in the lock-up of P S Fatehpur Chaurasi Information was sent to Superintendent of police and District Magistrate, Unnao A 1st class Magistrate namely Sri Dinesh Chandra Misra was deputed for inquest proceedings He prepared inquest report Ex Ka 18 and other relevant papers Autopsy of Nanha was held by Dr B R Sabberwal, Dy C M O Unnao on 6-2-1976 He found 18 ante-mortem injuries of blunt weapon upon the dead body of Nanha A large number of bones of the deceased were found fractured under some of the external injuries In the opinion of Dr Sabberwal the deceased had died as a result of multiple blunt weapon injuries inflicted upon different parts of his body in his lifetime

4 The prosecution case is that when the police party, comprising of the six appellants, reached village Mundaha they forcibly entered into the house of Surja P W 8 They beat him and took away a 'Chadar' and 'Saari' from his house They also caught hold of Surja's son Nanha and gave him a merciless beating Confession about his involvement in some deceity was attempted to be extracted from him but he made no such confession The appellants then entered into Chheda's house and caused injuries to him and Phool Chand The injuries inflicted by the appellants upon the body of Nanha Chheda and Phool Chand had made them unable to walk. They were then loaded on a bullock cart and were taken to P S Fatehpur Chaurasi In the entry about the arrival of the police party, along with the injured, at the police station made by A S I Ashfaq Ahmed (Ex ka 11) false entries were made by him to indicate that Nanha was beaten by Chandrika in the incident of 11 a m about which a report was lodged by him at the police station at 3 30 p m and Phool Chand and Chheda had received injuries during their arrest by the police party

5 The prosecution also alleged that at the police station Nanha was further beaten by S I Gulab Singh and Head Constable, Sheo Mohan Misra but that part of the prosecution story was not accepted by the trial Judge

6 When post-mortem examination report relating to Nanha was received by the police, the Circle Officer, namely K L Pandey directed a case to be registered under Section 302 I P C A case was accordingly registered at report No 19 of the general diary of P S Fatehpur Chaurasi on 7-2-1976 which is Ex ka 7 Chheda and Phool Chand had already been sent to jail Surja got his injuries examined at the District Hospital, Unnao by Dr Sudhir Baipai in the noon of 6-2-1976 Four visible blunt weapon injuries were found on his person though he was also complaining

of pain in his body here and there According to Dr Bajpai injuries of Suria were about 2 days old

7 The case registered against the appellants was successively investigated by Inspector, R S Garg P W 10 and Dy S P O P Singh P W 11 After conclusion of investigation the six appellants and three acquitted accused were charge-sheeted

8 The appellants admitted that they had gone to Mundaha after the registration of case on the basis of Chandrika's report whose investigation was entrusted to A S I Ashfaq Ahmad They also admitted that they had brought Nanha Chheda and Phool Chand injured to the police station on a bullock cart and had reached there at 10 30 p m and entry Ex ka 11 was made in the general diary by Ashfaq Ahmad The alleged assault of Nanha Suria, Phool Chand and Chheda was denied by the appellants They suggested that Phool Chand and Chheda received minor injuries during their arrest and Nanha had received injuries in the morning incident A S I Ashfaq Ahmad maintained that correct facts were noted by him in Ex ka 11 The appellants suggested that they were falsely implicated as some of their officers were displeased with them A private medical practitioner of Fatehpur Chaurasi, namely Dr Sattar Ali was examined in defence to prove that the police had called him to the police station in the night of 4/5 2 1976 to attend to three persons who were in the lock-up

9. Besides medical and other formal evidence the prosecution relied upon the testimony of Babu Lal P W 1 Satia Prasad P W 2 Sukhdeo Prasad P W 3 Phool Chand P W 4 and Suria P W 8 Babu Lal and Sukhdeo Prasad did not support the prosecution case as they did not fix the identity of the policemen who had taken the three injured to the police station on a bullock cart though they stated that policemen had taken Nanha, Chheda and Phool Chand to the police station on a bullock cart. Sukhdeo Prasad P W 3 did not state about the assault of the alleged victims by the policemen, though he stated that the police party had come to the village and interrogated Nanha and had taken Nanha Phool Chand and Chheda on a bullock cart to the police station. The remaining two witnesses, namely, Phool Chand and Suria fully supported the prosecution case The learned Sessions Judge believed them and passed the order under appeal

10. Two technical pleas have been raised on behalf of the appellants and I would like to dispose the same of before taking up the prosecution evidence

11. It has been, firstly, contended that because all the six appellants were public servants, so their prosecution in the case under appeal, without sanction of the Government as prescribed by S 197 Cr P C was illegal

12 Section 197 (1) Cr P C lays down that when any persons who is or was a Judge or Magistrate or a public servant not removable from his office, save by or with the sanction of the Government, is accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction of the Government, Central or State as the case may be, in whose employment the accused was at the time of the commission of the alleged offence This section applies only to such public servants as are not removable from office save by or with the sanction of the State Government or of the Central Government In other words the bar of previous sanction imposed by the section will apply only when the public servant is removable from office by or with the sanction of the State Government or Central Government and not by any other authority While interpreting the phrase 'public servant who is not removable from his office save by or with the sanction of a State Government' occurring in Section 197 (1) Cr P C, the Supreme Court has laid down in Nagraj v. State of Mysore (AIR 1964 SC 269) that the Inspector General of Police can dismiss a Sub-Inspector who is a police officer below the grade of Assistant Superintendent and, therefore, no sanction of the State Government for the prosecution of the Sub-Inspector was necessary even if he had committed an offence while acting or purporting to act in the discharge of his official duty. Ashfaq Ahmad appellant was thus not a public servant removable from his office, save by or with the sanction of the State Government, for the purposes of Section 197 (1) Cr. P. C.

The other five appellants were only police constables removable by the Sundt of police and were not public servants removable from office save by or with the sanction of the State Government The six appellants, therefore, do not come within the category of public servants whom Section 197 (1) Cr P C protects It is also important to note that forming of unlawful assembly for extracting confession beating of persons or looting of property by police officers during the course of investigation, cannot be said to be an act committed by them while acting or purporting to act in discharge of their official duties I am therefore, of the opinion that sanction of the appellants under Section 197 (1) Cr P C was not at all necessary for their prosecution in the present case

13 The second technical plea raised by the learned counsel for the appellants is that all the eye-witnesses, including Phool Chand and Surja, conceded in the witness-box that they did not know the appellants since before the occurrence and that they had, for the first time seen them at the time of occurrence It was contended that in this state of affairs the investigating agency ought to have arranged a test identification of the appellants, and had the witnesses succeeded in picking them up in the test parade sanctity might have been attached to their testimony and in the absence of the test identification the naming of the appellants or their identification by the witnesses in the trial court could not attach any credit to their testimony It is undoubtedly true that where a witness identifies an accused, who is not known to him in the court for the first time his evidence is absolutely valueless unless there has been a previous test identification parade to test his power of observation, because the idea of holding test identification parade under Section 9 of the Evidence Act is to test the veracity of the witness on the question of capability to identify an unknown person whom the witness may have seen only once (Vide Kanan v State of Kerala AIR 1979 SC 1127)

14 In the present case however, the failure of the investigating agency to arrange a test identification of the appellants cannot damage the prosecution case because all the six appellants admitted that when the case was registered at P S Fatehpur Chaurasi on the basis of Chandrika's report investigation of that case was entrusted to appellant No 1 and he, along with the other appellants had gone to village Mundaha for investigation and from there Nanha Phool Chand and Chheda were brought by them in injured condition The relevant entries of the general diary of P S Fatehpur Chaurasi which are on record show that none except the six appellants had gone to Mundaha for investigation of the case registered on Chandrika's report If under these circumstances the taking place of the occurrence is accepted, none except the six appellants can be said to be the police personnel which was involved in it There can thus be no confusion about the identity of the policemen who were involved in the occurrence complained of The cases wherein statements of the witnesses fixing the identity of an accused for the first time in court are disbelieved are those where, apart from the ipse dixit of the witnesses there is nothing else to fix the identity of the accused persons In the present case it is established by the admissions of the appellants made in the trial court and by the relevant entries of the general diary of P S Fatehpur Chaurasi that the appellants were the only policemen who could possibly participate in the occurrence In these particular circumstances of the case I am of the opinion that there can be no confusion about the participation of the appellants in the occurrence if the eye-witnesses examined by the prosecution are believed and it is held that the occurrence had taken place in the manner alleged by the prosecution

15 Coming to the direct evidence of the occurrence, it has already been remarked above that Babu Lal, Sukhdeo Prasad Shitla Prasad, Phool Chand and Surja are the five eye-witnesses examined by the prosecution in the trial court

16 Babu Lal P W 1 stated that at 2 or 3 p m on the day of occurrence he saw policemen taking Nanha, Chheda and one more person on a bullock cart towards the police station He gave the number of policemen to be six, though he refused to fix the identity of the policemen in the witness-box He was then declared hostile The settled view of the Supreme Court with respect to

the worth of a hostile witness is that after having been declared hostile the statement of a witness does not cease to remain a part of the record and it can be judged by the court upon its own value and can be relied upon if it has any worth (Vide Sat Paul v Delhi Administration, AIR 1976 SC 294 and Syed Akbar v State of Karnataka, AIR 1979 SC 1848) Thus viewed, the statement of Babu Lal at least proves that six policemen had taken three persons including Nanha and Chheda on a bullock cart to the police station at the alleged time

17 Shitla Prasad P W 2 simply followed the foot-steps of Babu Lal His statement is also helpful to the prosecution only to the extent indicated above

18. Sukhdeo Prasad P W 3 identified the six appellants in the trial court as the policemen who had taken Nanha, Chheda and a relation of Chheda on bullock cart to the police station He further stated that he had seen Ashfaq Ahmad interrogating Nanha, though he did not support the prosecution case about assault of Nanha, Chheda and Phool Chand before him

19 Phool Chand P W 4 and Suria P W 8 have fully supported the prosecution case According to them the six appellants had at first entered into the house of Suria and had beaten him and Nanha and thereafter they entered into the house of Chheda and beat him and Phool Chand and then they took Nanha Chheda and Phool Chand in injured condition on a bullock cart to the police station

20. Medical examination of Chheda and Phool Chand was not arranged by the police It was however noted in the general diary Ex ka 11 by Ashfaq Ali and appellant himself that there were injuries on the person of both of them It can, therefore, not be disputed that Chheda and Phool Chand had received injuries in the occurrence, When there is direct evidence on record to prove that they were beaten by the police there is no justification to hold that they received injuries while resisting their arrest Phool Chand being an injured witness, his statement inspires confidence Similar was the case with Suria P W 8 He gave out in the police station to the police and the medical evidence lent support to their statements [illegible] ber of blunt weapon injuries at the time of occurrence, one of which was grievous Suria is also thus an injured witness Mere relationship of Phool Chand and Suria inter se or with Chheda and Nanha cannot discredit their testimony. The autopsy report of Nanha deposed, which is on record, shows that merciless beating of Nanha was done by the police party. According to the prosecution case Nanha was also beaten at the police station. That story was disbelieved by the trial court and rightly so, because in the general diary entry Ex. ka. 11 though the injuries of Nanha have been described only at serial Nos 1 to 8 yet a careful scrutiny of those injuries would reveal that the same cover all the 18 injuries which were found upon the dead body of Nanha by Dr Sabberwal It means that the entire beating was given to Nanha at the time of occurrence A. S I Ashfaq Ahmad appellant was also investigating a dacoity case at the time of occurrence. Since Nanha was a new arrival to the village from Kannur it appears that Ashfaq Ahmad suspected his hand in that dacoity, and on that account subjected him to severe beating and third degree method The said injuries of Nanha give full support to the statements of Phool Chand and Suria P. Wc Slight confusion made by Phool Chand or Suria about the exact time of the occurrence cannot discredit their testimony when it is admitted by the appellants themselves that after the registration of the case on the basis of Chandrika's report they had immediately rushed to Mundaha and had brought Nanha, Chheda and Phool Chand in injured condition to the police station at 10 30 p m. The time of the occurrence being thus undisputed any confusion about it in the statements of Phool Chand and Suria cannot belie their testimony on merits.

21. The defence filed certified copies of the report of Chandrika and Munni Lal but that evidence is of no avail to the appellants because their injuries related to the morning incident about which Chandrika had lodged a report at P S Fatehpur Chaurasi at 3 30 p m on 4-2-1976. It is true that the appellants had no common object to commit murder of Nanha, and he has died as a result of simple and grievous injuries received by him when attempt was made by the appellants to extract confession from him. On that account the learned

Sessions Judge has rightly held the appellants guilty only under Section 325/149 I P C and not for committing his murder or culpable homicide amounting to murder

22 After fully considering the statements of Phool Chand and Surja P Ws I am of the opinion that their statements inspire every confidence, and the same read with the statements of other three witnesses, the medical evidence of the injuries of Surja and Nanha, the entry of general diary, Ex ka 11 and, the admissions of the appellants themselves, leave no room for doubt that after reaching Mundaha in connection with the investigation of case registered on the basis of Chandrika's report the six appellants suddenly formed an unlawful assembly in order (to commit) a dacoity and for causing simple and grievous hurt to him and also to Surja, Phool Chand and Chheda and in prosecution of the common object of the said assembly they caused one grievous hurt to Surja, several grievous injuries to Nanha and a large number of simple injuries to Nanha, Surja Phool Chand and Chheda and Nanha succumbed to his injuries in the same night The appellants have therefore, been rightly convicted by the trial Judge under Section 147 Indian Penal Code and also on two counts under Section 325/149 IPC and, on one count under S 323/149, IPC

23 A perusal of entry Ex ka 11 made in the general diary by A S I Ashfaq Ahmad appellant No 1, shows that it was incorrectly prepared by him and wrong facts were mentioned by him in that entry in order to suppress the crimes committed by the appellants at the time of occurrence He has, therefore, been rightly convicted under Section 218 I P C

24. As regards sentences of the appellants, it is true that they showed extreme high-handedness in assaulting Nanha deceased and three others by means of blunt weapons but we cannot lose sight of the fact that it was just an over-zeal on the part of the appellants while they were busy in investigation of different crimes, that they indulged in the said high-handedness The evidence on record does not show what specific role was played by each appellant in assaulting Nanha deceased and the other three victims Considering all these circumstances I am of the opinion that a sentence of two years' R I without any fine on each count under S 325/149 I P C would be adequate punishment for each appellant Other sentences awarded to the appellants by the trial court do not call for any interference by this court

25 The appeal is thus dismissed The conviction of the appellants ordered by the trial court for different offences is upheld The sentence of three years' R I on one count under Section 325/149 I P C awarded to the appellants by the trial court is reduced to two years' R I The fine of Rs 100 awarded to each appellant on each of the two counts under Section 325/149 I P C is set aside In all other respects the order of the trial court is held intact Different sentences of the appellants shall run concurrently Fine, if already paid by them, shall stand refunded The appellants are on bail They shall surrender forthwith to undergo their aforesaid sentences The C J M Unnao shall report compliance to this court within six weeks

Appeal dismissed

1981 ALL L J 877

(LUCKNOW BENCH)

S C MATHUR, J

Radhey Shyam and others, Petitioners v Ram Kishan Das and another, Opposite Parties

Writ Petition No 2299 of 1976, D/-15-2-1980

U P Zamundari Debt Reduction Act, 1952 (15 of 1953), Sections 8 and 4 — Debt reduced under Section 4 — Can be realised only from three-fourths of compensation and three-fourths of rehabilitation grant (U P. Encumbered Estates Act (25 of 1934), S 14 (7)).

The use of the term "secured debt" in Section 3 (1) and Section 4 (1) makes it clear that the provisions of the Act apply only to secured debts It is also obvious that the term "secured debt" in Section 4 (1) has been used to denote the nature of the original transaction of debt and not the nature of the debt as it came to be under the decree passed under Section 14 (7) of the U P Encumbered Estates Act 1934 Sub-section (1) of Section 8 is subject to sub-section (2) Sub-section (1) provides for realization

of the "decree relating to secured debt passed in any suit to which this Act applies" Sub-section (2) refers to the reduced amount found under Section 4 or 4 as respects mortgaged estate Sub-section (1) therefore relates to that portion of the secured debt which is not related to estate and which has not been reduced under the Debt Reduction Act In view of the provisions contained in cls (a) and (b) of sub-s (1) of S 8 the compensation and the rehabilitation grant payable in respect of the mortgaged estate can be proceeded against to the extent of three-fourths only for recovery of such debt, that is one-fourth of the compensation and one-fourth of the rehabilitation grant is exempted from being proceeded against Cl (b) makes it clear that the decree can be executed against other properties of the debtor without the restriction of any limit such as is prescribed in respect of compensation and rehabilitation grant Thus is obvious from the use of the words "be also executable, in addition to and without prejudice to every other remedy to which decree-holder may be entitled under the decree or law for the time being in force" Sub-section (2) of Section 8 on the other hand relates to that portion of the secured debt which is related to estate and which has been reduced either under Section 3 or under Section 4 of the Act Such a debt can be recovered only from the compensation and rehabilitation grant and from no other property Thus is obvious from the use of the words "shall not be legally recoverable otherwise than out of the compensation and rehabilitation grant." In view of this position it is clear that the amount of debt reduced under Section 4 of the Debt Reduction Act can be realized only from three-fourths of the compensation and three-fourths of the rehabilitation grant payable in respect of the estate This disability will not attach to other debts which are not reduced under the provisions of Debt Reduction Act The order of the Board of Revenue so far as it holds that the secured debt reduced under Section 4 can be recovered from properties other than compensation and rehabilitation grant is obviously erroneous and deserves to be quashed 1970 All LJ 1104 (SC). Distinguished. (Paras 10, 13, 16)

Cases Referred: Chronological Paras

1970 All LJ 1104; AIR 1971 SC 678 4, 5, 16

K B Sinha, for Petitioners, S M Fakhruzzman, for Opposite Parties

ORDER — This petition has arisen from the proceedings for liquidation of debt under the provisions of U P Encumbered Estates Act, 1934 The petition calls for interpretation of Section 8 of the U P Zamindari Debt Reduction Act, 1952 (U P Act No XV of 1953) The petition has arisen in the circumstances hereinafter indicated

2. One Smt. Gulab Kunwar was the proprietor of eight annas share in village Maura, Tehsil and district Lucknow On 19th December, 1924 she mortgaged this eight annas share to Debi Dass — predecessor-in-interest of the petitioners Two annas out of this eight annas share was sold in execution of a decree against Smt Gulab Kunwar and the mortgage security was thus reduced to six annas only On 26th July, 1927 Debi Dass mortgaged his mortgagee rights to opposite party No. 1 for the consideration of Rs 22,000/ Opposite party No. 1 filed Suit No 55 of 1931 on the basis of this mortgage deed The suit was decreed on 14th September, 1931 for the sum of Rs 29,000/- together with costs and future interest. On 9th July, 1932 the preliminary decree dated 14th September, 1931 was made absolute Opposite party No 1 had brought another suit, being Suit No 61 of 1934 which was decreed for recovery of Rs 9,271-15-6 together with costs and future interest In the year 1934 the U P Encumbered Estates Act, 1934 (U P Act No XXV of 1934) was passed The Act came into force with effect from 30th April, 1935 After the enforcement of this Act, Debi Dass the judgment-debtor in the suits hereinbefore referred to made an application under Section 4 of the Encumbered Estates Act This application was registered as Encumbered Estates Case No. 3 of 1935 Opposite Party No 1 preferred his claim in this case which was based on the two decrees hereinbefore mentioned The Special Judge constituted under the Encumbered Estates Act passed a decree on 17th September, 1941 in favour of opposite party No 1 for the sum of Rs. 38,000/- together with costs and pendente lite and future interest at 3% relating to the secured debt and for the sum of Rs 5,104-00 together with costs and pendente lite and future interest at 3% in respect of the

simple money decree Opposite party No 1 under this order, was treated as a creditor of class IV On 26th August 1950 Debi Dass died leaving petitioners as his heirs and legal representatives The liquidation proceedings in respect of the decree passed on 17th September, 1941 were held up pending passage and enforcement of U P Zamindari Abolition and Land Reforms Act and U P Zamindari Debt Reduction Act. The proceedings were reopened on 14th March, 1956 and the petitioners were substituted in place of Sri Debi Dass deceased Before the decree could be satisfied Zamindari was abolished in the State of U P through U P Zamindari Abolition and Land Reforms Act, 1950 The State Government issued notification under Section 4 of the Act and the estate which was the subject matter of mortgage vested in the State Then followed the passing of the U P Zamindari Debt Reduction Act, 1952 (U P Act No XV of 1953) by the State Legislature This Act provided for the scaling down of the decreed as well as non-decreed debts of the former intermediaries whose estates had vested in the State under the provisions of U P Zamindari Abolition Act Section 4 of the Act dealt with the reduction of the debt after a decree had already been passed in respect thereof This provision was applicable to the debts in question and accordingly the petitioners applied for reduction and their case was registered as Case No 65 of 1965 Through the application made under Section 4 of the Act the petitioners claimed reduction of secured as well as unsecured debts They also claimed adjustment of amount allegedly paid to Debi Dass towards satisfaction of the decree On 25th May, 1966 the Special Judge by his decree reduced the debt so far as it related to the mortgage to Rs 16,395/- The decree for the unsecured debt was not reduced The special Judge did not award any interest with effect from 1st July 1952 Against this reduction opposite party No 1 filed Civil Revision No 217 of 1956 in this Court which was dismissed on 6th Sept 1966 The decree as reduced by order dated 25th May 1966 was sent to Liquidation Officer for liquidation of the debts under Section 19 of the U P Encumbered Estates Act On 27th July, 1966 the petitioners moved an application before the Liquidation Officer claiming that Sri Debi Dass, their predecessor-in-interest, had paid Rs 3446/- to opposite party No 1 between 1932 and 1944 and the said amount was liable to be adjusted against the unsecured debt, it was further pleaded that the secured debt could be realized only out of the compensation and rehabilitation grant to the extent of 3/4th as provided under Section 8 (2) of the Debt Reduction Act and the balance if any, could not be realised out of other properties of the petitioners The Liquidation Officer found payment to the extent of Rs 3198/- only instead of Rs 3446 00, as proved and allowed adjustment for the same After allowing the adjustment he found the balance amount of the unsecured debt as Rs 913 97 He also accepted the petitioners' plea that the secured debt could be realised only out of the compensation and rehabilitation grant to the extent of 3/4th and thereupon the decree was to be treated as fully satisfied and discharged Against the order of the Liquidation Officer opposite party No 1 preferred appeal which was partly allowed by the Additional Commissioner, Lucknow Division, Lucknow by his order dated 11-5-1970 The Additional Commissioner enhanced the balance amount of the unsecured debt to Rs 4284 00 instead of Rs 913 97 determined by the Liquidation Officer He further confirmed the order of the Liquidation Officer regarding the secured debt Aggrieved by this decision the opposite party No 1 preferred revision before the Board of Revenue who allowed the same by order dated 25th May, 1976 (Annexure No 4) While allowing the revision of opposite party No 1 the Board of Revenue held that the debts in question could be realized from property other than the mortgaged property of the debtors (petitioners) It was also held that the petitioners were entitled to adjustment of the amounts paid to opposite party No 1 although the same had not been certified With these observations the case was remanded to the Liquidation Officer for liquidating the debts in accordance with the observations made by him

3. The above order of the Board of Revenue has been challenged by Sri K B Sinha, learned counsel for the petitioners with these pleas In view of Section 8 (2) of the U P Zamindari

Debt Reduction Act, the amount of the decree, so far as it relates to secured debt, can be realized only from the compensation and rehabilitation grant to the extent of 3/4th and if after such realization any balance remains the same cannot be recovered at all

4 The above contention of Sri K B Sinha was countered by Sri S M Fakhruzaman learned counsel for opposite party No 1 who argued that the decree that was passed on 17th September, 1941 under Section 14 (7) (b) (i) of the Encumbered Estates Act was a simple money decree and the amount due thereunder could not be treated to be "amount as respects mortgaged estates " so as to attract sub-section (2) of Section 8 of the Zamindars' Debt Reduction Act The learned counsel further argued that there was no provision in the Encumbered Estates Act under which the decree was being liquidated, prohibiting recovery of the decretal amount from properties other than the compensation and rehabilitation grant and therefore the amount of the secured debt could be recovered from the said other properties also In support of his contention the learned counsel relied upon (AIR 1971 SC 1678), (1970 All LJ 1104) Mst Jamshed Jahan Begum v Lakhan Lal

5 The learned counsel for the petitioners however, urged that the judgment in Jamshed Jehan Begam's case (supra) had no application to the facts of the present case inasmuch as in the said case their Lordships were not considering the provisions of Debt Reduction Act but were considering the provisions of the Encumbered Estates Act under which there was no prohibition against realization of the decree from properties of the ex-intermediary other than compensation and rehabilitation grant The learned counsel argued that sub-section (2) of Section 8 applied only to those cases in which determination of the reduced amount had been done either under Section 3 of the Act or under Section 4 and that in Jamshed Jahan Begum's case (1970 All LJ 1104) (SC) (supra) there was no determination of the reduced amount under either of the two sections. Sri Sinha further pressed that the term "as respects mortgaged estate" used in sub-section (2) of Section 8 referred to the nature of the original transaction and not to the nature of the decree passed Learned counsel also pointed out that the material question that cropped up for consideration before their Lordships was whether bhumidhari rights were proprietary rights so as to be beyond the reach of the Collector in view of Section 24 of the Encumbered Estates Act

6. In order to appreciate the legal position some of the provisions of the enactments relating to Zamindars' properties, their debts, and the liquidation of their debts require examination These enactments are U P Encumbered Estates Act, 1934 (U. P. Act No XXV of 1934), (hereinafter referred to as Encumbered Estates Act), U P Zamindari Abolition and Land Reforms Act, 1950 (U P Act No 1 of 1951) (hereinafter called the Z A Act), and U P Zamindars' Debt Reduction Act, 1952 (U. P Act No XV of 1953), (hereinafter referred to as Debt Reduction Act). The Encumbered Estates Act was enforced with a view to assist the land holders whose estates were threatened with insolvency on account of slump in prices and consequent increase of the burden of their indebtedness The assistance was provided by reducing the amount of debt and providing a special mode for the liquidation of the reduced amount of the debt. This mode aimed at saving the properties as far as possible. The Act applied to such land holders as opted to have relief thereunder by making an application under Section 4 of the Act Under this section application could be made by any landlord "who is subject to or whose immovable property or any part thereof is encumbered with "private debts" The term "private debt" is defined under Section 2 (b) as "any debt other than a public debt" "Public debt" is defined under Section 2 (c) as a debt due to the Crown or local authority. The term debt is defined under Section 2 (a) as any debt including any pecuniary liability except a liability for unliquidated damages Chapter IV of the Act dealt with the determination of the amount of debt and reduction thereof Liquidation of the reduced amount of the debt was provided under Chapter V

7. For the purposes of the present case a detailed examination of all the sections falling under chapter IV is not necessary The sections which call for examination are Sections 14, 16 and 19.

Section 14 dealt with the examination of claims of creditors and determination of the amount of debts The manner in which the amount of debt is to be determined is prescribed under sub-sections (4) to (6) After the amount has been determined the Special Judge appointed under Section 3 of the Act is required to proceed under sub-section (7) Thus sub-section as it stood before the enforcement of the Zamindari Abolition Act read as follows —

"(7) If the Special Judge finds that any amount is due to the claimant he shall pass a simple money decree for such amount together with any costs which he may allow in respect of proceedings in his court and of proceedings in any Civil Court stayed under the provisions of this Act, together with pendente lite and furture interest at a rate not greater than the rate specified in Section 27, and if he finds that no amount is due he may pass a decree for costs in favour of the landlord Such decree shall be deemed to be a decree of a Civil Court of competent jurisdiction but no decree against the landlord shall be executable within the United Provinces except under the provisions of this Act (emphasis supplied)

Provided that no pendente lite interest shall be allowed in case of any debt where the creditor was in possession of any portion of the debtor's property in lieu of interest payable on such debt" Section 16 provided for ranking of the debts for priority in payment The section as it stood prior to the amendment made by U P Act No XIII of 1954 read as follows —

"16 The Special Judge shall rank all debts for priority, provided that debts in the earlier of the following classes shall have priority over those in the latter classes —

Class (1) Debts recoverable under the Agra Tenancy Act, 1926, the Oudh Rent Act, 1886, and the Land Revenue Act, 1901;

Class (2) Public debts due to the Government and public debts due to a local authority creating charge on immoveable property

Class (3) Debts secured upon property against which the Collector may take action under the provisions of Section 24 up to the value of the security,

Class (4) other secured debts,

Class (5) Debts due on account of goods supplied or services rendered and

Class (6) Unsecured debts due to a local authority, debts falling into class (3), in excess of the value of security and other unsecured debts"

8 Under Section 19 the decree passed under Section 14 (7) was required to be transmitted to the Collector for execution in accordance with the provisions of Chapter V Section 19 as it stood prior to 1954 provided as follows:

"19 (1) The Special Judge shall send the decrees granted under sub-section (7) of Section 14 to the Collector for execution in accordance with the provisions of the Chapter The Special Judge shall also inform the Collector of the order in which he has ranked the debts for priority

(2) The Special Judge shall inform the Collector of the nature and extent of the property mentioned in the notice under Section 11 which he has found to be liable to attachment, sale or mortgage in satisfaction of the debts of the applicant"

Under the above provision the Special Judge was required to inform the Collector the ranking of debts fixed under Section 16 Under sub-section (2) he was required to inform the Collector of the property found liable to attachment, sale or mortgage in satisfaction of the debts of the applicant Under Section 22 falling under chapter V the Collector was required to give opportunity to the debtor to pay into court the whole or part of the amount found due against him within two months If the amount of the debt was not paid in full the Collector was required to realise the value of the debtor's property and apply the amount realised in discharging the debts in order of priority fixed under Section 16 The examination of the provisions hereinabove mentioned brings out the following position —

(1) Although application under Section 4 (1) could be made only when the Landlord's immovable property or any part thereof was encumbered with private debts the proceedings for determination of the amount of debts due and for the liquidation thereof were not confined either to private debts or to secured debts only The Special Judge

determined the amount due in respect of public debts as also in respect of unsecured debts Liquidation was also made of all the debts private, public, secured and unsecured

(2) Although a simple money decree was passed in respect of the debts under Section 14 (7) and under Section 18 previously existing rights of the creditor were extinguished the original character of the loan was not completely obliterated. This consequence was obvious from the provisions of Section 16 which used the words "secured debts" and "unsecured debts" and gave priority to "secured debts" over "unsecured debts" in the liquidation of debts Thus, after Section 14 (7) wherever the term "secured debt" was used in the Act it denoted the original character of the loan It did not refer to a transaction which continued to retain the mortgaged security even after passing of the decree under Section 14 (7) which was not possible in view of the provision contained in S 14 (7)

9. I have referred hereinabove to Section 22 which falls under chapter V relating to execution of decrees and liquidation of debts — If after resort to Sections 22 and 23 any amount of the debt determined against the landlord remained unpaid the Collector was required to liquidate the debt in accordance with the provisions of Sections 24 to 42 For the purposes of the present writ petitions a close examination of these provisions is not necessary Sections 24 (2) and 32 referred to the ranking of debts made under Section 16 and provided for priority in payment to the debts ranked highest As observed hereinbefore "secured debt" ranked higher than transferred or unsecured debts and therefore enjoyed priority in payment over the latter. I have referred to the provisions of chapter V only to indicate that even after passing of the simple money decree under Section 14 (7) a distinction is maintained between a debt which was originally obtained on the security of immovable property and other debts It is in this context that connotation of the terms "secured debt" and "judgment debtor ... in respect... mortgaged estate" used in Sect on 8 of the Debt Redaction Act have to be understood

10. Encumbered Estates Act was enacted to save land holders from the blow dealt by slump in prices which had the consequence of increasing the burden of their indebtedness Another blow was dealt to the land-holders by vesting of their estates in the State on the enforcement of the Zamindari Abolition Act Before vesting of the estates the land-holders had the estates to fall back upon for liquidation of their debts. After vesting of the estates in the State Government they were left with compensation, rehabilitation grant, properties not acquired under the Act and other new rights acquired under the Act These assets were of a considerably reduced value and in order to provide relief to ex-intermediary or ex-landlord, the State Legislature enacted Debt Reduction Act Relief under the Act was made available in respect of un-decreed debts as well as in respect of decreed debts The Act laid down the mode and the procedure for reduction of these debts Reduction of un-decreed debt was provided under Section 3 while Section 4 provided for reduction of the decreed debt. Sub-section (1) of Section 3 provides as follows —

"Notwithstanding anything in any law, agreement or document, in any suit to which this Act applies relating to a secured debt the Court shall, after the amount due has been ascertained but before passing a decree, proceed as hereinafter stated"
(emphasis supplied)

Sub-section (1) of Section 4 provides as follows :—

"Notwithstanding anything in the Code of Civil Procedure, 1908, or any other law, the Court, which passed a decree to which this Act applies relating to a secured debt shall, on the application either of the decree-holder or judgment-debtor, proceed as hereinafter stated." (emphasis supplied)

The use of the term "secured debt" in the above sub-sections makes it clear that the provisions of the Act apply only to secured debts. Sub-section (1) of Section 4 further uses the words "on the application either of the decree-holder or judgment-debtor." This indicates that jurisdiction of reducing the debt under Section 4 would be acquired by the court only when approach is made to it in that behalf; this approach may be made either by the decree-holder or by the judgment-debtor.

In the present case it is not disputed that approach was made under Section 4 by the petitioners and the amount of the decree that was passed under the Encumbered Estates Act was reduced It is not contended before me that this reduction was illegal because at the time of the enforcement of the Debt Reduction Act there was no "secured debt" in favour of the opposite parties and the decree passed under the Encumbered Estates Act was not "a debt to which this Act" applied Indeed such a challenge could not be raised in the present proceedings which arise from proceedings for execution of the decree because executing authority could not go behind the decree Such a challenge would not be applicable on merits also Sub-section (1) of Sec 4 uses the words "decree relating to secured debt" It cannot be disputed that the decree passed under the Encumbered Estates Act in favour of the opposite parties related to secured debt also When the Debt Reduction Act was passed the Legislature was already aware of such a decree and still such a decree was not exempted from the purview of Section 4 (1) It is, therefore, obvious that the term "secured debt" in Section 4 (1) has been used to denote the nature of the original transaction of debt and not the nature of the debt as it came to be under the decree passed under Section 14 (7) of the Encumbered Estates Act

11. For the proper appreciation of Section 8 of the Debt Reduction Act, it is necessary to consider the extent of the reduction that is permissible of the "secured debt" There is no difference in this regard in the provisions contained in Sections 3 and 4 of the Act I am reproducing below sub-sections (2) and (3) of Section 4

"(2) Where the mortgaged property (***) consists exclusively of estate and such estate has been acquired under the provisions of the U. P Zamindari Abolition and Land Reforms Act, 1950, the Court shall—

(a) If there is only one judgment-debtor entitled as owner to the estate, calculate the amount due on the first day of July, 1952, and then reduce it in accordance with the formula given in the schedule.

(b) If there are two or more judgment-debtors and all or more than one out of them were on the thirtieth day of June, 1952, entitled as owners to the mortgaged estate—

(i) calculate the amount due on the first day of July, 1952.

(ii) apportion between the judgment-debtors so entitled an amount due, where the decree defines their respective liability in the ratio of their liability otherwise in proportion to their respective shares in such estate and

(iii) after the amount due has been so apportioned, reduce the amount in the case of each of the judgment-debtors in accordance with the formula given in Schedule I

(3) Where the mortgaged property (***) consists partly of estate and partly of property other than estate the Court shall—

(a) determine the amount due on the 1st day of July, 1952 and distribute the same on the two properties separately in accordance with the principles contained in Section 82 of the Transfer of Property Act, 1882, as if the decree had been a debt and the two properties belonging separately to two persons with separate and distinct rights of ownership, and

(b) after the amount due as respects the estate has been so calculated,

(i) if there is only one judgment debtor who was on the 30th day of June, 1952, entitled as owner to the estate reduce it in accordance with the formula given in Schedule I

(ii) if there are two or more judgment-debtors and all or more than one out of them were on thirtieth day of June 1952, entitled as owners to the estate, apportion the amount due as aforesaid between them, where the decree defines their respective liability, in the ratio of their liability, otherwise in proportion to their respective shares; and

(iii) after the aforesaid amount has been so apportioned reduce the amount in accordance with the formula given in Schedule I"

12 From the above provisions it would be seen that the entire secured debt is not reduced but only that portion of it is reduced which on apportionment is found to have had an "estate" or portion thereof as security for its repayment Under sub-section (3) the court is required to determine the

total amount due on 1-7-1953 in respect of the secured debt Thereafter the court is required to apportion the debt so as to identify the debt related to "estate" Under clause (b) it is this debt which is reduced and not the debt related to property which is not "estate" In the context in which it has been used the term "estate" has the same meaning as assigned to it under Section 3 (8) of the Zamindari Abolition and Land Reforms Act

13. Having thus determined the nature of the reduction made under the Debt Reduction Act I now come to the main provision of the Act which requires interpretation viz Section 8 which is in the following terms —

"8 Debt realisable from compensation money and rehabilitation grant (1) Notwithstanding anything in any agreement, document or law for the time being in force, but subject to the provisions of sub-section (2) a decree relating to a secured debt passed in any suit to which this Act applies —

(a) shall, in so far as the compensation for the mortgaged estate is concerned, be executed to the extent of three-fourths amount only against such compensation, and

(b) be also executable, in addition to and without prejudice to every other remedy to which the decree-holder may be entitled under the decree or law for the time being in force, against the rehabilitation grant payable in respect of the mortgaged estate to the extent of three-fourths of such grants.

(2) Notwithstanding anything in any law the reduced amount found in the case of a mortgagor or judgment-debtor, as the case may be, under Section 3 or Section 4 as respects mortgaged estates shall not be legally recoverable otherwise than out of the compensation and rehabilitation grant payable to such mortgagor or judgment-debtor in respect of such estates."

Sub-section (1) is subject to sub-section (2). Sub-section (1) provides for realization of the "decree relating to secured debt passed in any suit to which this Act applies" Sub-section (2) refers to the reduced amount found under Section 3 or 4 as respects mortgaged estate Sub-section (1) therefore relates to that portion of the secured debt which is not related to estate and which has not been reduced under the Debt Reduction Act In view of the provisions contained in clauses (a) and (b) of sub-section (1) of Section 8 the compensation and the rehabilitation grant payable in respect of the mortgaged estate can be proceeded against to the extent of three-fourths only for recovery of such debt that is one-fourth of the compensation and one-fourth of the rehabilitation grant is exempted from being proceeded against Clause (b) makes it clear that the decree can be executed against other properties of the debtor without the restriction of any limit such as is prescribed in respect of compensation and rehabilitation grant This is obvious from the use of the words "be also executable, in addition to and without prejudice to every other remedy to which decree-holder may be entitled under the decree or law for the time being in force" Sub-section (2) of Section 8 on the other hand relates to that portion of the secured debt which is related to estate and which has been reduced either under Section 3 or under Section 4 of the Act Such a debt can be recovered only from the compensation and rehabilitation grant and from no other property. Thus is obvious from the use of the words "shall not be legally recoverable otherwise than out of the compensation and rehabilitation grant." In view of this position Sri Sinha is right in saying that the amount of debt reduced under Section 4 of the Debt Reduction Act can be realized only from three-fourths of the compensation and three-fourths of the rehabilitation grant payable in respect of the estate This disability will not attach to other debts which are not reduced under the provisions of Debt Reduction Act

14. Debt Reduction Act only provides for reduction of the debt. After a debt has been reduced the execution proceedings again take place under the provisions of the Encumbered Estates Act. In view of the abolition of zamindari and enactment of Debt Reduction Act the provisions of Encumbered Estates Act were amended by U P Encumbered Estates (Amendment) Act, 1954 (Act No XIII of 1954) so as to bring them in conformity with the provisions of the Zamindari Abolition Act and the Debt Reduction Act. Under the unamended provisions only

an attempt was required to be made to save proprietary rights of the landlord in the land but such rights were not completely immune from being proceeded against in satisfaction of the decree Under Section 25 even mortgage could be granted in favour of a person who agreed to pay the amount due After the estate had vested in the State there was obviously no question of mortgage being granted in respect of the estate Accordingly sub-section (7) of Section 14 was replaced as follows —

"If the Special Judge finds that —

(a) no amount is due, he may pass a decree for cost in favour of the landlord,

(b) an amount is due to the claimant he shall —

(i) pass a simple money decree having regard also to the provisions of Section 3 of the U P Zamindari Debt Reduction Act, 1952 for such amount together with any costs which he may allow in respect of the proceedings in his court and of proceedings in any court stayed under the provisions of this Act together with pendente lite and future interest at a rate not higher than 4-1/4% per annum, and

(ii) also certify the amount, if any, of such decree which, in accordance with the provisions of Section 8 of the U P Zamindari Debt Reduction Act, 1952 is not legally recoverable otherwise than out of the compensation and rehabilitation grant payable to the landlord

Provided that no pendente lite interest shall be allowed in the case of any debt where the creditor was in possession of any portion of the debtor's property in lieu of interest payable on such debt for the period he was so in possession"

Section 19 (2) was also substituted as follows —

"The Special Judge shall inform the Collector

(a) of the amount of the secured debt which is not legally recoverable otherwise than out of the compensation and rehabilitation grant payable to the landlord in respect of the mortgaged estate, and

(b) of the nature and extent of the property mentioned in the notice under Section 11 which he has found to be liable to attachment or sale in satisfaction of the debts of the applicant" Then Section 19-A was added so as to make the decree executable only for the reduced amount determined under the Debt Reduction Act Section 19-A reads as follows —

"19-A Amendment of decrees transmitted to the Collector, — Where a decree has been passed by the Special Judge before the commencement of the U P Encumbered Estates (Amendment) Act, 1954 and the decree not having been already fully satisfied is in respect of secured debt to which the U P Zamindari Debt Reduction Act, 1952, applies, the Special Judge shall, upon reduction of the amount of the debt in accordance with the provisions of the said Act —

(a) inform the Collector of the reduction so made, and

(b) certify the amount, if any, of the decree aforesaid which is not legally recoverable otherwise than out of the compensation and rehabilitation grant payable to the landlord in respect to the mortgaged estate, and the decree transmitted to the Collector under Section 19 shall be deemed to have been amended accordingly"

Consequential amendments were made in Chapter V of the Encumbered Estates Act also Section 23 was also added to empower the Collector to collect the amount of compensation and rehabilitation grant The new Section 23-B (1) provided as follows —

"23-B (1) Without prejudice to the provisions of Section 8 of the U P Zamindari Debt Reduction Act 1952, the amount or the bonds on account of compensation or rehabilitation grant received by the Collector in pursuance of the requisition under Section 23-A shall be expended or utilised by the Collector in liquidation of the amount of the secured debt which having regard to the provisions of the U P Zamindari Debt Reduction Act, 1952, was secured on the proprietary rights in land in respect of which such money has been received."

The above provision is without prejudice to the provisions of Section 8 of the Debt Reduction Act Therefore, what is provided under Section 8 prevail and the debt has to be discharged in the manner provided therein.

15. From the amended provisions also it is apparent that the disability of recovering the debt from three-fourths of the compensation and rehabilitation grant attaches only to such debts as have been reduced under Section 3 or under Section 4 of the Debt Reduction Act It does not attach to any other debt Therefore, if in a particular case no reduction of debt is made either under Section 3 or under Section 4 the debt can be recovered from the other properties of the debtor

15-A. It is in the context of the above legal position that the dictum laid down by their Lordships of the Supreme Court in Jamshaed Jehan Begum's case (1970 All LJ 1104) (supra) has to be understood In the entire judgment of their Lordships there is no reference to the Debt Reduction Act It is, therefore, obvious that their Lordships were not dealing with a decree which had been reduced under Section 3 or under Section 4 of the Debt Reduction Act The judgment of their Lordships, therefore has no application to the present case in which debt had been reduced under Section 4 of the Act Reliance placed by the Board of Revenue on the decision of their Lordships was, therefore, misconceived The judgment was relied upon by the learned counsel for the opposite parties also during the course of argument

16. In view of the above discussion, the order of the Board of Revenue so far as it holds that the secured debt reduced under Section 4 can be recovered from properties other than compensation and rehabilitation grant is obviously erroneous and deserves to be quashed. The said order holds good so far as other debts are concerned The said order also holds good in respect of the adjustment allowed in favour of the petitioners inasmuch as the same was not challenged by the opposite party No. 1 As such, the writ petition succeeds partially

17. In view of the above, the writ petition is partly allowed The order of the Board of Revenue dated 26th May, 1976 (Annexure No 4) so far as it relates to the secured debt reduced under Section 4 of the Debt Reduction Act, is hereby quashed A writ of certiorari will issue accordingly. The Board of Revenue will decide the revision in accordance with law indicated hereinabove The costs of this petition shall be easy

Petition partly allowed

1981 ALL L J. 886

(SUPREME COURT)

(From: Allahabad)

S MURTAZA FAZAL ALI AND V D ERADI, JJ

Civil Appeals Nos 812-814 of 1981, D/-25-2-1981.

Irshad Ali Khan (Dead) by LRs and others, Appellants v State of U. P. and others, Respondents

U. P Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 10 (2) — Notice under, on original owner — Appellants seriously contesting factum of original owner having continued in cultivatory possession till death that occurred after enforcement of Act — No finding given by Prescribed Authority and District Judge on that aspect — Case remanded Decision of Allahabad High Court Reversed. (Para 1)

FAZAL ALI, J.:— After having heard learned counsel for the parties we are of the opinion that neither the District Judge nor the prescribed authority seems to have gone into the real question in the case as to whether Mumtaz Ali, who was the original owner of properties comprising 108 Bighas, 16 Biswas and 9 Biswansis, continued to be in cultivatory possession of the land until his death which occurred long after the coming into force of the Act The District Judge as also the prescribed authority have merely relied on the notice under Section 10 (2) issued by the prescribed authority where it was mentioned that Mumtaz Ali continued to be in possession This fact was seriously controverted by the appellants before the prescribed authority as also before the District Judge but there is no clear finding by any of these authorities regarding the question of possession The definite case of the appellants was that Mumtaz Ali and Irshad Ali had separated each getting half of the total land It was also alleged that the grand-sons of Mumtaz Ali, namely the four sons of Irshad Ali — Mukarram Ali, Zafar Ali, Kanwar Ali and Anwar Ali — had purchased the lands from Mumtaz Ali as far back as 1957 This plea also does not appear to have been noticed by the authorities concerned. However, the

dominant question to be decided by the authorities would be whether Mumtaz Ali continued to be in cultivating possession of the lands in dispute held by him in 1971

2 Another argument addressed to us was regarding the grove This, however, is concluded by findings of fact and does not call for any interference by this Court

3. In these circumstances, therefore, we allow this appeal and remit the case to the prescribed authority for considering the question as to whether or not Mumtaz Ali was in cultivating possession of the land in 1971 (sic) (1961) when the Ceiling Act came into force after examining the contentions raised by the appellants before him The prescribed authority will also determine whether the other grandsons of Mumtaz Ali were in separate cultivating possession of the lands claimed by them in 1971 The parties are directed to appear before the prescribed authority on the 25th March, 1981

Order accordingly

1981 ALL L J. 887

= AIR 1981 Supreme Court 1646

(From Allahabad)

S MURTAZA FAZAL ALI, BAHARUL ISLAM AND A VARADARAJAN, JJ

Criminal Appeals Nos 177A and 177B of 1975. D/- 25-3-1981

Janeshwar Das Aggarwal, Appellant v State of U P Respondent

Penal Code (45 of 1860), S. 409 — Conviction for misappropriation — Essentials to be proved. (Decision of Allahabad High Court, Reversed)

Before a conviction under S 409 can be recorded, the prosecution must prove two essential facts (1) the factum of entrustment and (2) the factum of misappropriation of the entrusted articles

(Para 3)

Where in a case though entrustment of certain articles in open godown was assumed but there was no evidence either direct or circumstantial, to show that the accused had misappropriated any of the articles in the godowns, the accused could not be presumed to have misappropriated the articles, merely on the ground that he failed to give any explanation for the shortage and his conviction would not be sustained. Decision of Allahabad High Court, Reversed.

(Para 3)

JUDGMENT :— These appeals by special leave are directed against the judement of the Allahabad High Court by which the conviction of the appellant under Section 409 Indian Penal Code on three counts have been affirmed.

2. The facts of the case have been detailed in the judgments of the trial court and the High Court and it is not necessary to repeat the same

3. According to the prosecution, the appellant who was an overseer was put in charge of tubewells and some open godowns which were attached to those tubewells These godowns contained cement, bricks and coal Although the High Court has found that the articles in the godowns were entrusted to the appellant, there is no evidence at all to show that any such entrustment was made No document in the nature of a list or charge has been shown to show that physical charge of the articles after being regularly counted in the godowns was made over to the appellant This fact has not been seriously disputed by Mr Bhat, appearing for the State In fact, the godowns were in the physical charge of Chowkidars and if there was any shortage, it was not the appellant but the Chowkidars who would be liable Even assuming that some sort of entrustment was there, there is absolutely nothing in this case to show that the appellant had misappropriated the goods from the godowns which were found to be short, particularly because the godowns being open the goods could have been pilfered by anyone else without the knowledge of the appellant Before a conviction under Section 409 Indian Penal Code can be recorded, the prosecution must prove two essential facts (1) the factum of entrustment and (2) the factum of misappropriation of the entrusted articles Even if it be assumed that entrustment was proved in this case, there is absolutely no evidence to show, either direct or circumstantial, that the appellant had misappropriated any of the articles in the godowns As the godowns were open and accessible to all and sundry, the possibility of the goods having been pilfered or stolen away by others cannot be excluded. The High Court was, therefore, clearly wrong in holding that as the appellant has not given any explanation for the shortage, he must be presumed to have misappropriated the articles kept in the godowns.

in the present state of evidence, no such legal inference could be drawn Mr Bhat also conceded that there is no legal evidence to show that there was any misappropriation by the appellant Even the two Chowkidars who were in physical charge of the godowns had not been examined to prove who caused the short age. In view of this unsatisfactory nature of the evidence, it is impossible for us to sustain the conviction of the appellant.

4 For these reasons therefore the appeals are allowed and the conviction of and the sentence passed upon the appellant are set aside and the appellant is acquitted of the charge framed against him The appellant who is on bail will now be discharged from the bail bond and need not surrender

Appeals allowed

1981 ALL L J 888

R B LAL, J

B M Surekha and another, Applicants v R K Rai and another, Respondents

Crl Misc Case No 6462 of 1980, D/- 8-7-1981.

(A) Criminal P C (2 of 1974), Section 482 — Application under, for quashing of proceeding — Two complaints against same accused on same facts — Basic allegations same — Variations and deviations in allegations in second complaint — Does not amount to abuse of process of court or indicate mala fide intention of complainant — Second complaint cannot be quashed.

(Paras 6, 7)

(B) Criminal P. C. (2 of 1974), Section 218 — Amalgamation of cases — Two separate complaints on same subject matter — Accused, main allegations and offences alleged same, in both complaints — No prejudice to accused by amalgamation — Amalgamation of cases is just and proper 1964 All LJ 925, 9501, ABR 1962 Raj 160, Rel on.

(Paras 12, 13)

Cases Referred Chronological Paras
1964 All LJ 925 AIR 1965 All 131 1965 (1) Cr. LJ 275 11, 12
AIR 1962 Raj 160 : 1962 Cri. LJ 1599 10

Shashi Kant Agarwal, for Applicants, Govt Advocate for Respondents

ORDER — The accused-applicants have moved this application under Section 482, Cr P C for quashing the complaint dated 17-2-1979 filed by the present opposite party No 1

2. Bal Mukund Surekha applicant No 1, carries on business at Calcutta and applicant No 2 is his secretary Opposite Party No 1 is Assistant Purchase Officer, Dalla Cement Factory, District Mirzapur It is said that applicant No 1 agreed to supply G I Corrugated sheets weighing twelve tons to the Cement Factory Two officials of the factory namely R K Malhotra, Purchase Inspector, and R B Pandey Assistant Engineer (Civil), went to Calcutta along with two bank drafts to obtain the sheets from the applicants as they (sheets) were required very urgently These officials met the applicants on 7-2-1979 and the latter represented that the sheets were in their godown which was pledged with a bank, and they (the officials) should handover the bank drafts to them so that the goods may be available in the godowns for inspection and delivery Acting on this representation the officials handed over a bank draft of Rs 57,975 85 p. to the applicants Next day, the two officials met the applicants and were told that the sheets of three meter length were not available The applicants neither returned the money nor gave delivery of the requisite material

3. R K Malhotra, the Purchase Inspector, filed a complaint against the present applicants on 3-3-1979 setting out the facts which were substantially the same as mentioned earlier, alleging that the accused (the present applicants) had committed offences under Sections 406, 409, 417, 418, 420, 421 and 109, Indian Penal Code. The Magistrate took cognizance and summoned the accused. The accused (the present applicants) challenged these criminal proceedings before the Sessions Judge, Mirzapur and this Court, but without success

4. The General Manager of the Cement Factory, authorised Sri R K Rai, the present opposite party No 1 to file a complaint and the latter filed a complaint against the present applicants on 17-12-1979 alleging that they had committed offences under Sections 420/408, Indian Penal Code. The facts

set out in the complaint were more or less the same as mentioned earlier

5 The contention of the accused-applicants is that the filing of the second complaint by Sri R K Rai, the Assistant Purchase Officer, on the same facts amounted to an abuse of the process of the court and it indicated mala fide intention and, therefore it (the second complaint) should be quashed It has also been pointed out that the second complaint contains several deviations in allegations and many improvements as compared to the first complaint and this indicated that the purpose was to improve the prosecution case

6 I have heard the learned counsel for the parties and have also gone through the copies of the two complaints which form Annexures I and II to the present application A reading of the two complaints shows that there are some differences in the allegations but on account of them it cannot be said that the basic allegations have been altered substantially Much need not be said with regard to these variations in the two versions here because they can be properly considered by the Trial Magistrate at the relevant time On account of these variations or deviations, as the learned counsel for the applicants would like to call them it cannot be said that the second complaint amounts to an abuse of the process of the court or indicates any mala fide intention on the part of the authorities of the cement factory The learned counsel for opposite party No 1 has in this connection made one submission He has contended that the present applicants had won over R K Malhotra the Purchase Officer of the Cement Factory and got the complaint filed by him with incomplete facts in order to forestall the prosecution which might be launched by the factory Hence, the authorities of the factory had to file the second complaint. This submission does not receive support from the affidavit of Sri. R. K Rai, opposite party No 1 which is silent on this point

7. On a careful consideration I do not find any merit in the above submissions of the learned counsel for the accused-applicants and therefore, in my opinion no good ground exists for quashing the second complaint in exercise of the powers under Section 482 Cr P C

8 During the hearing of the application, I had suggested to the learned counsel for the applicants that the two complaints could be directed to be amalgamated and tried together The learned counsel submitted that there was no provision in the Code of Criminal Procedure, 1973 (briefly the Code) providing for an amalgamation of this kind He pointed out that Section 210 of the Code provides for a joint enquiry or trial of a complaint and case in which cognizance of any offence is taken on the basis of a police report This section does not provide for a joint trial of two cases arising out of separate complaints with regard to the same subject-matter

9. In the Code of Criminal Procedure 1898 (briefly the old Code), there was no provision corresponding to the provision contained in Section 210 However, the question, whether a complaint and a case arising on police report or two complaints, in which the subject-matter was the same and at least some of the accused were common, could be amalgamated and enquired into or tried jointly sometimes arose for consideration of courts The preponderance of authority was that a joint trial could be held if the circumstances of the particular cases did not make such a course improper If the number of the accused was different in two cases, Section 239 of the old Code was also called into aid

10. In Mukania v Achalia (AIR 1952 Raj 160) the police submitted a charge-sheet against three persons under Section 326, I P C Mukania did not feel satisfied and filed a complaint against nine persons including those three who were named in the charge-sheet by the police The Magistrate summoned five accused including those three named by the police The Sessions Judge relying on a single Judge decision of the Rajasthan High Court was of the view that the joint trial was illegal and made a reference. The Division Bench did not approve of the single Judge decision and held that "if a Magistrate has both a complaint and a police report before him about the same offence, he can take cognizance of that offence on the basis of both

The further question whether after taking cognizance on the basis of both he can amalgamate them and hold a joint trial of the accused named in the police report as well as in the complaint depends upon Section 239 of the Criminal Procedure Code and the discretion of the Magistrate, which has to be exercised according to the circumstances of each case" The Division Bench further held that there was no impropriety in trying the accused together in the particular case before it

11. In Giriraj Singh v State (1964 All LJ 335) (AIR 1965 All 131) the facts were very much similar to the facts of the instant case One Basheshwar Dayal filed a complaint on 11-1-1962 alleging that Giriraj Singh and Sohan Lal Sharma had committed offences under Sections 498, 467 and 471, I P C The Bench Magistrate summoned the accused On 4-6-1962 one Debaram Singh filed another complaint on the same facts against the same accused alleging that they had committed offences punishable under Sections 406, 467 and 471 I P C In this case also the accused were summoned The Magistrate amalgamated the two cases and directed that both complainants shall be treated as co-complainants with the right to cross-examine or contradict the witnesses examined by the other complainant, of course, with the permission of the court The accused challenged this order before this Court A learned single Judge considered the various provisions of the old Code and observed that the Magistrate takes cognizance of an offence on a complaint or on police report or upon information received The further proceedings taken are not with particular reference to the complainant or the informant He further observed that there could be no fresh trial after the acquittal or conviction of the accused the trial is of the offence committed not necessarily with particular reference to the complaint The learned single Judge concluded thus (at p 341 of All LJ)—

"My reading of the various provision of the Code of Criminal Procedure, therefore, is that even if a Magistrate could take cognizance of an offence once he can entertain and take cognizance of other complaints applications or police reports with regard to that offence, if made, during the pendency of the trial Considering that there can be one trial for the offence, all the complaints, police reports or applications pertaining to that offence must be amalgamated Amalgamation and joint trial of all the cases if registered separately, is thus necessary"

The learned Single Judge, however, set aside the Magistrate's order permitting one complainant to cross-examine the witnesses produced by the other.

12. The Legislature while enacting the Code of Criminal Procedure, 1973 added Section 210 in the Code to prevent forestalling of police investigation in serious cases and consequent miscarriage of justice by the institution of hurried or collusive complaints The fact that the Code is silent in regard to amalgamation of cases arising on two separate complaints of which the subject matter is the same, cannot lead to the conclusion that such amalgamation cannot be directed in appropriate cases on general principles. Though Giriraj Singh's case was under the old Code, the principles enunciated in that decision with regard to amalgamation of cases on separate complaints, still hold good, because there is nothing contrary in the Code I respectfully agree with the principles laid down in Giriraj Singh's case

13. In the instant case, the accused, main allegations and the main offences alleged to have been committed by the accused, are the same in the two complaints Both the cases are to be tried, according to the procedure laid down for trial of warrant cases Hence amalgamation of the two cases is just and proper The accused applicants will also not be prejudiced in any manner As observed earlier, the variations in the prosecution story in the two complaints may be brought to the notice of the Magistrate at the time of trial, in the manner provided by law.

14. The application for quashing the complaint dated 17-12-1979 is rejected. It is, however, directed that the cases arising out of the two complaints shall be amalgamated and tried jointly according to law The order staying the case arising out of the second complaint, is vacated The record shall be sent back to the Magistrate for further proceedings at an early date.

Application dismissed.

1981 ALL L. J 891

MURLIDHAR J

Darvao Singh, Applicant v State, Respondent

Criminal Revn No 1281 of 1980, D/- 26-2-1981

Railway Property (Unlawful Possession) Act (29 of 1966), S. 3 — Conviction under, of shunting porter for unlawful possession of railway property — Accused producing witnesses from the office where he worked to prove that he was on duty at office room at the alleged time of occurrence — Prosecution witnesses admitting accused to be on duty for a period covering the time of occurrence. Testimony of defence witnesses showing that accused was called away by police constable from office at particular hour — Version wholly inconsistent with prosecution case as to recovery of goods at particular hour and lodging of complaint at particular time — Conviction of accused by brushing aside testimony of defence witnesses on untenable grounds is liable to be set aside. (Paras 3, 4)

Mohan Chandra, for Applicant, Addl Govt Advocate for Respondent

ORDER — The applicant Darvao Singh has been convicted under Section 3 of the Railway Property (Unlawful Possession) Act and sentenced to 18 months' R I

2. The prosecution case was that on 19-11-1974 seven cotton bales had been booked at Bareilly Junction for Bishavatgani and these bales were on the platform Further that the applicant who is a shunting porter at Bareilly Junction was caught at about 5 A M in the goods yard with one of these bales by a party of R P F that was on patrol duty The gunny wrapped bale is said to have contained the railway mark which is allegedly put on booked packages After preparing a recovery memo the applicant was brought to the R P F Outpost and a first information report was allegedly lodged there at 6 15 A M It was conceded by the R P F officials that the applicant was supposed to be on duty from 12 midnight to 8 A M as shunting porter on the day of occurrence The applicant's case was that he was falsely implicated after being called from the office of the Assistant Yard Master through an R P F Rakshak at about 6 30 A M due to his enmity with one Rohtas Singh, Rakshak. About recovery the prosecution examined A S I Hari Chandra and A S I Ram Kumar Sharma The applicant in his defence examined Head Train Clerk Rana Pratap to prove that he was on duty and Badri Dutt and Parvin Datt Assistant Yard Foreman and Shunting Jamadar respectively, to support his case that he was on duty with the Jamadar at the office room of the Assistant Yard Master when R P F constable had called him away on the excuse that he had some private business with him These witnesses say that subsequently when the applicant did not return they enquired about him for R P F and were told that he had been locked up The courts below have accepted the prosecution version and disbelieved the defence

3. The only point pressed in revision is that the defence evidence has been brushed aside by the courts below on unconvincing grounds The trial court laid great stress on non-production of certain registers but this is absolutely immaterial when even the prosecution witnesses admit that the applicant was found to have been on duty The crucial point is the weight to be attached to the testimony of Assistant Yard Foreman Badri Dutt and the shunting Jamadar Pravin Datt The trial court's reasoning that even if their statements be accepted as true that would not show the applicant to have been constantly present in the office is wholly untenable The point is not whether the testimony proves his presence in the office at every moment but that this testimony is wholly inconsistent with the prosecution case and, therefore, if this has any substance the prosecution case about recovery at 5 A M must fail Again, the trial court said that this testimony was belied by the diary entries at the R P F Outpost according to which the applicant had been arrested at 5 A M and the F I R was lodged at 6 15 A. M This is again perverse reasoning for it is precisely to challenge the authenticity of these entries that this evidence has been adduced The worth of the evidence can, therefore not be assessed after accepting the entries as truthful Similarly, the appellate court has referred to the cross-examination directed to the nature of the register and recorded its suspicion which, as already noted, is

irrelevant As regards the evidence of Badri Dutt and Pravin Dutt the only point it has noted is that it is not shown that they submitted any report to their superior officer about the circumstances in which the applicant was apprehended I do not think this fact alone can be of much importance Moreover Badri Dutt has specifically deposed during cross-examination that he had on learning about the arrest of the applicant immediately informed the Yard Master and the Station Master It is therefore clear that the courts below have failed to take into account the evidence of D Ws 2 and 3 about the applicant having been called away by an R P F constable near about 6.30 A M in its proper perspective and have disbelieved it on untenable grounds If this evidence is taken into consideration the least that can be said is that the prosecution story becomes doubtful and the conviction becomes unsustainable

4 The revision therefore succeeds and is allowed The conviction and sentence of the applicant are set aside and he is acquitted He is on bail and need not surrender The bail bonds are discharged

Revision allowed

1981 ALL. L J 892

MURLIDHAR. J

Hari Ram, Applicant v State of U P., Respondent

Criminal Revn No 1159 of 1980, D/- 24-2-1981

Essential Commodities Act (10 of 1955), Section 11 (as amended by U P. Act 9 of 1976) — Institution of prosecution under the Act — Sanction of District Magistrate or other empowered Officer for each prosecution is necessary.

Section 11 as amended in U. P requires specific sanction of District Magistrate or other empowered Officer for institution of each prosecution under the Essential Commodities Act Under S 11 the Court is barred from taking cognizance of any offence except on a written report by order of or under authority from the District Magistrate etc. Therefore it is the written report of the facts constituting the offence that has to be by order of or under authority from the District Magistrate This necessarily brings in the need for sanctioning each particular report specifically and a general authority to institute prosecution of case under the Essential Commodities Act would not make a particular report launching such a case a report by order of the District Magistrate or under his authority AIR 1970 SC 318 and 1963 All LJ 1057 (SC) Distinguished (Para 4)

Cases Referred; Chronological Paras

AIR 1970 SC 318 1970 Cri LJ 492 4
1963 All LJ 1057 AIR 1963 SC 1198; 1963 (2) Cri LJ 194 4

J C Pandey and Rishi Ram, for Applicant. Addl Govt. Advocate, for Respondent

ORDER :— Revisionist Hari Ram has been convicted under S 7/7 Essential Commodities Act and sentenced to R I For three months and a fine of Rs 1000 in default further R I for three months

2. The prosecution case in brief was that a party of district officials on the evening of 3-10-1977 checked the revisionist's shop in district Pauri and discovered some violations of U P Essential Commodities (Display of Prices and Stock and Control of Supply and Distribution) Order 1977 These breaches are said to have consisted of (1) sale of three 2 kg tins of mustard oil on 17-9-1977 without issue of cash memos (2) receipt of twenty four 900 gms. smalltins of mustard oil on 3-10-1977 without an entry in the stock register. (3) sale on 3-10-1977 of four tins out of these without cash memos and (4) non display of the stock list in the shop

3. The defence on facts was that receipt of 3-10-77 stock would have been shown in the stock register by the evening and the sale were without cash memos because these were sales on credit and that the credit memos had been issued As regards the omission to display a stock-list, there is said to have been no charge nor any question put to the revisionist in the trial. The trial court convicted and the appellate Court has upheld the conviction.

4. In this revision a number of legal points have been raised The first and the main contention is that the cognizance of the case by the Magistrate was taken illegally and, therefore, the conviction is without jurisdiction. The contention is based on Section 11, Essen-

tial Commodities Act as amended in U P which prescribes that no court shall take cognizance of any offence punishable under this Act except on a report in writing of the facts constituting such offence made by order or under authority from the District Magistrate or such other officer as may be empowered by the State Government by the general or special order in this behalf Now there is no dispute that in the present case the raid was headed by the Sub-Divisional Magistrate who lodged a F I R at the Thana On the basis of this F I R a case was registered and after investigation the police through the sub-inspector as is usual submitted a charge-sheet against the revisionist The Magistrate took cognizance on the basis of this charge-sheet The argument was that this charge-sheet was a report by the sub-inspector but not a report made by order of or under authority from the District Magistrate or another empowered officer and, therefore, the cognizance could not be taken on its basis It is elaborated that the order or authority of the District Magistrate or other empowered officer to institute the prosecution has to be a specific one for a particular prosecution and a general authority to a person or a class of persons is not contemplated by Section 11 On this basis the authority relied upon and conferred by the District Magistrate per his order dated 4-8-1977 is attached as illegal and incapable of validating the prosecution This order purports to have been passed by the District Magistrate in exercise of the powers conferred under Section 11 of the Act purports to "empower all the supply inspectors under D S O and sub-inspectors of police to check license shop of essential commodities scheduled in the Act and to take legal process to charge-sheet the accused for trial in courts of law in accordance with the provisions of Essential Commodities Act and Rules made thereunder" On behalf of the State it has been urged that the general authority under this order is valid and fulfils the requirement of S 11 and hence there was no defect in taking cognizance No direct authority on the point has been cited before me The learned counsel for the revisionist has however relied upon Gour Chandra v. Public Prosecutor (AIR 1963 SC 1799 (1963 All LJ 1057)) relating to Section 198-B (3) (a) The words there were no complaint shall be made by the public prosecutor except with the previous sanction of any secretary to the Government authorised by him (Governor) in this behalf It was held that the authorisation by the Governor to the Secretary has to be a specific one with regard to the making of a particular complaint and the general authorisation would be illegal because it would defeat the object which the Legislature had in view when it enacted the provisions The present case is slightly different because here neither the considerations which operated while enacting 198B (3) (a) of the old Cr P C apply for it is contended that even the other empowered officer has to be specifically empowered by the State Government the Statute itself prescribing that this may be by a general order The limited question is whether the word of Section 11 earlier quoted visualise the persons making the complaint being so under a general order or authority or an order or authority specifically relating to the particular complaint The learned counsel for the State has relied upon Dhian Singh v Saharanpur Municipality (AIR 1970 SC 318) which pertains to Section 20, P F Act The relevant words of that provision require that no prosecution shall be instituted except by or with the written consent of a local authority or a person authorised in this behalf by general or special order by a local authority" In this situation it was observed by the Supreme Court that there was no question of the local authority applying its mind to the facts of the case before the institution of the complaint as the authority to be conferred can be conferred long before a particular offence has taken place This decision however is not helpful because under Section 20 there a general authority was specifically contemplated which is not the case here Moreover the language of Section 11 is different Here the Court is barred from taking cognizance of any offence except on a written report by order of or under authority from the District Magistrate etc etc Therefore it is the written report of the facts constituting the offence that has to be by order of or under authority from the District Magistrate This necessarily brings in the need for sanctioning each particular report specifical-

ly and a general authority to institute prosecutions of case under the Essential Commodities Act would not make a particular report launching such a case a report by order of the District Magistrate etc or a report under authority from the Dist Magistrate etc This view is strengthened by considering the nature of U P amendment The original section in the Central Act only required report by a public servant By the U P Amendment this wide scope was curtailed and the complaint required to be made under the order or authority of the District Magistrate or the empowered officer These authorities must clear every prosecution under the Act This veto appears to have been given with a view to avoid technical, trivial, oppressive or otherwise undesirable prosecutions which are regarded as likely to create market scarce or unduly dislocate and distrub the supply of essential commodities The District Magistrate or other authority empowered are expected to exercise this discretion in public interest in the light of local conditions I would, therefore, hold that Section 11 as amended in U P requires specific sanction of the District Magistrate or other empowered officer for institution of each prosecution under the Essential Commodities Act, in this situation cognizance in the present case must be held to be illegal The conviction is, therefore, unsustainable

5. In view of this conclusion it is not necessary to consider the other points relied upon on behalf of the revisionist

6. The learned Government Advocate prayed for leave to appeal to Supreme Court I do not consider this to be fit case for such leave and therefore the prayer is rejected

7. In the result, the revision is allowed. The conviction and sentence of the revisionist is set aside

Revision allowed

1981 ALL. L J. 894

S D AGARWALA. J

Lal Bahadur, Petitioner v The District Judge and others, Respondents

Civil Misc Writ Petn No. 10405 of 1981. D/- 11-5-1981

(A) Civil P. C. (5 of 1908), O. 15, R. 5 (U. P.) — Non-compliance of provisions by tenant — Date of moving an application by landlord for striking off defence is not a relevant date on which court would examine if there has been default in complying with the provisions of R. 5. (Para 5)

(B) Civil P. C. (5 of 1908), O. 15, R 5 (U. P.) — It is a mandatory provision — Default in complying with provisions of — Representation not made within specified period of time as required by O. 15, R. 5 (2) — Court has no jurisdiction to consider time barred representation or condone delay or extend time, AIR 1980 SC 1664 Disting, 1981 All LJ 82, Foll. (Para 6)

Cases Referred. Chronological Paras
1981 All LJ 82 6
AIR 1980 SC 1664 6

K. N. Tripathi, for Petitioner; H. N Sharma, for Respondents.

ORDER:— This is a petition under Article 226 of the Constitution of India arising out of proceedings in a small causes court suit No. 37 of 1978 filed by the opposite parties Nos. 3 and 4 Shrimati Sudama Devi and Smt Prabha Devi against the petitioner Lal Buhadur. The property in dispute is a portion of house No. 117/3, Khuldabad, Allahabad. The abovementioned suit was filed by the respondents Nos. 3 and 4 against the petitioner for ejectment and for recovery of arrears of rent and damages During the pendency of the suit on 14th February, 1979 an application was made by the opposite parties Nos. 3 and 4 under Order 15, Rule 5 C. P. C. seeking an order of the court striking off the defence as according to the opposite parties Nos. 3 and 4 the petitioner had not complied with the requirement of Order 15, Rule 5 C P. C The application was allowed by the Judge Small Cause Court, Allahabad by his order dated 7-7-1979. It was held by the Court that the petitioner had not deposited the amount of rent as required by the pro-

visions of Order 15, Rule 5 C P C and as such the defence was struck off Against the order dated 7-7-1979 the petitioner filed a revision in the court of the District Judge Allahabad The revisional court agreed with the conclusion of the Judge Small Cause Court and dismissed the revision on 10th September, 1979 Aggrieved by the decision of the District Judge dated 10th September, 1979 the present petition has been filed in this Court

2 I have heard the learned counsel for the parties

3. Learned counsel for the petitioner has raised three contentions before me His first contention is that for the purpose of Order 15, Rule 5 C P C the court has to see whether the deposit has been made or not in relation to the date for moving of the application for striking off the defence The submission is that on 14th February, 1979 when the application was made by the opposite parties Nos 3 and 4 for striking off the defence the entire amount of rent had already been deposited and as such the courts below have no jurisdiction to strike off the defence of the petitioner The second submission of the learned counsel is that the provisions of Order 15 Rule 5 C P C are directory and even if there has been a default in complying with the Order 15, Rule 5, C P C the court in the instant case should have applied its discretion in not striking off the defence The third submission of the learned counsel is that since in the instant case there was a dispute as to whether the opposite parties Nos 3 and 4 were the landlords or not, it cannot be held that the admitted rent was due from the petitioner and as such also the provisions of Order 15 Rule 5, C P C would not apply

3A. Order 15, Rule 5 C P C is in the following terms —

"5 Striking off defence on failure to deposit admitted rent etc — (1) In any suit by a lessor for the eviction of a lessee after the recovery from him of rent or compensation for use and occupation the defendant shall at or before the first hearing of the suit deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly deposit monthly amount due within a week from the date of its accrual and in the event of any default in making the deposit of the entire amount admitted by him to be due or the monthly amount due as aforesaid, the court may subject to the provisions of sub-rule (2) strike off his defence

Explanations 1 to 3

(2) Before making an order for striking off defence, the court may consider any representation made by the defendant in that behalf provided such representation is made within ten days of the first hearing or, of the expiry of the week referred to in sub-section (1) as the case may be

(3) "

4 Order 15 Rule 5 C P C clearly provides that the tenant has to deposit the admitted rent on or before the first hearing of the suit along with interest thereon at the rate of 9% per annum It further provides that for a subsequent period, namely, during the continuance of the suit the tenant is obliged to deposit rent regularly within a week from the date of its accrual whether the said amount according to him is admitted or not.

5. The court therefore, has to examine whether the deposit has been made by the tenant on the first hearing of the suit and thereafter every month during the continuance of the suit It could not possibly be held as urged by the learned counsel for the petitioner that the relevant date would be the date of moving an application by the landlord for striking-off the defence, namely 14th February 1979 in the present case In fact, on a reading of Order 15, Rule 5 C P C this provision can also be suo motu exercise by the courts and it is not mandatory for the landlord to move an application for striking off the defence In this view of the matter I am of the opinion that the date of moving of the application by the landlords cannot possibly be deemed as the relevant date on which the court should examine whether there has been a default in complying with the provisions of Order 15, Rule 5 C P. C, or not The first submission made by

the learned counsel for the petitioner, therefore, in my opinion, is not well founded

6 In regard to the second submission learned counsel has placed reliance on Miss Santosh Mehta v Om Prakash, AIR 1980 SC 1664 Learned counsel has relied on certain observations made by the Supreme Court in a case under the Delhi Rent Control Act The provisions of Order 15 Rule 5 C P C as amended by the U P Legislature are entirely different from that which came up for interpretation before the Supreme Court in the case of Santosh Mehta The Division Bench of this Court in Pooran Chand v Pravin Gupta, 1981 All LJ 82, to whom a reference had been made in view of certain conflicting decisions of learned Single Judge of this Court was called upon to interpret Order 15, Rule 5 C P C as amended by the Legislature After interpreting various provisions it has been held that the provisions of Order 15, Rule 5 C P C are mandatory It has been further held that if a representation is not made within the specified period of time as required by Order 15, Rule 5 (2) C P C then the court has no jurisdiction to consider the time-barred representation or condone the delay or extend the time I am bound by this decision

7 In the instant case, admittedly there has been a default in complying with the provisions of Order 15, Rule 5 C P C Further it is admitted on record that there was no representation made as required by sub-clause (2) of Order 15 Rule 5 C P C In this view of the matter I am of the opinion that the second submission made by the learned counsel also does not have substance

8. In regard to the last submission raised by the learned counsel, as I have already indicated above, the deposit so far as the amount due before the first date of hearing has to be of the admitted amount During the continuation of the suit whether the amount has been admitted or not the tenant is obliged to deposit the same In the instant case, admittedly there has been no compliance by the tenant of depositing the amount of monthly rent in accordance with the provisions of Order 15, Rule 5 C P C during the continuation of the suit In this view of the matter even if the argument of the learned counsel for the petitioner is accepted then too since there has been a default in depositing the rent during continuation of the suit, the defence of the petitioner is liable to be struk off Thus submission made by the learned counsel for the petitioner would not help the petitioner at all but in any case I would like to discuss this question also as it has been urged at length by the learned counsel for the petitioner

9. The Judge Small Cause Court as well as the revisional court after examining various paragraphs of the written statement came to the conclusion that the petitioner had admitted the respondents Nos 3 and 4 as his landlords In view of this decision it cannot be said that there was any dispute in regard to the relationship of landlord and tenant in the instant case

10. I have also examined the written statement filed by the petitioner in the instant case On a reading of the written statement it is clear that the petitioner specifically denied the plaintiff's case that he had denied the title of plaintiffs and ultimately it is his own case as set out in paragraph 20 that he approached the opposite parties 3 and 4 to pay rent and that they avoided to take the rent on one pretext or the other It was thereafter that they deposited the rent, and that too in the name of opposite parties Nos 3 and 4 in the court under Sec 30 of the Act, Paragraph 22 of the written statement is very specific which is as follows

"22 That the defendant has neither committed default nor he has denied the title as such the suit is not maintainable"

11. This paragraph 22 makes it absolutely clear that the petitioner does not deny the relationship of the landlord and tenant between the petitioner and the opposite parties Nos. 3 and 4 and therefore, it cannot be said that the finding recorded by the court below is manifestly erroneous In view of the above, I find no force in the third submission made by the learned counsel for the petitioner

12. In the result the petition fails and is accordingly dismissed. Parties are directed to bear their own costs.

Petition dismissed.

1981 ALL. L J. 897
= 1981 Cri L. J 1083

FULL BENCH

YASHODA NANDAN, K N SINGH AND S J HYDER, JJ

Ramji Pandey, Petitioner v State of U P and others, Respondents

Civil Misc Writ No 9437 of 1979, D/-11-5-1981

(A) U P. Control of Goondas Act (8 of 1971), S 3 (1) — Notice under — Requirement — Magistrate forming his opinion under S. 3 (1) — Notice must contain "general nature of material allegations" forming basis of his opinion (Constitution of India, Arts. 226, 21).

The notice issued by the District Magistrate must contain the general nature of material allegations on the basis of which the District Magistrate may have formed his opinion under Section 3 (1) In the absence of material allegations the person to whom notice is issued will be denied opportunity of explanation. It is, therefore mandatory to set out the general nature of material allegations in the notice issued under Section 3 (1) If the notice fails to contain the general nature of material allegations it would be vitiated and the proceedings taken in pursuance thereof would be rendered null and void 1972 All LJ 762, Approved (Para 6)

(B) U. P. Control of Goondas Act (8 of 1971), S. 3 (1) — Notice under — Contents of — Essential assertions of facts as to matters in cls. (a), (b) and (c) of S 3 (1) necessary — Evidence or further details not needed. (Constitution of India, Art. 21 — Words & Phrases — "Material allegations — Bombay Police Act (22 of 1951), S 59)

The notice under Section 3 (1) should contain the essential assertions of facts in relation to the matters set out in clauses (a), (b) and (c) of sub-section (1) of Section 3 It need not refer to any evidence or other particulars or details The names of witnesses, and persons who may have made complaint against the person against whom action is proposed to be taken or the time, date and place of the offence committed by the person need not be mentioned in the notice There is a distinction between the "general nature of material allegations" and "particulars of allegations" In the former the notice need not give any details of the allegations, instead the requirement of the law would be satisfied if the notice contains a general statement of facts which need not contain any details or particulars 1972 All LJ 762, Explained and Disting, 1969 Cri LJ 26 (SC), Relon (Paras 7, 10, 13)

(C) U. P. Control of Goondas Act (8 of 1971), S 3 (1) — Notice not complying with S. 3 (1) — Invalid — Action taken under Sec. 3 (1) — Affects personal liberty of citizen — Notice must, therefore, be strictly construed (Constitution of India, Arts. 21, 19 — U P Control of Goondas Rules (1970), R. 4 — Interpretation of Statutes — Penal statute — Liberal construction).

It is true that validity of a notice is generally upheld if it substantially conforms with the requirement of law but while considering the validity of a notice issued under Section 3 the same considerations cannot be applied The Act is extraordinary in nature Its provisions permit serious inroads on the liberty of a citizen as the provisions permit externment of a citizen without a judicial trial The provisions of the Act provide slender safeguards to a citizen In such a situation the question of liberal construction of notice does not arise The provisions of the Act should be strictly complied by the executive while taking action under the Act If notice issued under Section 3 (1) is not in accordance with the provisions of Section 3 (1) and if it fails to comply with the mandatory requirements of setting out the general nature of material allegations further proceedings initiated in pursuance of that notice would also be rendered illegal (Para 17)

In the instant case notice was issued in form prescribed under Rule 4 of the Rules framed under the Act In column (d) of the notice meant for setting out material allegations of general nature against the noticee, no statements of fact relating to his conduct has been stated, instead it mentioned details of a criminal case wherein he was convicted for an offence of robbery and the list of criminal cases pending against him and also a list of first information reports lodged with the police.

Held, that the notice was not in compliance with S 3 (1) of the Act (Paras 15, 16, 18)

Cases Referred : Chronological Paras

1974 All WR (HC) 21 13
1973 Cri LJ 612 AIR 1973 SC 630 12, 13, 16
AIR 1972 All 498 1972 All LJ 537 5
1972 All LJ 762 1, 2, 6, 8, 13, 17, 18
1969 Cri LJ 26 AIR 1968 SC 1468 1, 2, 9, 10, 12, 13, 16

R N Singh, for Petitioner

K N SINGH, J — The District Magistrate, Ballia, issued a notice to the petitioner on 10-10-1979 under Section 3 of the U P Control of Goondas Act, 1970 directing him to appear before him on 12-11-1979 at 10 A M and to give his explanation in writing as to why an order should not be passed against him under Section 3 of the Act The petitioner instead of appearing before the District Magistrate filed this petition under Article 226 of the Constitution in this Court challenging validity of the notice While issuing notice of the writ petition to the respondents, a Division Bench of this Court observed that the decision of a Division Bench of this Court in Harsh Narain v District Magistrate (1972 All LJ 762) relied on by the counsel for the petitioner in assailing the validity of the notice required reconsideration in view of the Supreme Court decision in State of Gujarat v Mehbub Khan (AIR 1968 SC 1468) (1969 Cri LJ 26) In this view the Bench referred the matter to a larger Bench and that is how this petition has been placed before us.

2. Learned counsel for the petitioner urged that the notice issued to the petitioner under Section 3 of the Control of Goondas Act, 1970, (hereinafter referred to as the Act) is illegal as it does not contain "general nature of material allegations" against the petitioner in respect of the matters set forth in clauses (a), (b) and (c) of Section 3 (1) of the Act, as a result of which the petitioner is denied a reasonable opportunity of tendering explanation He further urged that the Act provides slender safeguards to a person against whom notice is issued under Section 3 and as such it is imperative that the statutory provision is strictly complied with Since the notice is invalid for non-compliance of statutory provisions, the entire proceedings under the Act are rendered illegal and void He placed reliance on the decision of a Division Bench of this Court in Harsh Narain's case (1972 All LJ 762) (supra) where an order passed under Section 3 of the Act externing the petitioner of that case from the district of Allahabad for a period of six months was quashed on the ground that the notice issued under Section 3 (1) did not set out general nature of material allegations Learned Standing Counsel has, on the other hand, urged that the impugned notice is in accordance with Section 3 (1) of the Act as it sets out "general nature of material allegations" against the petitioner The nature of the proceedings under the Act and the purpose of the order which may ultimately be passed do not contemplate a judicial trial or prosecution and it is not necessary to give details or particulars of the matters set out in clauses (a), (b) and (c) of Section 3 of the Act. Placing reliance on the Supreme Court decision in State of Gujarat v Mehbub Khan (1969 Cri LJ 26) (supra) he urged that the view taken by this Court in Harsh Narain's case is not a good law

3. Before we consider the submissions made by the learned counsel for the parties, we think it necessary to have a brief appraisal of the scheme of the Act The Act, as its preamble shows was enacted by the legislature for the control and suppression of Goondas with a view to maintaining of public order The Act confers power on the District Magistrate or any other person specially authorised in that behalf by the State Government to extern a Goonda outside the district, or part thereof for a period not exceeding six months Goonda as defined by Section 2 (b) of the Act, means a person who either by himself or as a member or leader of a gang, habitually commits or attempts to commit, or abets the commission of, offences punishable under Chaps XVI, XVII or XXII of the Indian Penal Code, or has been convicted under the Suppression of Immoral Traffic in Women and Girls Act, 1956 or has been convicted not less than three times under the U. P Excise Act, 1910 or is generally reputed to be a person who is desperate and dangerous to the community If the District Magistrate is satisfied that any person is Goonda, and his movements in the district or any part thereof are causing alarm, danger or harm to persons or there is reasonable ground for believing that he is engaged or is about to engage in the commission of any offence punishable under Chapter XVI, XVII or XXII of the Indian Penal Code or under the Suppression of

Immoral Traffic in Women and Girls Act, 1956 or under the U P Excise Act 1910 or in the abetment of any such offence and that witnesses are not coming forward to give evidence by reason of terror on his part or on account of safety of their person or property, he shall by notice in writing inform the person concerned of the general nature of material allegations against him and give him a reasonable opportunity of tendering his explanation The person against whom an order under Sec 3 is proposed to be passed has a right of defence and he is further entitled to examine witnesses

4. If the District Magistrate is satisfied that the conditions specified in clauses (a), (b) and (c) of sub-section (1) of Section 3 are satisfied he may pass orders directing the person concerned to remove himself outside the district or pass any other order as contemplated by clauses (a) and (b) of Section 3 (3) of the Act Section 4 confers power on the District Magistrate to permit any person against whom externment order may have been passed to enter or return for a temporary period Section 5 confers power on the District Magistrate to extend the period specified in the order passed under Section 3 (3) of the Act but the legislature has provided that in no case the period shall exceed 2 years in the aggregate Section 6 provides appeal against the orders passed under Sections 3, 4 and 5 before the Commissioner Section 7 confers power on the District Magistrate and the Commissioner to secure attendance of any person against whom an order is proposed to be made and to do all such acts which may be necessary for the purpose of giving effect to the order including the power to issue warrant of arrest Section 8 lays down that the provisions of the Indian Evidence Act, 1872 shall not apply to the proceedings but District Magistrate and the Commissioner may take into consideration any evidence which they may consider to have probative value for the purpose of satisfying themselves as to whether the conditions for making and confirming the order under Section 3 exist The Commissioner and the District Magistrate have powers to rescind the order passed under Section 3 Contravention of an order passed under Sections 3, 4 and 5 is punishable under Section 10 Section 11 confers power on the police to arrest a person against whom an order under Sections 3, 4 and 5 may have been passed and if he has failed to move from the district or part thereof or if he re-enters the area in contravention of the order The District Magistrate is authorised to remove the person outside the area specified in the order with the aid of the police

5 These provisions unfold the scheme of the Act which provides for a summary procedure for taking action against persons whose activities jeopardise peace and safety of the citizens in a particular locality The Act is of extraordinary character which seeks to meet those exceptional cases where action against bad characters and undesirable elements of the society is not possible in accordance with ordinary law, as in many cases witnesses for fear of violence to their person or property are not willing to depose publicly against bad characters whose presence in certain areas constitutes menace to the safety of the public residing therein The legislature has made a departure from the ordinary procedure followed in courts of law by providing a summary procedure of externment of a goonda in accordance with the procedure laid down under the Act The Act does not contemplate any judicial trial and the proceedings before the District Magistrate or the Commissioner are not governed by the Criminal Procedure Code or the Indian Evidence Act except as permitted by the Act The provisions of the Act no doubt, make serious inroad on the personal liberty of a citizen but such restraints have to be suffered in the larger interest of the society The validity of the Act was upheld in Raja v State of Uttar Pradesh (1972 All LJ 537) (AIR 1972 All 498)

6 Now coming to the provisions of the Act, it would be seen that Section 3 confers power on the District Magistrate to extern any one who is a Goonda outside the district or to place restrictions on his movement If the District Magistrate is satisfied that the matters set forth in clauses (a), (b) and (c) of sub-section (1) are made out he may issue notice to the Goonda informing him of the "general nature of material allegations" against him in respect of those matters The District Magistrate is further required to give him reasonable opportunity of tendering his explanation regarding those matters The notice issued by the District Magistrate must contain the general nature of material

allegations on the basis of which the District Magistrate may have formed his opinion under Section 3 (1) of the Act In the absence of material allegations the person to whom notice is issued will be denied opportunity of explanation It is, therefore, mandatory to set out the general nature of material allegations in the notice issued under Section 3 (1) of the Act If the notice fails to contain the general nature of material allegations it would be vitiated and the proceedings taken in pursuance thereof would be rendered null and void We are in agreement on this question with the view taken by the Division Bench in Harsh Narain's case (1972 All LJ 762)

7 The question then arises what does the expression "general nature of material allegations" denote The expression "material allegations" has not been defined by the Act According to the Dictionary meanings, the word "material" means important and essential of significance The word allegation means statement or assertion of facts Thus the notice under Section 3 (1) should contain the essential assertions of facts in relation to the matters set out in cls (a), (b) and (c) of sub-section (1) of Sec 3 of the Act It need not refer to any evidence or other particulars or details The names of witnesses, and persons who may have made complaint against the person against whom action is proposed to be taken or the time, date and place of the offence committed by the person need not be mentioned in the notice There is a distinction between the "general nature of material allegations" and "particulars of allegations" In the former the notice need not give any details of the allegations, instead the requirement of law would be satisfied if the notice contains a general statement of facts which need not contain any details or particulars

8. In Harsh Narain's case (1972 All LJ 762) the notice, instead of setting out the general nature of material allegations, it mentioned a list of first information reports filed against the petitioner in the last several years and reference of cases in which he was convicted. The question arose whether the notice contained "general nature of material allegations" The learned Advocate-General who appeared on behalf of the State conceded before the Bench that the notice in that case did not set out the general nature of material allegations, but he urged that the defect in the notice did not handicap the petitioner in making his representation The Bench repelled this contention and held that the defect of not setting out the "general nature of material allegations" in the notice was a fatal defect as it resulted in non-compliance of the provisions of Section 3 (1) The Bench observed thus (at p 769)

"Section 3 (1) enjoins upon the District Magistrate to inform the Goonda of the general nature of material allegations against him in respect of cls (a), (b) and (c) and further enjoins upon him to give the goonda a reasonable opportunity of furnishing his explanation regarding them If the goonda is not informed of the general nature of the material allegations regarding cls (a), (b) and (c) he can furnish no explanation in respect of them and would be deprived of the reasonable opportunity to which he is entitled under Section 3 (1) Not only this, in the absence of a proper explanation, he would also be deprived of the reasonable opportunity under sub-section (2) of producing his evidence in support of his explanation When he is deprived of the reasonable opportunity at both these stages, the action taken must be held to be illegal."

Proceeding further, the Bench held that since notice was not issued in accordance with the provisions of Section 3 (1) of the Act, subsequent action taken on the basis of the notice must fail. In coming to that conclusion the Bench observed thus —

"Where a statute permits the executive to pass orders imposing restrictions on the fundamental rights of the citizens guaranteed by Article 19 of the Constitution then, such orders can be passed only after strictly complying with the provisions of the statute. If orders are passed without strictly complying with the provisions of the statute they must be struck down"

9 The correctness of the principles laid down in Harsh Narain's case is assailed in view of the Supreme Court decision in State of Gujarat v Mehbub Khan (1969 Cri LJ 26) In Mehbub Khan's case, the provisions of the Bombay Police Act, 1951 were considered The Bombay Police Act provides for externment of a person who makes himself obnoxious as to render his presence in any part of the Bombay State a menace to the public including public peace and safety, Section 56 confers

powers on the Commissioner, appointed under the Act or the District Magistrate or the Sub-Divisional Magistrate specially empowered by the State Government to extern a person from an area if it appears to them that the movement or acts of a person are causing or calculated to cause alarm, danger or harm to person or property, or that there is reasonable apprehension that such person is engaged or is about to be engaged in the commission of an offence involving force or violence or an offence punishable under Chapters XII, XVI or XVII of the Indian Penal Code, or in the abetment of any such offence, and when in the opinion of such officer witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property The section further requires the authority concerned to pass an order in writing before externing the person from any district or area Section 57 confers power on the authority designated therein to direct a person to remove himself from the area or not to enter the area or contiguous district or area if he has been convicted for the offences mentioned therein and if the authority has reason to believe that such person is likely again to engage himself in the commission of offences similar to that for which he may have been convicted Section 58 lays down that the period for which the order may be passed under Section 57 shall not extend for more than a period of 2 years Section 59 lays down that before an order under Section 56 or 57 is passed against any person the authority concerned shall inform the person in writing of the "general nature of material allegations" and give him reasonable opportunity of tendering explanation These provisions are almost similar to those contained in Sec 3 of the U P Act No VIII of 1971 Section 56 of the Bombay Act provides for removal of persons who are about to engage in committing offence, while Section 57 provides for removal of persons from an area or contiguous district or area who may have been convicted of certain offences An order under Section 3 of the U P Act can be passed only against a goonda as defined by Section 2 (b) of the Act Section 3 of the U P Act and Section 59 (1) of the Bombay Act both provide for setting out the "general nature of the material allegations" in the notice issued to the person concerned The essential features of Sections 56, 57 and 59 of the Bombay Police Act are contained in Section 3 of the U P Act, as such interpretation of the expression "general nature of material allegations" as occurring in Section 59 of the Bombay Act would apply with full force to the construction of a notice issued under Section 3 of the U P Act

10 In Mehbub Khan's case (1969 Cri LJ 26) the externment order was proposed under Section 56 for removing him outside the city of Ahmedabad and contiguous districts for a period of two years The notice as contemplated by Section 59 (1) of the Bombay Act stated as under —

"Take Notice —

Allegations —

It is alleged against you that you are a dangerous and desperate person and indulge in acts involving force and violence You terrorise the residents of the localities known as Rentiawasdi, Halmkhadki and round about area under Karanj and Madhavpura police stations Since the month of November, 1963 till today you are engaged in the commission of the following offences in the above localities —

(1) You waylay rob and extort money from the persons at the point of knife and under threats of violence

(2) You demand money from the persons and on their refusal to pay you beat them

(3) You consume eatables from the place of public entertainment without payment and when legal dues are demanded you beat the person

You are engaged in several acts as mentioned in paras (1), (2) and (3) above and that the witnesses to the above incidents are not willing to come forward to depose against you in public by reasons of apprehension on their part as regards the safety of their person and property

It is proposed to extern you for a period of two years It is also proposed to extern you out of the contiguous districts of Ahmedabad Rural, Kaira and Mehsana as you are likely to operate and indulge in your violent activities from the contiguous districts also through your associates and agents if not so externed."

Mehbub Khan contested the proceedings, but the Deputy Commissioner passed

an order directing him to remove himself outside Ahmedabad City and contiguous districts Mehbub Khan challenged the validity of the externment order before the Gujarat High Court and one of the grounds raised before the High Court in challenging the validity of the notice was that the notice issued under Section 59 (1) did not contain the "general nature of material allegations" The High Court accepted the contention and held that the notice was invalid and it quashed the externment order On appeal by the State of Gujarat, the Supreme Court set aside the judgment of the High Court and held the notice valid The Supreme Court rejected the argument that the notice was bad for vagueness It held that the person proposed to be externed was entitled to be informed of the general nature of material allegations but not all the particulars of the allegations As to the meaning of the phrase "general nature of material allegations" The Supreme Court observed (at p 32) —

"Without attempting to be exhaustive, we may state that when a person is stated to be a 'thief' that allegation is vague Again, when it is said that 'A' stole a watch from X on a particular day and at a particular place the allegation can be said to be particular Again, when it is stated that 'X' is seen at crowded bus stands and he picks pocket it is of a general nature a material allegation Under the last illustration given above, will come the allegations, which, according to the Gujarat High Court, suffer from being too general or vague Considering it from the point of view of the party against whom an order of externment is proposed to be passed, it must be emphasised that when he has to tender an explanation to a notice, under Section 59 he can only give an explanation which can be of a general nature It may be open to him to take a defence, of the action being taken, due to mala fides, malice, or mistaken identity, or he may be able to tender proof of his general good conduct, or alibi, during the period covered by the notice and the like"

11 It is significant to note that the learned Judges of the Gujarat High Court had taken the view that the allegations contained in the notice (as quoted earlier) did not contain the particulars of places of public entertainment or establishments which may have been visited by Mehbub Khan The Supreme Court emphasised that the general nature of material allegations is quite different from the particulars of the material allegations Sec 59 of the Bombay Police Act does not require particulars of the allegations, instead it requires the authority concerned to inform the person in writing of the general nature of the material allegations A perusal of the notice issued against Mehbub Khan would show that it contained the essential allegations against him Clauses 1, 2 and 3 of the notice gave the general nature of allegations against Mehbub Khan The Supreme Court, therefore, held that having regard to the nature of the defence open to a person to whom notice is issued under Section 59 (1) of the Bombay Police Act, the general nature of allegations as contained in the notice was sufficient

12. The scope of the words "general nature of the material allegations" was again considered by the Supreme Court in Pandhari Nath Rangnekar v State of Maharashtra (AIR 1973 SC 630) In that case validity of a notice issued under Sec 59 (1) of the Bombay Police Act, 1951, was challenged on the ground that the particulars contained in the notice were so vague that the petitioners possibly could not meet the allegations made against him and thereby he was denied reasonable opportunity of defence The material portion of the notice as quoted by the Supreme Court was in the following terms

"Notice under Section 59 of the Bombay Police Act, 1951.

Name, Address and Age — Sri Pandharinath Shridhar Rangnekar, Hindu, 28 years. Res Hama Niwas, Nariman Road, Vile Parle (East) Bombay 57

Under Section 59 of the Bombay Police Act, 1951 (Bom. XXII of 1951) you are hereby informed that the following allegations are made against you in proceedings against you under Section 56 of the said Act

In order to give you opportunity of tendering your explanation regarding the allegations I have appointed at 9 A M on 16-10-1969 to receive your explanation and to hear you and your witnesses, if any, in regard to the said allegations I, Shri H. S Joshi, Assistant Commissioner of Police, 'M' Division Bombay, therefore, require you to appear

before me at Vile Parle Police Station on the said date viz, 16-10-1969 at 9 A M for the said purpose and to pass a bond for the sum of Rs 500/- for your attendance during the enquiry of the said proceedings Should you fail to appear before me and to pass bond as directed above, I shall proceed with the enquiry in your absence

Take Notice —

Allegations —

(1) Since March, 1969 in the localities of Nehru Road, Azad Road, Moghibai Road, Mahatma Gandhi Road, Ram Mandir Road and the areas adjouning thereto in the jurisdiction of Vile Parle police station, Greater Bombay, your acts and movements are causing harm, alarm and danger to the residents of the aforesaid localities and areas under that

(2) That you assault the residents of the aforesaid localities and area either suspecting them of giving information to the police about your illegal activities or because they fail to accede to your demand of money which offences are punishable under Chapter XVI of the Indian Penal Code.

(3) That you commit robberies, by extorting money and articles from the residents of the aforesaid localities and areas by means of assault and/or under threats of assault which are offences punishable under Chapter XVII of the Indian Penal Code

(4) That since March, 1969 you have committed several acts of the matter described in paras (1), (2) and (3) above

(5) That the witnesses to your above described acts and movements are not willing to come forward and depose against you by reason of apprehension on their part as regards the safety of their persons in that they apprehend danger to the safety of their person or property, if they do so

Sd/- H S Joshi

Assistant Commissioner of Police
'M' Division, Bandra, Bombay

Dated
9-10-1969

The Supreme Court relying on its earlier decision in Mehbub Khan's case (1969 Cri LJ 26) repelled the contention raised on behalf of Pandharinath

13. Mehbub Khan's case was not placed before the Bench dealing with Harsh Narain's case (1972 All LJ 762) and it had no occasion to consider the same, although the principle laid down by the Supreme Court in interpreting Section 59 (1) of the Bombay Police Act with regard to the necessity of giving "general nature of material allegations" are fully applicable to a notice issued under Section 3 (1) of the Act As discussed above, the Supreme Court has emphasised that the material allegations do not require giving of particulars of allegations such as setting out of the date, time and place is not necessary, nor it is necessary to give the names of persons who may have given information or who may have refused to appear as witnesses In Harsh Narain's case, the Division Bench held that the notice issued in that case did not set out the general nature of material allegations The Bench unlike Gujarat High Court in Mehbub Khan's case did not hold that the notice was invalid as it failed to set out particulars of the allegations instead it held that the notice did not contain even the minimum possible material allegations, as the column in the notice which was meant for setting out the general nature of material allegations contained a list of convictions and first information reports lodged against the petitioner of that case By any standard the notice in Harsh Narain's case failed to set out the general nature of material allegations, while notice in Mehbub Khan's case contained the essential statement of facts giving the general nature of the activities of Mehbub Khan The view taken by the Bench in Harsh Narain's case is not in conflict with that of the Supreme Court The question whether Harsh Narain's case is contrary to the law declared by the Supreme Court in Mehbub Khan's case was considered in Pannu v Commissioner (1974 All WR (HC) 21) and it was held that even though the case of Mehbub Khan was not cited before the Bench dealing with Harsh Narain's case, but that did not affect the position of law We are also of the view that the decision of the Division Bench in Harsh Narain's case is not inconsistent with the law laid down by the Supreme Court in Mehbub Khan's case or Pandharinath's case (1973 Cri LJ 612)

14. We would not advert to the notice issued to the petitioner in the instant case. The notice is as under

"Notice under Section 3 of the U P Control of Goondas Act, 1970.

It appears to me on the basis of the information placed before me by the Superintendent of Police, Ballia, that —

(a) Shri Ramji Pandey, son of Shiv poojan Pandey is a resident of village Damanpura, P S Sikandarpur, district Ballia, and is a goonda, i e he himself habitually commits crime or attempts to commit or abets the commission of offence punishable under Chapters XVI, XVII and XXII of the Indian Penal Code He is generally reputed to be a person, who is desperate and dangerous to the community

(b) That his movements and acts are causing alarm, danger and harm to the lives and property of the persons within the circle of P S Sikandarpur, district Ballia. There is reasonable ground for believing that he is engaged in the commission and abetment of offences punishable under Chapters XVI, XVII and XXII in the aforesaid region of the district

(c) The witnesses are not willing to come forward to give evidence against him by reason of apprehension on their parts as regards the safety of their personal property"

(d) In regard to the sub-paragraphs (a), (b) and (c) and material allegations of a general nature against him are as follows

(1) He was convicted for two years by the Court of J M, Ballia on 17-9-1970 in connection with offence No 31/74 under Section 394, I P C

(2) The case Crime No 15/71 under Section 379, I P C is pending

(3) The case Crime No 83/79 under Section 452/504, I P C is pending.

(4) The case Crime No 162/79 under Section 110, Cr P C is pending

(5) He was acquitted in the case Crime No 102/72 under Section 394, I P C.

(6) He was acquitted in the case Crime No 250/71 under Section 177/452, I P C

(7) M C R No Section 109/79, Section 504/506, I P C

(8) M. C R No Section 192/79, Section 323/504, I P C

(9) M C R No Section 262, Sec-352/504, I P. C

(10) M. C R. No Section 283, Section 504/506, I P. C.

(11) M C R; No. S. 107/117, Cr P C.

The aforesaid Shri Ramji Pandey is hereby directed to present himself before me in my court on 12-11-1978 at 10 A M In regard to the aforesaid material allegations he may if he so desires, give his explanation in writing giving reasons as to why an order be not passed against him under sub-section (3) of Sec 3 of the U P Control of Goondas Act 1970 and he should also inform, if in support of his explanation, he wished himself to be examined or other witnesses if any to be examined and if so their names and addresses should also be furnished

The aforesaid Ramji Pandey is hereby further informed that if he does not present himself in the aforesaid manner or if within the specified time no explanation or information is received, it shall be presumed that Shri Ramji Pandey does not wish to give any explanation in respect of the aforesaid allegations or does not want to examine any evidence and I shall take proceedings for the compliance of the proposed order Clause (a) of the notice states that the petitioner is a 'goonda' and he is reputed to be a person who is dangerous and desperate to the community. Clause (b) sets out the area of the petitioner's activities within the police circle of Sikandarpur in district Ballia, where he is alleged to be engaged in commission and abetment of offence punishable under Chapters XVI, XVII and XXII of the Indian Penal Code and finally in clause (c) of the notice the District Magistrate has stated that the witnesses are not willing to come forward to give evidence against the petitioner by reason of apprehension on their part as regards safety of their person and property Clause (d) of the notice purports to set out the general nature of material allegations against the petitioner."

15. The above notice is in the form prescribed under Rule 4 of the U. P Control of Goondas Rules, 1970. In column (d) of the notice meant for setting out material allegations of general nature against the petitioner, no statements of fact relating to the petitioner's conduct has been stated, instead it mentions details of a criminal case where the petitioner was convicted for an offence of robbery and the list of crimine cases pending against him and also a list of first information report lodged with the police. Column (d) does not contain any allegation or material allegation against the petitioner It was argued that if column (d) is read with clauses (a), (b) and (c) of the notice, it is possible to discern the material allegations

against the petitioner A notice under Section 3 (1) cannot be issued unless the District Magistrate is satisfied about the matters set out in clauses (a), (b), and (c) of Sec 3 (1) The prescribed form also requires the District Magistrate to state in the notice that on the basis of the information laid before him he is satisfied that the person concerned is goonda and that his movements and acts and conduct fulfil the conditions as set out in clauses (a), (b) and (c) of Section 3 (1) of the Act In the impugned notice the District Magistrate has set out matters as required by cls (a), (b) and (c) in the prescribed form The prescribed form as well as the impugned notice both seek to maintain a distinction between material allegations and the matters set out in clauses (a), (b) and (c) of the notice The facts stated in column (a) (b) and (c) of the notice refer to the satisfaction of the District Magistrate with regard to the matters set out in cls (a), (b) and (c) of Sec 3 (1) of the Act Clause (d) of the notice intended to set out general nature of material allegations against the petitioner with a view to give him opportunity to submit his explanation and to defend himself In this view of the matter, it is not possible to accept the contention that columns (a), (b) and (c) of the notice set out the general nature of material allegations against the petitioner

16. In the instant case, the general nature of material allegations appears to be that the petitioner was waylaying persons and robbing them within the circle of police station Sikandarpur, district Ballia and also committing theft The allegation further appears to be that the petitioner has been assaulting people and causing injuries to them within the circle of police station Sikandarpur, district Ballia and that witnesses are not willing to come forward to give evidence against him on account of apprehension to their lives and property These matters could have been stated in a narrative form as was done in the cases of Mehbub Khan (1969 Cri LJ 26) (SC) and Pandharinath (1973 Cri LJ 612) (SC) but the impugned notice does not contain these allegations, instead it contains a list of first information reports and pending cases In our opinion, it is difficult to uphold the respondent's contention that the list of first information reports or list of cases in which the petitioner was convicted or the list of cases in which the petitioner was acquitted or the list of pending criminal cases against the petitioner is sufficient to meet the requirement of setting out "the general nature of material allegations" The impugned notice is, therefore not in accordance with Sec 3 (1) of the Act as it fails to set out general nature of material allegations against the petitioner

17 Learned Standing Counsel urged that on a liberal construction of the notice the material allegations on the basis of which action against the petitioner is proposed to be taken are discernible and as such the notice is not rendered illegal and the proceedings taken against the petitioner are valid It is true that validity of a notice is generally upheld if it substantially conforms with the requirement of law but while considering the validity of a notice issued under Sec 3 of the Act the same considerations cannot be applied As noted earlier, the Act is extraordinary in nature Its provisions permit serious inroad on the liberty of a citizen as the provisions permit externment of a citizen without a judicial trial The power conferred on the authorities and the procedure provided by the Act seriously impinge upon the fundamental rights of a citizen and it makes a serious inroad on the personal liberty The provisions of the Act provide slender safeguards to a citizen in requiring the District Magistrate and other authorities to give notice to the person against whom action is proposed under the Act and to set out the general nature of material allegations in the notice with a view to give opportunity to the person concerned to submit his explanation and to defend himself The persons against whom action is proposed to be taken under the Act has a meagre opportunity of submitting his explanation to the allegations contained in the notice issued to him and to defend himself by producing evidence before the District Magistrate These are the only safeguards which the provisions of the Act provide to a citizen against whom action is proposed to be taken In such a situation the question of liberal construction of notice does not arise The provisions of the Act, in our opinion, should be strictly complied by the executive while taking action under the Act This was emphasised by the Supreme Court in Pandhari-

nath's case (1973 Cri LJ 612) where it observed (at p 615)

"We will only add that care must be taken to ensure that the terms of Sections 56 and 59 are strictly complied and the slender safeguard which those provisions offer are given to the proposed externee"

This Court also made similar observations in Harsh Narain's case (1972 All LJ 762) in saying that the executive must strictly comply with the provisions of the Act We are therefore of the opinion that if notice issued under Section 3 (1) of the Act is not in accordance with the provisions of Section 3 (1) of the Act and if it fails to comply with the mandatory requirements of setting out the general nature of material allegations further proceedings initiated in pursuance of that notice would also be rendered illegal

18. In view of the above discussion, we do not find any good ground to take a different view than that taken in Harsh Narain's case We further hold that the impugned notice issued to the petitioner has failed to comply with the mandatory provisions of Section 3 (1) of the Act

19. The petition succeeds and is accordingly allowed and the notice dated 10-10-1979 is quashed The petitioner is entitled to his costs

Petition allowed

1981 ALL L J 906

* AIR 1981 Supreme Court 1656

(From Allahabad)*

R S PATHAK, E S VENKATARAMIAH AND V BALAKRISHNA ERADI, JJ

Civil Appeal No 3133 of 1979, D/- 28-7-1981

M/s Annapurna Biscuit Manufacturing Co, Kanpur, Appellant v Commissioner of Sales Tax, U P Lucknow, Respondent

(A) U. P. Sales Tax Act (15 of 1948), S. 3A — Notification under, fixing rate of levy on turnover of 'cooked food' — 'Cooked food' — Interpretation — It does not include biscuit in its strict meaning. (Words and Phrases — 'Cooked food').

*S T R No 573 of 1979. D/- 30-7-1979 (All)

HY/HY/D510/81/AAJ/SSG

Where the State Government issued the notification under S 3-A whereby the tax was fixed at two per cent of the turnover payable at all points of the sale in the case of cooked food or 'pakaya hua bhojan' (as found in the Hindi text of notification) the assessee, a registered firm engaged in the business of manufacture and sale of biscuits intended for human consumption could not claim to be taxed as per rate prescribed under notification as expression 'cooked food' does not include biscuits in its strict meaning, S T R No 573 of 1979, dated 30-7-1979 (All), Affirmed (Para 5)

In its wider meaning 'cooked food' may include biscuit But ordinarily biscuit is not understood as cooked food 1977 Tax LR NOC 3 (All), (1968) 21 STC 309 (Madh Pra), Approved (Para 5)

(B) Interpretation of Statutes — Taxing statutes — Construction — Rule as to

The words used in a law imposing a tax should be construed in the same way in which they are understood in ordinary parlance in the area in which the law is in force If an expression is capable of a wider meaning as well as narrower meaning the question whether the wider or the narrower meaning should be given depends on the context and the background of the case. (Para 4)

Cases Referred	Chronological Paras
1977 Tax LR NOC 3	38 STC 461 (All) 6
1975 Tax LR 1677	35 STC 127 (All) 4
(1968) 21 STC 309	(Madh Pra) 6
(1918) 87 LJKB 893	118 LT 447 34 TLR 403, Hinde v Allmond 4

Mr G. L Sanghi Sr Advocate (M/s Bharat Ji Aggarwal, Naresh Kumar Sharma and Vineet Kumar, Advocates with him), for Appellant S C Manchanda, Sr Advocate (Mrs Sobha Dixit Advocate with him), for Respondent

E. S. VENKATARAMIAH, J.:— The short point for consideration in this appeal is whether the expression 'cooked food' used in certain notifications issued under the U. P Sales Tax Act, 1948 (U P Act XV of 1948) (hereinafter referred to as 'the Act') can be construed as including within its meaning 'biscuits' also

2. The assessee, the appellant herein, is a registered firm engaged in the business of manufacture and sale of biscuits intended for human consumption. The assessee is a registered dealer under the Act. During the assessment proceedings under the Act for the year 1972-73 the

assessee claimed that the turnover relating to biscuits manufactured and sold by it amounting to Rs 35,09,920 38 P was liable to be taxed at two per cent which was the rate prescribed by a notification issued by the State Government for cooked food contending that 'cooked food' included 'biscuits' also The notification relied on was one issued on October 6, 1971 under sub-sec (2) of S 3-A of the Act in supersession of an earlier notification dated July 1, 1969 In both the notifications the tax was fixed at two per cent of the turnover payable at all points of sale in the case of cooked food The Assistant Commissioner (Tax Assessment) Sales Tax, Kanpur who was the assessing authority rejected the contention of the assessee that cooked food included biscuits also and imposed tax at the rate of three and a half per cent on the turnover relating to biscuits treating the same as an unclassified commodity An appeal filed against the order of the assessing authority before the Deputy Commissioner Sales Tax and a further appeal before the Judge (Appeal) Sales Tax, Lucknow were unsuccessful The High Court of Allahabad also declined to interfere with the said order This appeal by special leave is filed against the order of the High Court under Art 136 of the Constitution

3 The only ground urged before us is that biscuits should have been treated by the authorities under the Act and by the High Court as cooked food and sales tax should have been levied on the turnover of biscuits at the rate prescribed in respect of cooked food under the notification referred to above The argument urged on behalf of the appellant is that biscuit which was consumed by human beings for nourishment is food and since it is prepared by baking which is a kind of cooking process it should be treated as cooked food Relying on some foreign English dictionaries it is contended that cooking means preparation of food by application of heat as by boiling, baking, roasting, broiling etc and biscuit should therefore be treated as cooked food What is of significance in this case is that the Hindi version of the notification issued uses the expression पकाया हुआ भोजन (Pakaya hua bhojan) for 'cooked food' found in the notification in English language

4. It is a well settled rule of construction that the words used in law imposing a tax should be construed in the same way in which they are understood in ordinary parlance in the area in which the law is in force If an expression is capable of a wider meaning as well as narrower meaning the question whether the wider or the narrower meaning should be given depends on the context and the background of the case In Hinde v Allmond, (1918) 87 LJKB 893 the question was whether tea was an "article of food" within the meaning of an order designed to prohibit the hoarding of food namely Food Hoarding Order of 1917 The learned Judges held it was not even though in some other decisions it had been held to be an "article of food" Shearman, J one of the Judges said that he rested his judgment on the 'common sense interpretation of the word 'food' in the Order, apart from its meaning in any other statute' It is interesting to note that in a case before the Allahabad High Court in Annapurna Biscuit Manufacturing Co v State of U P, 35 STC 127 (1975 Tax LR 1677) the assessee had contended that biscuit was an article of confectionery and that contention was negatived It is relevant to note, as we have mentioned earlier, that when the Hindi text of the notification was issued contemporaneously with the English version the words पकाया हुआ भोजन (pakaya hua bhojan) were used as the equivalent of the words 'cooked food'

5 It may be that biscuit is served at tea time and in its wider meaning 'cooked food' may include biscuit But ordinarily biscuit is not understood as cooked food If a person goes to a hotel or restaurant and asks for some cooked food or पकायाहुआ भोजन (pakaya hua bhojan) certainly he will not be served with biscuits in Uttar Pradesh While it is not necessary to state in the present case as to what all items may be called as cooked food, we can definitely say that in the context and background of the notification biscuit cannot be treated as cooked food

6 The High Court of Allahabad has in an earlier case in Commissioner of Sales Tax v Jassu Ram Bakery Dealer, 38 STC 461 (1977 Tax LR NOC 3) held that biscuit was not cooked food The High Court of Madhya Pradesh has also taken the same view in Commissioner of Sales Tax [illegible] v Ballabhdas Iswardas, [illegible] 21 STC 309 We approve of the views expressed in the aforesaid decisions.

7. There is no ground to interfere with the orders under appeal In the result, this appeal fails and is dismissed No costs

Appeal dismissed

1981 ALL L J 908

= AIR 1981 Supreme Court 1657

(From Allahabad)*

R S PATHAK, O CHINNAPPA REDDY AND BAHARUL ISLAM JJ

Civil Appeal No 1759 of 1981. D/- 27-7-1981

Bunal Chand Jain, Appellant v Gopal Agarwal, Respondent

Civil P. C (5 of 1908), O 15, R 5 (2) (U P) (as amended by U P Act No 57 of 1976) — Suit for ejectment — Striking off defence on failure to deposit admitted rent and further failure to make representation within terms of O 15, R. 5 — Court still has discretion not to strike off defence if on facts and circumstances already existing on record there is good reason for not doing so. (Civil Revn No 525 of 1980, D/- 3-12-1980 (All), Reversed, 1981 All LJ 82. Overruled)

In a suit for ejectment of lessee and for recovery of arrears of rent, the Court enjoys the discretion not to strike off the defence in case the defendant has defaulted in depositing the rent and has also failed to make any representation within terms of O 15, R 5 There is a reserve of discretion vested in the Court entailing it not to strike off the defence if on the facts and circumstances already existing on the record it finds good reason for not doing so It will always be a matter for the judgment of the Court to decide whether on the material before it, notwithstanding the absence of a representation under sub-rule (2), the defence should or should not be struck off The word "May" in sub-rule (1) merely vests power in the Court to strike off defence It does not oblige it to do so in every case of default Sub-rule (2) obliges the Court before making an order for striking off the defence to consider any representation made by the defendant in that behalf In other words the defendant has been vested with a statutory right to make a representation to the Court against his defence being struck off This is a right expressly vested in the defendant and enables him to show by bringing material on the record that he has not been guilty of the default alleged or if the default has occurred there is good reason for it But it is not impossible that the record may contain such material already In that event it cannot be said that sub-rule (1) obliges the Court to strike off the defence It must be remembered that an order under sub-rule (1) striking off the defence is in the nature of penalty A serious responsibility rests on the Court in the matter and the power is not to be exercised mechanically Civil Revn No 525 of 1980, D/- 3-12-1980 (All), Reversed, 1981 All LJ 82, Overruled (Para 6)

Cases Referred Chronological Paras
1981 All LJ 82 2, 4, 6

Mr F S Nariman, Sr Advocate, (Mr K K Mohan Advocate with him), for Appellant, Mr R K Garg, Sr Advocate (M/s Pramod Swarup and Sunil Kumar Jain Advocates with him) for Respondent

PATHAK, J :— In a suit for ejectment of a lessee and for recovery of arrears of rent, does the court enjoy any discretion not to strike off the defence in case the defendant has defaulted in depositing the rent and has also failed to make any representation within the terms of R 5 of O XV, Civil P C ? That question is raised in this defendant's appeal by special leave against an order of the Allahabad High Court maintaining in revision that the trial court has no discretion in the circumstances but must strike off the defence

2. The respondent as lessor filed a suit against the appellant as lessee for his ejectment and for recovery of arrears of rent. The appellant filed a written statement and resisted the suit During the pendency of the suit the respondent filed an application praying that the appellant's defence be struck off in view of R 5, of O XV, Civil P C inasmuch as the appellant had committed default in depositing the rent regularly The appellant opposed the application and attempted to show that he had been depositing the rent as required by the law The trial court held that while the rental arrears admitted by the appellant to be due had been deposited in accordance with the relevant provision of sub-rule (1 of R 5 of O XV, he had failed to make regular deposits of the monthly rent de

*Civil Revn No 525 of 1980 D/- 3-12-1980

cruing during the pendency of the suit as required by the other provision of the said Rule The trial court also noted that the appellant had failed to make any representation permitted him by sub-rule (2) of R 5 of O XV within the time prescribed in that provision Following a ruling of the Allahabad High Court that in those circumstances the court was obliged to strike off the defence, the trial court did exactly that The appellant applied in revision to the High Court, and the High Court in view of the view taken by a Division Bench in Puran Chand v Pravin Gupta, Civil Revision No 356 of 1978 decided on October 30, 1980 (reported in 1981 All LJ 82) affirmed the order of the trial court

3 Rule 5 of Order XV, Civil P C, was enacted by the U P Civil Laws (Amendment) Act 1972 It provided that unless the defendant deposited the admitted rent or compensation at or before the first hearing of the suit and also deposited the monthly rent regularly, his defence was liable to be struck off There was a further provision entitling a defendant to make a representation and obtain further time to make the deposit The Rule was repealed by U P Act No 57 of 1976 and was re-enacted as follows

"Striking off defence on failure to deposit admitted rent, etc — (1) In any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and whether or not he admits any amount to be due he shall throughout the continuation of the suit deposit the monthly amount due within a week from the date of its accrual and in the event of any default in making the deposit of the entire amount admitted by him to be due or the monthly amount due as aforesaid, the court may subject to the provisions of sub-rule (2) strike off his defence

Explanations 1 to 3 x x x x

(2) Before making an order for striking off defence, the court may consider any representation made by the defendant in that behalf provided such representation is made within ten days of the first hearing or of the expiry of the week referred to in sub-section (1) as the case may be

(3) The amount deposited under this rule may at any time be withdrawn by the plaintiff.

Provided that such withdrawal shall not have the effect of prejudicing any claim by the plaintiff disputing the correctness of the amount deposited.

Provided further that if the amount deposited includes any sums claimed by the depositor to be deductible on any account the court may require the plaintiff to furnish security for such sum before he is allowed to withdraw the same"

4 The High Court held in Puran Chand (1981 All LJ 82) (supra), that if the representation contemplated by sub-r (2) was not made within the time prescribed therein the court had no jurisdiction to entertain a representation made beyond time and to condone the delay in making it It held further that where no representation was made, or if made was filed beyond time, the court was bound to strike off the defence and enjoyed no discretion in the matter

5 It appears on the facts in this case that no representation under sub-r (2) was made by the appellant The only question raised before us is whether, in the absence of such representation, the court was obliged to strike off the defence of the appellant

6 It seems to us on a comprehensive understanding of Rule 5 of Order XV that the true construction of the Rule should be thus Sub-rule (1) obliges the defendant to deposit, at or before the first hearing of the suit, the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and further, whether or not he admits any amount to be due, to deposit regularly throughout the continuation of the suit the monthly amount due within a week from the date of its accrual In the event of any deafult in making any deposit, "the court may subject to the provisions of sub-rule (2) strike off his defence" We shall presently come to what this means Sub-rule (2) obliges the court, before making an order for striking off the defence to consider any representation made by the defendant in that behalf In other words, the defen-

dant has been vested with a statutory right to make a representation to the court against his defence being struck off If a representation is made the Court must consider it on its merits, and then decide whether the defence should or should not be struck off This is a right expressly vested in the defendant and enables him to show by bringing material on the record that he has not been guilty of the default alleged or if the default has occurred there is good reason for it Now, it is not impossible that the record may contain such material already In that event, can it be said that sub-r (1) obliges the court to strike off the defence" We must remember that an order under sub-rule (1) striking off the defence is in the nature of a penalty A serious responsibility rests on the court in the matter and the power is not to be exercised machanically There is a reserve of discretion vested in the court entitling it not to strike off the defence if on the facts and circumstances already existing on the record it finds good reason for not doing so It will always be a matter for the judgment of the court to decide whether on the material before it, notwithstanding the absence of a representation under sub-rule (2), the defence should or should not be struck off The word "may" in sub-rule (1) merely vests power in the court to strike off the defence It does not oblige it to do so in every case of default To that extent, we are unable to agree with the view taken by the full Court in Puran Chand (1981 All LJ 82) (Supra) We are of opinion that the High Court has placed an unduly narrow construction on the provisions of clause (1) of Rule 5 of Order XV

7 In the circumstances, the appeal is allowed, the order dated December 3, 1980 of the High Court is set aside and the case is remanded to the High Court for fresh consideration In the circumstances, there is no order as to costs

Appeal allowed

1981 ALL. L J 910
= AIR 1981 Supreme Court 1673
(From — Allahabad)*
V V CHANDRACHUD, C J,
V VARADARAJAN AND
AMARENDRA NATH SEN, JJ
Civil Appeal No 2324 of 1980, D/-11-8-1981

R K Khandelwal, Appellant v State of U P and others, Respondents

Constitution of India, Article 136 — New plea — Not taken in writ petition before High Court — Not even mentioned in special leave petition — Plea requiring enquiry by Supreme Court — Plea not allowed to be raised in appeal.

Where in a writ petition against refusal to admit the petitioner to M D Course in Paediatrics of University the question that the ratio 1 1 between the teachers and the students was relaxed from time to time by the University and that the petitioner was discriminated against by the arbitrary refusal of the authorities to relax the ratio in his favour was not taken in the Writ Petition which was filed in the High Court, it was not argued in the High Court and was not even mentioned in the Special leave petition before the Supreme Court, it was held that it could not be raised for the first time in appeal The question as to whether the authorities had the power to relax the ratio and the further question as to whether that power had been exercised arbitrarily in this case raised new points into which it was difficult for the Supreme Court to enquire for the first time (Para 3)

Dr L M Singhvi, Sr Advocate, (Mr. S K Verma, Advocate with him) for Appellant, Mrs. Shobha Dikshit, Advocate, (for Nos 1 & 2) and Mr. S N Kacker, Sr Advocate, (M/s. B R Agarwala and P. G Gokhale, Advocates with him) (for No 4), for Respondents

CHANDRACHUD, C. J.:— The question which arises for consideration in this appeal is whether the appellant, Dr. R. K Khandelwal, is entitled to be admitted to the M D Course in Paediatrics of the Agra University and whether in any case he is entitled to the benefit of the stay order passed in his favour pending the disposal of his legal rights

2. The appellant passed the M B B S Examination from the S N Medical

*Civil Misc Writ No 2228 of 1979 D/- 23-4-1979 All

College, Agra, in December, 1976 and completed his internship in December, 1977 Being desirous of prosecuting post-graduate studies in Paediatrics, he took a year's house-job in the Paediatrics Department of the S N Medical College Hospital, which he completed in January, 1979 He then applied for admission to the M D Course in Paediatrics for the academic year 1979-80 He was admitted to the D C H Course but he was refused admission to the M D Course on two grounds First, that amongst the applicants for the M D Course in Paediatrics there were four students who had secured higher marks than him in the M B B S Examination, and second that on the basis of the 1 1 ratio between teachers and students, there were only four seats available for the post-graduate course in Paediatrics

3. The appellant filed a writ petition in the High Court of Allahabad challenging the decision of the College by which he was denied admission to M D (Paediatrics) That petition was dismissed summarily by a Division Bench of the High Court on the ground that the relief of mandamus sought by the appellant could not be granted to him since he had failed to establish that any of his legal rights was violated This appeal by special leave is directed against the High Court's order dated April 23, 1979

4. The appellant, as stated earlier, was admitted to the D C H Course after he had finished his house-job in Paediatrics His case is that for many years in the past, candidates who had passed the D C H Examination were preferred for admission to the M D Course but that the University suddenly discontinued that practice, as a result of which he had to compete with others who had passed their M B B S Examination There is no substance in this contention and in any case the appellant cannot make a grievance of a change in the practice for admission to the particular course Admittedly, there was no rule at any time requiring that an applicant seeking admission to the M D Course in Paediatrics had to pass his D C H Examination All that is alleged is that such a practice was recognised over many years or at least, that such was the understanding of all concerned Both the practice and the understanding have been denied on behalf of the College But apart from that, discontinuance of a mere practice cannot sustain a charge of injury to legal rights The practice had not ripened into a rule and the University was under no obligation to admit only those who had passed their D C H Examination We also feel some difficulty on the facts before us in accepting the contention of the appellant that passing the D C H Examination was a passport for admission to the M D Course It may, at the highest, be said that it was easier for students to get admitted to the M D Course after passing the additional examination of D C H after the M B B S Examination

5 The appellant applied for admission to the M D (Paediatrics) Course for the academic year 1979-80 He had passed his M B B S Examination in December, 1976 There were other students who had applied for admission to the M D Course in Paediatrics along with the appellant Some of them had passed their M B B S Examination prior to December 1976 and had secured higher marks than the marks obtained by the appellant in the December 1976 Examination The number of seats being limited, admissions were given according to merit and the four students who had secured highest number of marks were given preference to others regardless of the year in which they had passed their M B B S Examination No one was admitted to the 1979-80 academic year for the M D Course in Paediatrics, who had secured lesser marks than the appellant The four students who secured admission had obtained marks varying between 60 06% to 65 80% while the appellant had secured 58 56% marks only He was sixth in order of merit amongst the applicants and there were only four seats available, bearing in mind the ratio 1 1 between the teachers and the students

6 Dr Singhvi who appears on behalf of the appellant, raised a further contention that the ratio 1 1 was relaxed from time to time by the University and that the appellant was discriminated against by the arbitrary refusal of the authorities to relax the ratio in his favour We are prepared to accept that if there is a power to relax the ratio, that power must be exercised reasonably and fairly It cannot be exercised arbitrarily to favour some students and to disfavour some others But the difficulty in the way of the learned counsel is

that this point of discrimination was not taken in the Writ Petition which was filed in the High Court, it was not argued in the High Court and is not even mentioned in the Special Leave Petition before us The question as to whether the authorities have the power to relax the ratio and the further question as to whether that power has been exercised arbitrarily in this case raise new points into which it is difficult for us to enquire for the first time We are therefore unable to entertain the submission made by the counsel

7 The appellant has thus failed to make out a case of injury to any of his legal rights, for which reason the appeal must fail The appeal is accordingly dismissed But considering that under interim orders passed by this Court from time to time, the appellant has appeared for the M D Examination on the completion of the Course, we hope that the University and the S N Medical College will take a sympathetic view of the appellant's case and have his result declared It may be mentioned that because of the interim orders passed by this Court directing the college and the University to admit the appellant to the M D Course in Paediatrics, the college cancelled the appellant's admission to the D C H Course That may have been right because no student can do the D C H Course and the M D Course simultaneously But the point is the matter is that if this Court were not to direct as an interim measure that the appellant should be allowed to prosecute his studies in M D Paediatrics (subject to the result of this Appeal), the appellant might have completed his D C H Course and, subject to being admitted to the M D Course within a year or so from now he would have taken his M D Examination after passing the D C H Examination The authorities concerned will bear in mind that the appellant should not be placed in a worse position than he would have been in, had he not filed this appeal Therefore, if the appellant has passed the examination, he should be declared to have passed it like any other student He should not be subjected to any disadvantage for the reason that he was not entitled initially to be admitted to the M D Course in Paediatrics If he has failed he should be permitted to take the examination again (or again and again in accordance with the rules of the University) Since the result of the other students, who had appeared for the M D Examination along with the appellant, was declared in February 1981, we hope that the appellant's result would be declared forthwith

There will be no order as to costs

Order accordingly

1981 ALL. L. J. 912

P N GOEL, J

Jagannath Prasad Singh, Petitioner v. Kamlapati Tripathi and others, Respondents

Election Petn No 11 of 1980, D/- 29-7-1981

(A) Representation of the People Act (43 of 1951), S 100 — Election petition — Grounds — Allegation that electoral roll is not as envisaged by the 1950 Act — Not a ground under S. 100 — Election petition not maintainable on such ground — Rectification of election roll — Remedy lies under the 1950 Act which is a complete Code (Representation of the People Act (1950), Ss. 21, 24). AIR 1963 SC 453 and AIR 1970 SC 340 and AIR 1973 SC 2602 and AIR 1977 SC 1992, Rel on.

(Para 7)

(B) Representation of the People Act (43 of 1951), S. 83 (1) — Election petition — Contents of — Allegation of corrupt practice — Material facts as well as full particulars should be given. (Civil P. C. (1908), O 6 Rr. 2, 4).

If an election is challenged on the ground of corrupt practice, the petition should not only contain material facts thereof, but should also set forth full particulars of the corrupt practice as laid down in S 83 (1) (b) There is difference between material facts and the particulars As regards the period of limitation for filing an election petition the material facts cannot be allowed to be amended but the party is to satisfy the legal requirements Better particulars can be called upon if material facts have been stated in the petition and the petition is not bad for vagueness and is complete Paras 6, 10, 14

(C) Representation of the People Act (43 of 1951), Ss. 123 (1), 83 (1) — Corrupt practice — Bribe to voters — Allegation that agents and workers of returned candidate supplied snacks and tea to voters

outside polling centres — No allegation, however that voters were asked in return to vote for returned candidate or not to vote for other candidate — Held, allegations in election petition do not give material facts of corrupt practice of bribery (Paras 20, 25, 26)

(D) Representation of the People Act (43 of 1951), S 123 (2) — Undue influence — Allegation that returned candidate and his agents did not allow other contestant and his followers to do any effective canvassing out of fear of life — Secondly, carrying on false propaganda that casting vote to opposite candidate would amount to incurring divine displeasure — Held, amounted to undue influence (Para 42)

(E) Representation of the People Act (43 of 1951), S. 123 (3A) — Promoting enmity between different classes of citizens on ground of religion, caste etc. — No allegation in election petition that said propaganda was for furtherance of prospects of returned candidate or for prejudicially affecting election of other candidates — Nor any allegations against any specific classes — Held, allegations were incomplete and did not constitute corrupt practice under Section 123 (3A) (Paras 47, 49)

(F) Representation of the People Act (43 of 1951), S. 123 (4) — Publication of false statement — Allegations not touching personal character of contesting candidate but his political or public character — Do not constitute corrupt practice under Section 123 (4). (Para 59)

(G) Representation of the People Act (43 of 1951), Section 123 (5) — Hiring of vehicles — Absence of allegations that voters were given free conveyance — No corrupt practice within S 123 (5) (Para 67)

(H) Representation of the People Act (43 of 1951), Ss. 83 (1), 23, 100 (1) (d) (iv) — Election petition — Violation of provisions of the Constitution and the Act alleged — Allegations incomplete and speculative — Nothing to show that if proved would materially affect election result — Held, allegations did not amount to material facts within meaning of Section 83 (1). (Para 73)

Cases Referred : Chronological	Paras
AIR 1980 SC 701	21, 24
AIR 1980 SC 1347	10
AIR 1978 SC 351 (1978) 1 SCC 504	65
AIR 1977 SC 1992	7
AIR 1976 SC 744	10, 14
AIR 1975 SC 667	65, 66
AIR 1975 SC 1612	21
AIR 1973 SC 38	57
AIR 1973 SC 2602	7
AIR 1972 SC 515	10
AIR 1972 SC 1302	10, 12
AIR 1971 SC 2025	21, 23
AIR 1970 SC 340	7
AIR 1970 SC 1231	57
AIR 1970 SC 1841	57
AIR 1969 SC 586	65
AIR 1969 SC 734	36, 41
1969 All LJ 462 AIR 1969 SC 395	36, 41
AIR 1969 SC 1201	10, 11
AIR 1968 SC 904	36
AIR 1968 SC 1083	21, 23
AIR 1968 SC 1191	21, 23
AIR 1968 Punj 416 (FB)	21
AIR 1966 SC 773	57
AIR 1965 SC 677	57
(1965) 27 Ele LR 123 (Bom)	48
AIR 1963 SC 458	7
AIR 1962 SC 1156	57, 58
AIR 1961 All 356	21, 22
(1961) 18 Ele LR 403 (Bom)	36
AIR 1960 SC 770	65
AIR 1960 Bom 249 17 Ele LR 373	36
AIR 1957 SC 444	10

B Soloman, R C Srivastav, M C Misra, Pradeep Chandra and M Khalid, for Petitioner, V B Upadhyay, Advocate General, P. C Chaturvedi, Raja Ram Agarwal, K N Tripathi, S K Mukerji, J N Chaturvedi, D S Sinha, S P Srivastav, Dr J N Dubey, R Chandra, K C Sinha, G S Misra, V K Singh, H Upadhyay Yogeshwar Pd., S. Prakash and M C Gupta for Respondents

ORDER — On the application (A-17) dated 19-11-1980 moved by the respondent No 1 On 3-1-1980 there took place polling in connection with the election of a Member of the Lok Sabha from Varanasi Parliamentary Constituency No 52. Sr. Kamlapati Tripathi, respondent No 1, and Sri Raj Narain, respondent No 2, amongst others, were candidates The result of the election was declared on 3-1-1980 Sri Kamlapati Tripathi won the election by a margin of 24735 votes against Sri Raj Narain, Jagannath Prasad Singh, petitioner, is a voter in the constituency On 22-2-1980 he filed the election petition challenging the election of the respondent No. 1 on the following grounds :—

(1) Respondent No 1, his agents and workers with his consent committed corrupt practices

(2) The result of the election was materially affected by non-compliance of the provisions of the Constitution, the Representation of the People Act and the Rules and Orders made thereunder

(3) The result of the election was materially affected because the electoral roll was not an electoral roll as envisaged in the Representation of the People Act, 1950

2 The respondent No 1 moved an application (A-17) alleging that the corrupt practices alleged by the petitioner even if they were true do not constitute any corrupt practice under the Representation of the People Act, 1951, hereinafter called the Act, that the entire petition did not disclose any cause of action because it did not contain concise statement of material facts, that the electoral roll could not be investigated in the instant case The respondent No 1 prayed that paragraphs 3 to 14 of the petition be struck out and the petition be rejected with costs This application was supported by an affidavit of Om Prakash Sharma

3 The petitioner filed counter-affidavit (A-18)

4 On 9-7-1981 the case was put up for striking issues Sri R C Srivastava, Advocate, for the petitioner was present. Sri D S Sinha and other Advocates were present for respondents Nos 1 to 3 Sri Sinha urged that there was no triable issue because the petition did not contain material facts Therefore, it was considered proper to decide application (A-17) first The case was fixed for 20-7-1981 for hearing of application (A-17) It was clearly directed that parties' counsel would be heard whether the petition contained material facts

5. On 20-7-1981, Sri M C Misra, counsel for the petitioner informed that he had written several letters to the petitioner, that the petitioner did not come up, that therefore, he was not in a position to prosecute the case on that date and that Sri R C Srivastava, Senior Advocate, could not appear for the petitioner without being instructed by him As application (A-17) was moved by the respondent No. 1, his counsel Sri D S Sinha was asked to argue out the application Arguments of Sri D S. Sinha were heard on 20-7-1981 and 21-7-1981 No counsel for the petitioner came up even on 21-7-1981

6. Section 100 of the Act enumerates the grounds upon which the election of a returned candidate can be declared void In the present case the petitioner has challenged the election of the respondent No 1 on grounds mentioned in Cls (b), (d) (iv) of sub-section (1) of S 100 GROUND NO 3

7 The third ground taken by the petitioner may be disposed of first This ground is that the electoral roll was not an electoral roll as envisaged in the Representation of the People Act, 1950 (vide Para 14 of the petition) This is no ground under Section 100 of the Act The Representation of the People Act, 1950 is a self-contained Act It has no connection with the challenging of the election of a returned candidate Electoral rolls are prepared under Section 21 of the said Act If any elector/voter has been omitted from the roll, he has to ventilate his grievance before the appropriate authority under the said Act Section 24 of the said Act also provides an appeal in the matter Therefore, the election of the respondent No 1 cannot be challenged on the ground mentioned in Para 14 of the petition This Court, therefore, cannot go into this question This view gets support from the following cases

(i) Ramaswamy v B M Krishnamurty, AIR 1963 SC 458, (ii) Kabul Singh v Kundan Singh, AIR 1970 SC 340, (iii) Ram Prasad Mul Shankar v. V B Raju, AIR 1973 SC 2602, and (iv) Nirupendra Bahadur Singh v Jai Ram Verma, AIR 1977 SC 1992

8 Before dealing with grounds 1 and 2, it is necessary to make a reference to Section 83 of the Act, which indicates the contents of the petition Sub-section (1) of this Section reads as follows —

83 (1) An election petition—

(a) shall contain a concise statement of the material facts on which the petitioner relies

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice, and

(c) shall be signed by the petitioner and verified . .

9. It follows from the above that there should be a concise statement of material facts on which the petitioner relies in the election petition It means that the petition should contain material facts in respect of the grounds upon which the election of a returned candidate is challeng-

ed If the election is also challenged on the ground of corrupt practice, the petition should not only contain material facts thereof, but should also set forth full particulars of the corrupt practice as laid down in clause (b) of sub-section (1) of Section 83 An election petition is like a pleading of a civil suit The requirements of the petition mentioned in S 83 have been taken from the provisions contained in the Code of Civil Procedure O 6, R 2 of the Code of Civil Procedure clearly lays down that every pleading shall contain and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which they are to be proved It will be noticed that Rule 4 of Order VI C P C lays down that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, particulars with dates and items, if necessary, shall be stated in the pleading

10 It is evident that there is difference between material facts and the particulars What is meant by these expressions has been laid down by the Supreme Court in the following cases —

(1) Harish Chandra Bajpai v Triloki Singh, AIR 1957 SC 444, (2) Samant N Balkrishna v George Fernandez, AIR 1969 SC 1201, (3) Hardwari Lal v Kanwal Singh, AIR 1972 SC 515, (4) Raj Narain v Smt Indira Gandhi, AIR 1972 SC 1302, (5) Udhav Singh v Madhav Rao Scindia, AIR 1976 SC 744, and (6) Sultan Saluddin Owasi v Mohd Osman Shaweed, AIR 1980 SC 1347

11. For the purposes of the present case it will be sufficient to reproduce the following observations from the case of Samant N Balkrishna (AIR 1969 SC 1201 at pp 1212, 13) (supra) —

"What is the difference between material facts and particulars? The word 'material' shows that the facts necessary to formulate a complete cause of action must be stated Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet There may be some overlapping between material facts and particulars but the two are quite distinct The material facts thus will show the ground of corrupt practice and the complete cause of action and the particulars will give the necessary information to present a full picture of the cause of action In stating material facts it will not do merely to quote the words of the section because then the efficacy of the words 'material facts' will be lost The fact which constitutes the corrupt practice must be stated and the fact must be correlated to one of the heads of corrupt practice Just as a plaint without disclosing a proper cause of action cannot be said to be a good plaint, so also an election petition without the material facts relating to a corrupt practice is no election petition at all

It is inconceivable that a petition could be filed without the material facts

The entire and complete cause of action must be in the petition in the shape of material facts, the particulars being the further information to complete the picture

Since a single corrupt practice committed by the candidate, by his election agent or by another person with the consent of the candidate or his election agent is fatal to the election, the case must be specifically pleaded and strictly proved If it has not been pleaded as part of the material facts, particulars of such corrupt practice cannot be supplied later on"

12 It will also be useful to reproduce the following observation from the case of Raj Narain (AIR 1972 SC 1302 at p 1302) (supra) —

"From these decisions it follows that facts stated in the petition relating to any corrupt practice must be sufficient to constitute a cause of action In other words the facts must bring out all the ingredients of the corrupt practice alleged If the facts stated fail to satisfy that requirement then they do not give rise to a triable issue Such a defect cannot be cured by an amendment after the period of limitation for filing the election petition. But even if all the material facts are stated in the election petition, for a proper trial better particulars may still be required"

13 It will appear from the above that after the expiry of the period of limitation for filing an election petition, the material facts cannot be allowed to be amended, if they fail to satisfy the legal requirement and that better particulars

can be called upon if material facts have been stated in the petition and the particulars given thereto are not complete

14 It may here be indicated that the petition has to be construed as it stands and that it has to be read as a whole to ascertain its true import (vide the case of Uday Singh (AIR 1976 SC 744) (Supra)

15 Grounds 1 and 2 taken in the petition will now be analysed and examined in the light of the above observations

GROUND NO 1

16 The respondent No 1, his agents and workers with his consent committed corrupt practice of—

(i) bribery

(ii) undue influence

(iii) promotion of feeling of enmity and hatred between different classes of citizens on grounds of religion, caste, community and language

(iv) publication of false statement about the character and conduct of Sri Raj Narain, and

(v) luring of vehicles for carrying electors (vide para 15 of the petition)

17 The above corrupt practices are mentioned in sub-sections (1), (2), (3A), (4) and (5) of Section 123 of the Act These corrupt practices may be dealt with one by one

(i) Bribery

18 Para 12 of the petition says that respondent No 1, his agents and workers with his consent entertained the electors at their camp outside the polling centres with tea, snacks etc before sending the electors to cast their votes, that at several places bhang was also offered to the electors before they were sent to the polling stations to cast their votes Details of this corrupt practice are given in Schedule 5, Part B First column gives date as 3-1-1980 The second column mentions the places where tea, snacks and bhang were offered to the voters 3rd column mentions the names of the persons with his agents and workers who offered tea etc with the consent of the respondent No 1 The names of the voters to whom these articles were offered are not mentioned

19 Term 'bribery' has been defined in sub-section (1) of Section 123 and for the purposes of the instant case, its definition is any gift or offer with the object of inducing an elector to vote or refrain from voting or as a reward to an elector for having voted or refrained from voting

20 It has been pointed out that the petitioner has not alleged in para 12 of the petition that tea, snacks or bhang was offered/given to the voters with the object of casting votes in favour of the respondent No 1 or from not voting in favour of Sri Raj Narain There is no allegation in the petition that these articles were offered/given as a reward for having voted for the respondent No 1 or for not voting for Raj Narain

21 The learned counsel for the respondent has further urged that in the case of bribery as envisaged by the Act, there should be object or motive or element of bargain. In support of his contention he has referred to the cases of—

(1) Brij Bhushan v Raja Anand Brahma Shah, AIR 1961 Allahabad 356, (2) Trilochan Singh v Karnail Singh, AIR 1963 Punjab 416 (FB), (3) Ghasi Ram v Dal Singh, AIR 1968 SC 1191, (4) Mrs Om Prabha Jain v Abinash Chand, AIR 1968 SC 1083, (5) Bhanu Kumar Shastri v Mohanlal Sukhadia, AIR 1971 SC 2025, (6) Abdul Hussain Mir v Shamshul Huda, AIR 1975 SC 1612 and (7) Harjit Singh Mann v S Umrao Singh, AIR 1980 SC 701

22. For the purposes of this case, it will be sufficient to reproduce the following observations made in the case of Brij Bhushan (AIR 1961 All 356 at p 361) (supra).—

"Whatever may be the position in England the term of Section 123 (1) (a) of the Act makes it quite clear that it is the object of the Act which determines whether it amounts to 'bribery' or not It is, therefore, the motive which is behind the charity that should be taken into consideration in finding whether it is a subtle form of bribery" or not If the motive is corrupt and the object is to induce the voters to vote in a particular way then it is 'bribery' The Court has thus to find out the motive which actuated the distribution of sweets in question If it is with a benevolent motive, then it cannot amount to "bribery" ".

23. In the cases of Ghasi Ram v Dal Singh (AIR 1968 SC 1191) and Mrs. Om Prabha Jain v Abinash Chand, (AIR 1968 SC 1083) (supra), it was observed that in case of bribery there should be an element of bargain In this connection reference is also made to the following observations in the case of B K Shastri v Mohan Lal Sukhadia (AIR 1971 SC 2025 at p 2039) (supra) —

"Judged by the tests laid down in these decisions, it has to be found out as to whether the respondent Sukhadia did any ac

which can be construed to be out of the ordinary or with a view to entering into an election bargain with the voters"

24 The same view was expressed in the case of Harjit Singh Mann v S Umrao Singh (AIR 1980 SC 701) (supra). Relevant observation in this case reads as follows (at p 707) —

"It may be mentioned that the trial Court rightly took the view that it was necessary for the purpose of proving the corrupt practice of bribery to establish that there was an element of "bargaining" in what the respondent was alleged to have done for Bara Pind and Littran

It was therefore necessary for the appellant to plead, and prove that there was bargaining between the respondent and the voters So when the element of bargain was completely absent from the allegation against the respondent, the trial Court was justified in holding that the alleged corrupt practice had not been established"

25. In the instant case the petitioner has not alleged that the respondent No 1, his agents and workers entertained the voters with tea, snacks or bhang on the assurance that they would vote for the respondent No 1 or that they would not vote for Sri Raj Narain, respondent No 2 or any other candidate Instances have been noticed in which the voters took bhang etc at the place of one candidate and actually voted for another candidate It is for this reason that Section 123 (1) lays down that if gift is given by a candidate to the voter with the object of voting in his favour or for not voting for any other candidate, it is bribery

26. The position that follows is that the allegations made in para 12 do not fall within the definition of the term 'bribery' given in the Act In other words the allegations do not give material facts of the corrupt practice of bribery

(ii) Undue Influence

27 Section 123 (2) of the Act purports to define the term/expression "undue influence" It says that undue influence is any direct or indirect interference or attempt to interfere with the free exercise of any electoral right The essence of this definition is that there should be interference with the free exercise of an electoral right Sub-sec (2) further lays down that if a candidate or his agent or any other person with their consent threatens any candidate or any elector with injury of any kind or induces or attempts to induce a candidate or an elector to believe that he will become or will be rendered an object of divine displeasure or spiritual censure shall be deemed to interfere with the free exercise of the electoral right of the candidate or elector

28. Allegations in respect of undue influence have been made in paras 8 and 9 of the petition read with Schedules 1 and 2

29. Para 8 says that the respondent No 2 was not allowed to exercise his electoral right by the respondent No 1, his agents and workers On 20-12-79 Sri Raj Narain, respondent No 2 was not allowed to come out of the circuit house, that his car was heavily stoned and that he was injured Sri Raj Narain and his workers were threatened with dire consequences and later on the same day the election office of the Lok Dal was also stoned The result was that the workers and supporters of Sri Raj Narain stood terrorised and they also could not freely exercise their electoral right For several days they could not do any effective canvassing out of fear of loss of their life The agents and workers of respondent No 1 were raising slogans against Sri Raj Narain on the State Education Policy

30 Schedule 1 which relates to the allegations contained in para 8 mentions date in column 1 This date is 20-12-1979, places are mentioned in column 2 as Circuit house Varanasi and Lok Dal office, Chetganj Varanasi In column 3 the names of agents and workers of Sri Kamlapati Tripathi are mentioned In column 4 the names of the workers of Sri Raj Narain who were terrorised are mentioned It will be noticed that despite the allegations made in para 8, column 4 does not indicate the name of Sri Raj Narain

31 It was pointed out that the date of polling was 3-1-1980 and that there is absolutely no allegation that Sri Raj Narain and his workers were not allowed to go to the polling booth and cast their votes. The allegations relate to only one date i e 20-12-1979

32. Para 9 of the petition says that respondent No 1, his agents and workers carried out a false propaganda against Sri Raj Narain that he was the man who polluted the Vishwanath temple in 1956 by forcing entry of Harijans into the temple and that Hindu religion was being polluted by him as he was trying to raise Harijans and backward classes equal to Brahmins, which was a sin and that any

one helping Sri Raj Narain in any manner would incur divine displeasure

33 Schedule 2 relates to the allegations of this paragraph In the first column of the Schedule the alleged activities are said to have taken place between 8-12-1979 to 3-1-1980 In column 2 the places are mentioned In column 3, names of Sri Kamlapati Tripathi, his agent Smt Chandra Tripathi and the names of 6 workers are mentioned

34 The term electoral right has been defined in S 79 (d) of the Act as the right of a person to stand or not to stand or to withdraw or not to withdraw from being a candidate or to vote or refrain from voting at the election

35 The learned counsel for the respondent urged that to constitute undue influence there should be an element of compulsion

36. The respondent's counsel has referred to the cases mentioned below :—

(1) Baburao Patel v Dr Zakir Hussain, AIR 1968 SC 904 The relevant observation in this case is "The fact that the Minister's request was addressed in the form of what is called a whip is also immaterial so long as it is clear that there is no compulsion on the electorate to vote in the manner indicated"

(2) Narbada Prasad v Chhagan Lal AIR 1969 SC 395 (1969 All LJ 462) The relevant observation in this case is "The gravamen of the charge is that it was added that if the voters voted for the Congress candidate, they would be guilty of the sin of Gohatya and here the law of election steps in" It was held that the case fell within Section 123 (2) (ii) of the Act

(3) Manubhai Nand Lal Ameracy v Popat Lal Manilal Joshi, AIR 1969 SC 734 The relevant observation runs as follows —

"The actual effect of the speech is not material Corrupt practice is committed if the speech is calculated to interfere with the free exercise of electoral right and leave no choice to the electors in the matter"

(4) Sudhir Laxman Hendre v S A Denge, 17 Ele LR 373 (AIR 1960 Bom 249) In this case it was held that the right of a candidate to canvass or to carry on propaganda in support of his candidate could not be said to be an electoral right

(5) Kataria Takandas Hemraj v Pinto Frederick Michael, (1961) 18 Ele LR 403 (Bom). In this case one of the allegations was that the petitioner's workers were prevented from having access to voters with a view to educate them to vote in his favour by effecting high-handed methods and threatening tactics There was nothing to suggest that any of the voters was at all scared to an extent that by reason of that he did not go to cast his vote a few days thereafter, i e, on the date of election It was held that the prevention of the workers of the petitioner did not amount to a corrupt practice

37 A bare reading of the proviso to sub-section (2) of S 123 indicates that threat to cause injury of any kind or inducement causing belief that the candidate or a voter would be an object of divine displeasure or spiritual censure amounts to (interference with the) free exercise of the electoral right, i e, right of franchise This proviso does not say that the candidate or the voter did not cast vote because of the threat or inducement Therefore, it was not necessary for the petitioner to allege that Sri Raj Narain or any other voter could not cast vote on the date of polling Moreover, in para 6 of the petition, it has been stated that Sri Raj Narain was not allowed to exercise his electoral right It has also been alleged that the workers and supporters of Sri Raj Narain could not freely exercise their electoral right

38 It is further evident that threat or inducement should be given before the date of polling and not necessarily on the date of polling

39 In para 8 it has clearly been alleged that Sri Raj Narain and his workers were threatened with dire consequences The literal meaning of the word 'dire' is "dreadful, calamitous, ominous" Word 'calamity' means deep distress or grievous disaster

40 Taking into consideration the allegations made in para 8 and the meaning of the word 'dire', I am of the opinion that the allegations do fall within the proviso (a) (i)

41. In para 9 of the petition, it has been alleged that Sri Raj Narain was trying to raise Harijans and backward classes equal to Brahmins, that it was a sin and that any one helping Sri Raj Narain would incur divine displeasure These allegations on the very face attract the provisions of proviso (a) (ii) This view gets support from the cases of Narbada Prasad v. Chhagan Lal (1969 All LJ 462) and Manubhai Nand Lal v Popat Lal (AIR 1969 SC 734) (supra)

42. The position that follows is that paras 8 and 9 contain material facts relating to corrupt practice of undue influence

43. The learned counsel for the respondent next urged that the particulars in schedules 1 and 2 were vague In schedule 1 the names of the workers or supporters of Sri Raj Narain who were extended threat at Lok Dal office are not mentioned The petitioner can be called upon to remove this lacuna Schedule 2, taking into account the allegations contained in para 9, is general It does not appear vague

(iii) Promotion of feeling of enmity and hatred between different classes of citizens on grounds of religion, caste, community and language

44. Section 123 (3A) lays down that promotion or attempt to promote feelings of enmity or hatred between different classes of citizens of India on grounds of religion, caste, community or language by a candidate or his agent or any other person with his consent or that of his election agent for the furtherance of the prospect of the election of that candidate or for prejudicially affecting the election of any candidate is a corrupt practice

45 Para 11 of the petition relates to this ground This paragraph says that the respondent No 1 his agents and workers with his consent actively carried out a propaganda that respondent No 2 was harming the Sanskrit language and has done great disservice to the Hindu community in general and Brahmins in particular and this created hatred between different classes of citizens on the grounds of language It was publicly said that Sri Raj Narain stood for backward classes and Harijans who were against Sanskrit, a sacred language of caste Hindus and (as) such they should not be helped in this election Sri Kamlapati Tripathi is a Brahmin Details of this corrupt practice are given in schedule 4 Col 1 of Schedule 4 mentions period of propaganda from 20-12-1979 to 3-1-1980 Column 2 indicates the places of propaganda. Col 3 mentions the names of respondent No 1, his election agent Smt Chandra Tripathi and his workers who committed corrupt practice

46 It will be noticed that neither in para 11 nor in the Schedule it has been alleged that the said propaganda was for the furtherance of the prospects of the election of Sri Kamlapati Tripathi or for prejudicially affecting the election of Sri Raj Narain It has also to be borne in mind that Sri Raj Narain as well as Sri Kamlapati Tripathi both are Hindus

47 The position that follows is that the allegations in para 11 and schedule 4 are wholly incomplete and as such they do not constitute corrupt practice as laid down in sub-section (3A) of Section 123

48 The learned counsel for the respondent has referred to the case of Saligram v Govindrao, (1965) 27 Ele LR 123 (Bom) In this case the pamphlet was issued in which there were allegations against the personal character of one Saqui Niazi, worker of the respondent It was urged that the pamphlet was intended to create hatred between Hindus and Mohammedans It was observed that the pamphlet might have the tendency of inciting a few fanatics against the individual, but there was nothing in the pamphlet to suggest that all Mohammedans as a class are bad and, therefore, the allegations of the pamphlet did not amount to corrupt practice under Section 123 (3A) of the Act This case is of no help to the respondent It will, however, be noticed that the allegation in para 11 is that Sri Raj Narain was harming the Sanskrit language and that he stood for the backward classes and Harijans who were against Sanskrit Sanskrit is no doubt a sacred language of Hindus but even non-Hindus study Sanskrit There is no allegation between which classes of citizens the said propaganda created feelings of enmity or hatred

49 It is apparent from the above that the allegations contained in para 11 and schedule 4 do not amount to corrupt practice as envisaged by sub-sec (3A) of Section 123

(iv) Publication of false statement about the character and conduct of Sri Raj Narain

50 Sec 123 (4) of the Act lays down that publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any statement of fact which is false and which he either believes to be false or does not believe to be true in relation to the personal character or conduct of any candidate, or in relation to the candidature or withdrawal of any candidate, being a statement reasonably calculated to prejudice the prospects of

that candidate's election, is a corrupt practice

51 Paras 6, 7 and 10 and Schedule 3 of the petition relate to these corrupt practices Para 6 reads that the respondent No 1 from the very start of his election campaign decried Sri Raj Narain and called his party as a party of low people, that respondent No 1 convened a meeting on 8-12-1979 at the Town Hall Varanasi and there he made a false propaganda with intent to prejudice the electoral prospects of the respondent No 2 as a person belonging to the party which consists of low caste people and that this propaganda was carried out throughout the constituency between 3-12-1979 to 2-1-1980

52 Para 7 of the petition says that the respondent No 1, his agents and workers decried respondent No 2 and his party Lok Dal as agents of Muslims and called the party flag of Lok Dal as a flag of Muslim League The party flag of Lok Dal is of green colour The flag of Muslim League is also of green colour The respondent No 1 in his meetings called the Lok Dal flags as Pakistani These allegations have further been elucidated in this paragraph

53. Para 10 of the petition says that as Sri Kamlapati Tripathi was much behind in the contest, in a mad frenzy to recover the lost ground, the respondent No 1 raised the bogie of Sanskrit, that a violent propaganda was started that Sri Raj Narain had lowered the prestige of Sanskrit and worked against Hindu religion The State of Uttar Pradesh made Sanskrit a compulsory subject along with Hindi and Urdu was included in the list of optional subjects A false propaganda was made by the respondent No 1 that Sri Raj Narain got this change made in the language policy of the State

54 In column 1 of schedule 3, the period of propaganda is mentioned as 20-12-1979 to 3-1-1980 In column 2 the places of propaganda and in column 3, the names of the respondent No 1, his agents and workers who carried out the propaganda are mentioned

55. The gist of the above allegations is—

(i) the party of Raj Narain is party of low people (ii) the flag of the party of Sri Raj Narain being of green colour is flag of Muslim League and as such it was a Pakistani flag, and (iii) Sri Raj Narain lowered the prestige of Sanskrit and got a change made in the language policy of the State.

56 It will be noticed that under subsection (4) of Section 123, the statement of fact should relate to the personal character or conduct of a candidate The allegations contained in paras 6, 7 and 10 do not at all touch the personal character of Sri Raj Narain They touch his political or public character There is no allegation that Sri Raj Narain committed any offence e g cheating, theft, murder etc

57. The learned counsel for the respondent has referred to the following cases —

(1) Inder Lal v Lal Singh, AIR 1962 SC 1156, (2) Sheopal Singh v Ram Pratap, AIR 1965 SC 677, (3) Dr Jagjit Singh v Giani Kartar Singh, AIR 1966 SC 773, (4) Gurupi Shriharı Balıram Jivatode v Vithalrao, AIR 1970 SC 1841, (5) Devokanta Barooah v Golok Chandra Baruah, AIR 1970 SC 1231 and (6) N S Varadachari v G V Pai, AIR 1973 SC 38

58 The contention of the respondent's counsel is that the election petition does not make any allegation that the propaganda attacked the personal character or conduct of Sri Raj Narain In the first case of Inder Lal (AIR 1962 SC 1156) (supra) distinction between private character and public character has been indicated The relevant observation reads as follows (at pp 1159, 60) —

"Though it is clear that the statute wants to make a broad distinction between public and political character on the one hand and private character on the other it is obvious that a sharp and clear cut dividing line cannot be drawn to distinguish the one from the other In discussing the distinction between the private character and the public character, sometimes reference is made to the "man beneath the politician" and it is said that if a statement of fact affects the man beneath the politician it touches private character and if it affects the politician it does not touch his private character . . . . . If, for instance, it is said that the candidate is a cheat or murderer there can be no doubt that the statement is in regard to his private character and conduct and so if the statement is shown to be false, it would undoubtedly be a corrupt practice Similarly, if the economic policy of the party to which the candidate belongs or its political ideology is falsely criticised and in strong words it is suggested that the said policy and ideology would cause the ruin of the country that clearly would be criticism though false, against the public character

of the candidate and his political party and as such, it would be outside the purview of the statute If, for instance, it is said that in his public life, the candidate has utilised his position for the selfish purpose of securing jobs for his relations, it may be argued that it is criticism against the candidate in his public character and it may also be suggested that it nevertheless affects his private character"

59. Taking into consideration the above observation, it is clear beyond doubt in the present case that the allegations contained in the petition do not touch the personal character or conduct of Sri Raj Narain and as such the allegations made in paras 6, 7 and 10 do not constitute corrupt practice under sub-section (4) of Section 123

(v) Hiring of vehicles for carrying electors

60. Sub-section (5) of Section 123 of the Act lays down that the hiring or procuring of any vehicle or use of such vehicle for the free conveyance of any elector to or from any polling station is a corrupt practice

61. The pith and substance of the above provision is that no elector should be provided free conveyance by a candidate or his agents or workers to and from any polling station The word "or" underlined above is to be construed as "and"

62. Para 12 of the petition and Schedule 5 relate to this ground Para 12 reads that respondent No 1, his agents and workers used hired conveyance such as cycle rickshaw, auto-rickshaw, tractors and trollies for carrying electors from their residence to the polling centre and back

63 Schedule 5 indicates that the said corrupt practice was committed on 3-1-1980, the date of polling In column 2 places are mentioned from which the voters were taken to the polling station In column 3 names of the voters of the respondent No 1 who committed the corrupt practice are given

64. The gist of the allegation is that the workers of the respondent No 1 used cycle rickshaw, auto-rickshaw etc for carrying electors from their residence to the polling centre and back. There is no allegation that the workers or agents of the respondent No 1 had hired these conveyances and paid their fare It has not been alleged that the voters were given free conveyance In this way the allegations do not comply with the ingredients of the corrupt practice envisaged in sub-section (5) of S 123 of the Act

65. The view expressed above gets support from the following cases cited by the respondent's counsel —

(1) Balwan Singh v Lakshmi Narain AIR 1960 SC 770, (2) Jashbhai Chunibhai Patel v Anverbeg A Mirza, AIR 1969 SC 586, (3) Ch Rasik Ram v Ch J S Chouhan, AIR 1975 SC 667 and (4) Dada Saheb Dattatraya Pawar v Pandurang Raoji Jagtap, (1978) 1 SCC 504 (AIR 1978 SC 351)

66 In the case of Ch Rasik Ram (supra), it was held that the conjunction 'or' (underlined above) should read as 'and' It was further held that the hiring or procuring of the vehicles should be for the free conveyance of the voters

67 In the present case there is no allegation that the agents of the respondent No 1 engaged vehicles for the free conveyance of the voters Therefore, the allegation contained in the petition does not constitute the corrupt practice envisaged by sub-section (5) of Section 123 of the Act

Ground No 2 Non-compliance with the provisions of the Constitution or of the Act

68 Section 100 (d) (iv) lays down that the result of the election in so far as it concerned a returned candidate had been materially affected by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act

69 It is pertinent to remark that the non-compliance should materially affect the result of the election of the returned candidate

70. Para 13 of the petition relates to this ground This paragraph says that after the closure of the polling on 3-1-1980 it was widely discussed that Sri Kamlapati Tripathi had lost the election, that the agents and workers of Sri Kamlapati Tripathi firmly discounted it and gave out that they had taken all steps to win the election, that this created doubt in the mind of the petitioner and he was surprised on seeing the election result on 8-1-1980 These allegations are not pertinent and do not indicate any non-compliance with the provisions of the Constitution or of the Act

71 Para 13 then says that the petitioner came to know that a large number

of duplicate ballot papers were circulated by the respondent No 1, and his agents throughout the constituency, that on 3-1-1980 after the close of the poll, one ballot paper of polling centre No 106 of Varanasi Cantonment Segment was found in field which bore the office seal and also the cross-mark on the symbol of respondent No 2 970 ballot papers were issued to polling centre No 106 out of which 577 ballot papers were used and 193 remained unused and thus the (sic) what was found correct at the time of counting The genuine ballot papers bearing the cross-mark on the symbol of respondent No 2 appear to have been substituted by duplicate ballot papers otherwise the total would differ as one ballot paper was short at the time of counting Siya Ram Chauhan, an agent of Sri Kamlapati Tripathi has manipulated the substitution of a large number of duplicate ballot papers in collusion with the polling staff Thus appears to have been done throughout the constituency and in other constituencies also A scrutiny of the ballot papers and ballot paper account would indicate that a large number of ballot papers are not genuine The whole election is a fraud and a complete nullity The result of the election has been materially affected by non-compliance of the Constitution, the Representation of the People Act and the rules and orders made thereunder

72 The learned counsel for the respondent urged (1) The allegations in para 13 are simply speculative and conjectural The petitioner has used the word "appear" or "appears" which indicates that the petitioner is not certain And (2) only one ballot paper is said to have been found in a field If this ballot paper is added to the votes secured by the respondent No 2, even then the election of the respondent No 1 cannot be said to have been materially affected because the respondent No 1 secured 24735 votes more than the respondent No 2 The petitioner has not given the numbers of the ballot papers which were in favour of the respondent No 2 and which were substituted by the agents of the respondent No 1.

73 The contentions of the respondent's counsel are fully justified Therefore, it can easily be said that the allegations contained in para 13 are wholly incomplete and speculative and do not go to show that the election of the respondent No. 1 was materially affected for the alleged reason

74. The position that follows from the above discussion is that paras 6, 7, 10, 11, 12, 13 and 14 do not contain material facts as envisaged by Section 83 (1) (a) and as such these paragraphs are liable to be struck off and the petitioner has to be called upon to furnish complete particulars in respect of para 8 of the petition.

75. Paras 3 and 4 of the petition do not allege any ground for setting aside the election of the respondent No 1

76 The petitioner Sri Jagan Nath Prasad Singh is, therefore, directed to take steps/apply within 10 days for the striking off of paras 6, 7, 10, 11, 12, 13 and 14 of the petition and to furnish complete particulars in respect of para 8.

77 The counsel of the petitioner (Sri Jagan Nath Prasad Singh) shall be informed immediately of the above order

Order accordingly

1981 ALL. L. J. 922

S D AGARWALA, J

Mohd Ashgar, Petitioner v Smt Zaibunnissa and others, Respondents

Civil Misc Writ No 10487 of 1980, D/- 14-5-1981

(A) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules (1972), R. 16 (2) (b) — Applicability.

Rule 16 (2) (b) only becomes applicable where a release application is allowed on the basis of suitable alternative accommodation where the tenant can shift his business but it is not mandatory that whenever a release application is allowed the Court must determine whether a suitable alternative accommodation is available or not to the tenant where he can shift his business 1973 (UP) RCC 572, Disting (Para 10)

(B) Constitution of India, Art. 226 — Eviction petition — Lower Courts' finding regarding alternative and suitable residential accommodation available to tenant — Finding based on appraisal of evidence — It being a finding of fact having no manifest error would not be disturbed in writ jurisdiction (Para 12)

(C) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules (1972), R. 16 (1) (d) — Eviction petition

— **Finding of Court that only a part of accommodation will not suffice need of either landlady or tenant — Provisions of R. 16 (1) (d) cannot be applied (Para 9)**

Cases Referred Chronological Paras

1980 All Rent Cas 311 (SC) 6, 7, 8
1979 (UP) RCC 572 10

R P Singh, for Petitioner, Ravi Kiran Jain, for Respondents

ORDER :— This is a petition under Article 226 of the Constitution of India arising out of proceedings for release under Section 21 (1) (a) of the U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the Act)

2. The petitioner is a tenant Smt Zaibunnissa, respondent No 1, is the landlady of the said premises The property in dispute bears municipal No 6/630, situate in Saharanpur Initially, the application was filed by Haji Salam under Section 21 (1) (a) of the Act on the ground of need for residence as well as for business purposes During the pendency of the application, Abdul Salam died on 10th December, 1979 Smt Zaibunnissa, the widow, thereafter, got the application for release amended and sought release on the ground that she requires the accommodation for the residence of herself and four children She also wants to start a business in a portion of the property which are the shops, in order to maintain herself and the children This application was contested by the petitioner and it was denied that the respondent had a bona fide need for the premises in question

3 The Prescribed Authority by his order dated 28th July 1980, allowed the release application holding that the need of the landlady was bona fide and genuine and that greater hardship will be caused to her in case the release application is rejected Against the said decision, an appeal was filed under Section 22 of the Act in the court of the District Judge, Saharanpur The District Judge, Saharanpur, by his judgment dated 10th November, 1980, dismissed the appeal The petitioner has now challenged the orders of the prescribed Authority as well as that of the appellate court by means of the present petition

4. I have heard the learned counsel for the parties

5. The petitioner has raised two contentions before me The first contention of the petitioner is that in accordance with Rule 16 (1) (d) of the Rules framed under the Act, it was mandatory for the courts below to have considered whether part of the building under the tenancy of the petitioner would serve the need of the respondent No 1 or not Since this has not been considered, therefore, the finding in regard to bona fide need is vitiated in law This submission relates to the portion of the building, which is in occupation of the petitioner for residential purposes The second submission of the petitioner is that in accordance with Rule 16 (2) (b) of the Rules, it was mandatory for the courts below to have found that the petitioner can shift his business without substantial loss in the alternative accommodation available with him and in the absence of this finding, the finding with regard to comparative hardship is vitiated in law

6. In regard to the first submission, at the outset, it may be stated that the petitioner did not challenge the finding in regard to the bona fide need of the respondent No 1 on merits It has been only challenged on the ground mentioned in Rule 16 (1) (d) of the Act It is admitted on the record of the case that the petitioner did not urge this question before the courts below The petitioner, however, has relied upon a decision of Hon'ble Supreme Court in Smt Raj Rani Mehrotra v The 2nd Additional District Judge, 1980 All Ren Cas 311 The Supreme Court, in that case, has opined, after taking into consideration Rule 16 (1) (d), as under

"It is clear that under the relevant rule, it is a duty of the Court to take into account that aspect while considering the requirements of personal occupation of the landlord"

7 In the instant case, the principle laid down would apply, as on examining the judgments of the Prescribed Authority as well as that of the appellate court, it is clear that the applicability of Rule 16 (1) (d) of the Rules was not considered by the said Courts In view of the above, the learned counsel for the petitioner submitted that the matter be remanded to the lower appellate court Learned counsel for the widow Smt Zaibunnisa, however, urged that there are already facts on the record which could enable the court to determine this question and great injustice would be caused to the widow in case the matter is remand-

ed again to the appellate court The submission made by the learned counsel for the widow, in my opinion, is well founded and, in my opinion, there is sufficient evidence on the record to examine this plea and, as such, I do not think it necessary to remand this case on this question In the case of Raj Rani Mehrotra (1980 All Rent Cas 311) (supra) also, the Supreme Court has directed as under

"We, accordingly, set aside the order of the High Court dismissing the writ petition and remand the matter back to it for determination of the aforesaid issue If necessary, the parties may be allowed to lead fresh evidence, if the High Court is unable to decide it on the materials on the record If evidence becomes necessary, the High Court may, in its turn, remand the matter to the trial court, which will give an opportunity to both the parties to lead fresh evidence"

8. As I have already observed above in my opinion, no fresh evidence is required for determining this question and there is sufficient evidence on the record on the basis of which this question can be determined For the determination of this question, the extent of the accommodation and the number of the family members of both the landlord and the tenant are required All this evidence is already on the record I am, therefore, determining this question in this petition, as in the case of Smt Raj Rani Mehrotra (1980) All Rent Cas 311) (supra), also, the Supreme Court directed the High Court to determine this question and remand only if fresh evidence was required The extent of the property has been given in the plan, which is attached to the application under Sec 21 (1) (a) of the Act, which has been annexed as Annexue 'I' to the counter-affidavit of Smt Zaibunnissa in this Court The extent of the accommodation is not disputed The living residential accommodation consists of three rooms of the sizes 9' x 10', 11'6" x 11' and 14'6" x 9' There is a common court-yard and a common passage, only one latrine, one bathroom and one kitchen as well as a varandah According to the case set up by the petitioner, his family consists of himself, his wife and ten children, as stated in para 17 of his written statement, which is attached as Annexure 'P' to the counter-affidavit Smt Zaibunnissa, the widow, in accordance with para 19 (a) of her application under Section 21 (1) (a) of the Act, had four sons In 1979 when the application was filed, the ages of the sons were 11, 9, 7 and 3 years The position, therefore, is that the widow requires the accommodation for herself and her four sons and the family of the tenant consists of himself, his wife and ten children.

9. Rule 16 (1) (d) of the Rules provides that where the tenant's need would be adequately met by leaving with him a part of the building and the landlord's need could be served by releasing the other part, the Prescribed Authority shall release only the latter part of the building Looking to the family members of the petitioner tenant as well as the number of the family members of the respondent No 1, the widow, in my opinion, the petitioner's need cannot be adequately met by leaving him with a part of the building and the landlady's need can be met by the other part The residential portion of the building is small, having a common court-yard and a common passage, with only one latrine, bathroom and a kitchen There is no space where the bathroom, latrine or the kitchen can be constructed, if both the landlord and the tenant are permitted to stay in the same accommodation In my opinion, therefore, only a part of the accommodation will not, therefore, suffice the need of either the landlady or the tenant In the circumstances, the provisions of Rule 16 (1) (d) of the Rules cannot be applied in the present case The first submission made, therefore by the learned counsel lacks substance.

10 In regard to the second submission, learned counsel has relied on the decision given by me in Bhagwandas Gupta v Additional District Judge, 1979 (UP) RCC 572 In this case I had taken the view that if certain alternative accommodation is available to a tenant where he can carry on the business, the court has to further find out as to whether the accommodation in question is suitable or not and as to whether the substantial loss would be caused to the tenant in case the application for release is allowed In the case of Bhagwan Das Gupta (supra) the court had allowed the release application holding that there is an alternative suitable accommodation available to the tenant Since the release application was allowed on this very basis, I had observed that as required by Rule 16 (2) (b) further finding had to be recorded by the court in regard to substantial loss and suitability of accommodation In the

stant case, however this principle is not applicable, because the courts below have not allowed the release application on the basis of Rule 16 (2) (b) Rule 16 (3) (b) only becomes applicable where a release application is allowed on the basis if suitable alternative accommodation where the tenant can shift his business but it is not mandatory that whenever a release application is allowed the court must determine whether a suitable alternative accommodation is available or not to the tenant where he can shift his business

11. Both the Prescribed Authority as well as the lower appellate court after considering various accommodation, residential and non-residential available to the tenant came to the conclusion that greater hardship would be caused to the landlady-widow in case the release application is not allowed The Prescribed Authority as well as the appellate court have found that the petitioner has got an alternative residential accommodation No 6/415 It has been further found that the petitioner has got interest in shops Nos 6/769, 6/295/11, 6/295/12, 6/423 and 59 So far as shop No 6/769 is concerned, it has been stated in paragraph 22 of the application under Section 21 of the Act attached as Annexure 'F' to the counter-affidavit that the petitioner has in his actual occupation a big shop having two doors having municipal No 6/769 situate in Mohalla Chupiyan, Saharanpur which is west facing and just in front of the property in question The shop remains closed and the petitioner has taken it only to avoid the eventuality lest any prospective competitor may take that shop and establish business This averment has been denied in the written statement filed by the petitioner which is Annexure 2' to the counter-affidavit The extent of the accommodation has not been denied It was only denied in paragraph 20 of the written statement that he did not have this shop This part of the story has been disbelieved both by the Prescribed Authority as well as the Appellate Court and it has been held that the petitioner has half share in this shop, which is just in front of the shop in dispute Considering all these facts the appellate court ultimately recorded the following finding —

"The appellant is in a position evidently as indicated from the evidence to arrange for another alternative and suitable accommodation to himself even if he cannot fall back to any of the various houses recorded in his name as mentioned above whereas the respondent No 1 has no other place where she may shift for independent residence or to carry on business to feed herself and the children depending on her"

12 This finding in my opinion has been recorded on the basis of appraisal of evidence and I do not find any manifest error in the said finding This being a finding of fact cannot be disturbed under Article 226 of the Constitution of India. In view of the above, I am of the opinion that the second submission made by the learned counsel for the petitioner has also no substance

13 In the result, the petition fails and is, accordingly, dismissed In the circumstances of the case, the parties are directed to bear their own costs

Petition dismissed

1981 ALL. L J. 925

K C AGRAWAL AND V K KHANNA, JJ.

Vinod Kumar Agarwal, Petitioner v. State of U P and others, Respondents

Civil Misc Writ No 7625 of 1981, D/- 21-7-1981

Essential Commodities Act (10 of 1955), S 3 — U. P Khandsari Sugar (Levy) Order (1981), D/- 31-1-81 — Government Order No. 4273/LXX-M31/81, D/- June 4, 1981, Cl. (c) — Order D/- 4-6-1981 granting concession in khandsari sugar levy subject to the licencee, furnishing bank guarantee to the unpaid share of Khandsari at the rate of Rs. 600/- — Validity. (Constitution of India, Art. 14).

Under the Levy Order the licencees were to supply at the specified price at a purchase centre fifty per cent of the khandsari sugar manufactured by them in the first process On applications by licensees to the State Government regarding concession in levy the Government granted the concession by Order D/- 4-6-1981 by not insisting upon realisation of khandsari sugar in the current year But for assuring the supply of khandsari sugar next year, the Government imposed a condition in Cl. (c) of the Order D/- 4-6-1981 in public interest that the khandsari units which did not have khandsari of the first process required to be supplied under the Levy Order could be given the concession subject to their furnishing bank guarantee in

HY/HY/D494/81/SMA

regard to the value of unpaid share of khandsari at the rate of Rs 600/- per quintal. The Government was interested in assurance for getting the khandsari sugar for making it available to the public at large at a fair price. The licensee challenged Cl (c) of the Order D/- 4-6-1981 on the ground that the demand for furnishing bank guarantee at the rate of Rs 600/- per quintal was arbitrary, unreasonable and in contravention of Article 14 of the Constitution.

Held, that the demand of the Govt for securing the assurance of supply of khandsari sugar from the licencees for the next year for making it available to the consumers at a fair price was neither irrational nor capricious nor in contravention of Art 14 of the Constitution. The purpose of fixing the rate at Rs 600/- was to compel the licensees not to wriggle out of the undertaking given by them and to make khandsari sugar available to the public at a reasonable price. Merely because the bank guarantees are available in the markets from the Banks only on the condition of deposit of cash with them cannot be a ground for holding that the condition was arbitrary. Further, the demand of Rs 600/- per quintal was not unjustified merely because the price of the khandsari at the time of fixing the bank guarantee was far less than Rs 600/- per quintal as the price for which the khandsari sugar may be sold in the market in the next year could not be speculated. The power resides in the State Government. The High Court cannot substitute its own opinion. Case law discussed. (Paras 10 and 15)

Article 14 does not forbid a reasonable classification which is based on some real and substantial distinction and has a correlation to the object sought to be achieved. (Para 8)

Cases Referred	Chronological	Paras
AIR 1981 SC 487		7
AIR 1981 SC 996		3
AIR 1979 SC 1628		7
1978 All LJ 1067		17
AIR 1975 SC 1604	1975 Tax LR 1826	17
AIR 1967 SC 983		17
AIR 1952 SC 75		8

G N Chandra, for Petitioner.

ORDER :— The petitioner is a Khandsari manufacturer having a cane crusher of the size sulphitation non-hydraulic cane crusher. He had been granted a licence to manufacture Khandsari sugar under the U P Khandsari Manufacturing Licensing Order, 1967. Since Khandsari sugar is an essential commodity within the meaning of the Essential Commodities Act, 1955, its distribution, sale and purchase has been the subject matter of various Control Orders issued from time to time by the respective Governments, in exercise of the powers under S 3 of the Essential Commodities Act, 1955.

2. On 31-1-1981, the State of U P issued a notification in exercise of the powers under Section 3 of the Essential Commodities Act, 1955, known as the Uttar Pradesh Khandsari Sugar (Levy) Order, 1981 (hereinafter referred to as 'the Levy Order'). This had been issued by the State Government as it was of opinion that for securing equitable distribution of Khandsari sugar and for its availability at fair price it was necessary to do so. Cl (3) of the said Levy Order provides that every producer shall sell to the State Government at the specified price at a purchase centre, fifty per cent of the Khandsari sugar manufactured by him in the first process. The Explanation added to this Cl. (3) was that no levy shall be due on the sugar manufactured in the second or any subsequent process.

3. The validity of the Levy Order was challenged in the Supreme Court by various producers of Uttar Pradesh. On Feb. 27, 1981 (reported in AIR 1981 SC 998), the Supreme Court dismissed the writ petition upholding the validity of the Levy Order. The Supreme Court found that none of the points raised challenging the validity of the Levy Order had any merit. The Supreme Court held (at p 1000) —

"It is manifest that individual interests, however precious they may be, must yield to the larger interest of the community, namely, in the instant case, the large body of the consumers of sugar. In fact, even if the petitioners have to bear some loss there can be no question of the restrictions imposed on the petitioners being unreasonable."

4. From paragraph 27 of the writ petition, it appears that the petitioners were required to give 643·20 quintals of khandsari sugar out of the stock manufactured by him. Out of this, 353 quintals of levy khandsari sugar had been supplied by the petitioner, but the remaining quantity of 290·20 quintals had not been given.

5. From Government Order No. 4272/LXX-M-31/81, dated June 4, 1981, it appears that a number of applications were

made to the State Government regarding the grant of concession in levy The Government took a lenient view of the representations and found that although in the levy Order there was no provision regarding the grant of concession, but as the basis of demand for grant of concession by the khandsari units was that their production had been less and that they had no khandsari sugar for giving levy, hence the Govt decided to grant the concession to those who had not supplied the required quantity of khandsari sugar under the Levy Order, on various conditions The Government held the view that the price of sugarcane had been comparatively very high this year, and that lesser price was likely to be fixed next year It could not, therefore, be definitely said as to what the production cost of khandsari units would be during the next year as compared to this year It further found that the percentage of levy on khandsari could also not be predicted for the next year Taking all these matters into consideration, the Government laid down the procedure which had to be followed for the disposal of the applications received for grant of concession in levy We are in the present writ petition concerned with only one condition, out of several conditions, mentioned therein The said condition is Cl (c), which is reproduced below —

"In regard to the khandsari units, which do not have khandsari in the aforesaid quantity in the first process at present, the Controller may consider their cases for grant of concession subject to the condition that the unit concerned shall furnish bank guarantee in favour of District Magistrate in regard to the value of levy unpaid share of khandsari, which shall be fixed at the rate of Rupees 600/- per quintal"

6. Challenging the aforesaid clause of the Government Order dated June 4, 1981, Sri B D Agarwal, learned counsel, argued that the demand for furnishing of bank guarantee towards the price of the khandsari sugar which could not be supplied in this year at the rate of Rs 600/- per quintal was arbitrary and unreasonable Counsel's argument was that the requirement of depositing the bank guarantee @Rs 600/- per quintal would compel the petitioner to furnish the bank guarantee in the sum of Rs 1,75,000/- Thus demand, apart from being harsh, was in contravention of Art 14 of the Constitution Counsel urged that the petitioner could get the bank guarantee from the Bank only on depositing cash amount and if the cash worth the amount was deposited, the petitioner's trade was likely to suffer heavily In that connection, counsel contended that dumping of such a huge amount in the Bank was not likely to subserve any interest of the Government as well

7 Counsel next urged that the concept of the basic principle enshrined in Article 14 of the Constitution has undergone a change It carries a protection against arbitrariness Hence, an order, if it is found to be arbitrary, is liable to be quashed For this submission, learned counsel relied on a decision of the Supreme Court in Ajay Hasia v Khalid Mujid (AIR 1981 SC 487) In this case, the Supreme Court held as follows (at p 499)

"No attempt should be made to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence This was again reiterated by this Court in International Airport Authority's case (1979) 3 SCR 1014 at p 1042 (AIR 1979 SC 1628) (at p 1642) of the Report It must therefore now be taken to be well settled that what Art 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality The doctrine of classification which is evolved by the Courts is not paraphrase of Article 14 nor is it the objective and end of that Article It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Art 14 would be breached Wherever, therefore, there is arbitrariness in State action whether it be of the legislature or of the executive or of an "Auth-

ority' under Art 12, Art 14 immediately springs into action and strikes down such State action In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution "

8 Article 14 forbids discrimination It requires every citizen falling in one group to be treated alike "Equality before the law or the equal protection of the laws' within the meaning of Art 14 means absence of any arbitrary discrimination by the law or the administration It, however, does not forbid a reasonable classification which should be based on some real and substantial distinction and must have a correlation to the object sought to be achieved As said by the Supreme Court in State of West Bengal v Anwar Ali, (AIR 1952 SC 75) (at p 93)

"The classification must not be arbitrary, but be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out"

9. It, however, appears necessary in this case to find out first as to whether Cl (c) of the Government Order dated June 4, 1981, is arbitrary In this connection, it must be noted that under the Levy Order the petitioner was to supply fifty per cent of the manufactured khandsari sugar This Order, as stated above, has been found to be valid The petitioner, admittedly, did not give the khandsari required to be sold to the Government under the Levy Order For non-supply of khandsari sugar, the petitioner could be prosecuted, and under Cl (4) of the Levy Order his licence granted under Cl (3) of the U P Khandsari Sugar Manufacturing Licensing Order, 1967, was liable to be cancelled Like the petitioner, there were many others who approached the Government for a concession being given to them as they knew that non-supply of khandsari sugar could put them in serious difficulty The Government took a lenient view of the matter It was interested in the assurance for getting the commodity, that is, the khandsari sugar for making it available to the public at large, at a fair price It considered the representations made to it and decided to grant the concession by not insisting upon realisation of khandsari sugar in this year For assuring the supply of khandsari sugar next year, the Government thought of imposing such a condition in public interest so that the khandsari manufacturers could not wriggle out of the same It laid down in Cl (c) that those khandsari units which did not have khandsari of the first process which was required to be supplied under the Levy Order, could be given the concession subject to their furnishing bank guarantee in favour of the District Magistrate in regard to the value of unpaid share of khandsari at the rate of Rs 600/- per quintal The concession given was a grant The petitioner had no right to get such a concession It is still open to the petitioner to avail it or not to do so The petitioner if thinks that the condition of giving bank guarantee is likely to cause hardship to him, by adversely affecting his trade, it is still open to the petitioner not to give the bank guarantee

10 There appears to be a purpose behind fixing the rate of Rs 600/- per quintal The purpose is to impel the supply of khandsari sugar to the State Government out of the total stock which would be manufactured next year If the khandsari sugar was not supplied, the Government would be entitled under the Government Order dated June 4, 1981, to forfeit the guarantee This will work as a compulsion on the petitioner not to wriggle out of the undertaking given by him The object behind this clause was motivated by the laudable desire to make khandsari sugar available to the public at a reasonable price A thing is said to be arbitrary when any decision has been taken capriciously and without adequate determining principle not founded in the nature of things, non-rational, not done according to reason or judgment We cannot subscribe to the submission of the learned counsel Sri B D Agarwal that the condition of making the demand at the rate of Rs 600/- per quintal is capricious or irrational

11. Counsel in this regard emphasised that bank guarantees are available in the market from the banks only on the condition of deposit of cash with them Be that as it may, that itself cannot be a ground for holding that the condition is arbitrary. The country faced a very difficult situation this year, when the sugar, including khandsari, was available to it in the market at a very high price From the market reports appearing in the

Times of India of the 16th April, 1981, it appears that in the Muzaffarnagar market on 15th April, 1981, khandsari sugar was sold @ Rs 557/- to Rs 820/- per quintal This is being cited by us as only an illustration On account of the high price, sugar was available only in the kitchen of the rich and well to do persons It is matter of common knowledge that khandsari units purchased sugarcane at a very high price, as a result of which major quantity of sugarcane was diverted to them Sugar mills could not compete with khandsari units and had to close down their production

12 Taking into consideration all the above circumstances, it is not possible to say for us that the demand of the Government for securing the assurance of supply of khandsari sugar from the petitioner and others for the next year for making it available to the consumers at a fair price, is irrational or capricious As already observed above, the choice is still with the petitioners

13. The petitioners' counsel submitted in the alternative that if the amount of bank guarantee demanded was @ Rs 280/- per quintal, the petitioner could have arranged for the same He urged that the demand of Rs 600/- per quintal is unjustified inasmuch as if the petitioner would have supplied khandsari sugar to the State Government, the latter would have been bound to pay the price of the same According to the counsel, if the price of the khandsari would have been taken into account at the time of fixing the bank guarantee, the demand could not have exceeded more than Rs 280/- per quintal The offer of the petitioner to give bank guarantee in the sum of Rupees 280/- per quintal is not bona fide In the next year, the price at which khandsari sugar may be sold in the market cannot today be speculated But, seeing the circumstances, as they are, one can reasonably believe that it would be sold nearly at the same rate at which it was available this year Khandsari sugar was sold in the market between Rs 700/- and Rs 800/- per quintal If the petitioner would get the above price of the khandsari sugar in the market, he is likely to sell the same in the open market and earn more without caring for the lapse of the bank guarantee Even if the bank guarantee is lapsed, he would still be a gainer

1981 All L J /59 IX (1)

14 Another thing worthy of being noticed is that the petitioner, admittedly, sold the levy sugar in the market instead of supplying it to the government for being made available to the consumers From the price of khandsari sold by him in the market, the petitioner must have made huge profits The petitioner has pocketed the profit and is not even prepared to furnish bank guarantee

15 On the facts and in the circumstances of the present case, we are unable to agree that the demand of bank guarantee @ Rs 600/- per quintal was arbitrary This Court has no power to reduce the amount of Rs 600/- to Rs 280/- per quintal, even if it had found that the demand of bank guarantee @ Rs 600/- per quintal was excessive It is not the judicial question The power resides in the State Government The High Court cannot substitute its own opinion Assuming that we would have found that Art 14 was infringed on account of the arbitrariness demonstrated by the petitioner, we would have only quashed Cl (c) of the Government Order of June 4, 1981

16. It would be apparent that the order of Government now impugned is relating to a concession in favour of the petitioner, and not any detraction from the right he possessed If the impugned clause of the scheme now be vacated, the result would be that the petitioner would be relegated to the rights that he possessed before the formulation of the government policy contained in the Government Order dated June 4, 1981 Obviously, that is not the relief which the petitioner seeks by this petition In the circumstances, the allegation that there has been infringement of Art 14 of the Constitution, is incorrect

17. The Standing Counsel relied upon certain decisions of this Court and the Supreme Court, and contended that since the petitioner did not have any right to get the concession from the Government and was bound to supply khandsari sugar under the Levy Order, he could not challenge the validity of the same by claiming protection of Art 14 of the Constitution Amongst others, the decisions relied upon were (1) K V Raja Lakshmiah Setty v State of Mysore, (AIR 1967 SC 993), (2) International Cotton Corporation v Commercial Tax Officer, (AIR 1975 SC 1604) and (3) Shri Sita Ram Sugar Company v State of U P (1978 All LJ 1067) Since we have found the impugned

Government Order to be valid and not arbitrary, we are not called upon to go into this question in this petition

18 No other point was pressed Counsel had confined his argument to the attack on Government Order dated June 4, 1981, on the grounds stated above

The petition is dismissed summarily

Petition dismissed

1981 ALL L J. 930

DEOKI NANDAN, J

Navjiwan Kisan Intermediate College, Mawana and another, Appellants v. Narendra Mohan Gupta, Respondent

Second Appeal No 161 of 1976, D/ 14-7-1981 *

Civil P C (5 of 1908), S 146 — Expression "Person claiming under" — Meaning of — Successors-in-office could not be 'persons claiming under' within S 146, when they were not personal heirs or representatives of the predecessors-in-office

A decree for injunction restraining personally the then Manager, the Secretary of the Managing Committee and the Principal of the college from interfering with A in the discharge, of his duties as teacher was passed The prayer made in the application for execution was against the present Manager and the present Principal who were not parties to the suit and not against whom the decree for injunction was passed personally

Held, that as the present Manager and Principal were not the parties to the suit and were not the personal heirs or representatives of the previous Manager and Principal, the decree could not be executed against them with the aid of S 146, they could not be said, to be a person claiming under the Ex Manager simply because they happened to succeed to the office AIR 1966 All 474, Disting (Para 5)

Cases Referred Chronological Paras

AIR 1966 All 474 5

S S Bhatnagar, for Appellants, Dhan Prakash, for Respondents

JUDGMENT — This is an execution second appeal The decree, under execution, contains a declaration that the plaintiff continues to be in the services of Navjiwan Kisan Intermediate College, Mawana, District Meerut, defendant No 1, and is entitled to join his services since 1-1-1961, and an injunction restraining the defendants Nos 2, 3 and 4 from interfering in the discharge of his duties by the plaintiff as an assistant teacher in the said institution The decree-holder is Sri Narendra Mohan Gupta He is the respondent in the appeal in this Court The Institution named Navjiwan Kisan Intermediate College, Mawana, District Meerut, was the first defendant and was impleaded through Sri Dharam Vir Singh acting Manager of the College Sri Shyam Lal Singh Advocate was the second defendant and was described as the Secretary of the Managing Committee of the College Sri Dharam Vir Singh, the Acting Manager, was impleaded as the third defendant Sri Harpal Singh Gahlot, Principal of the Institution, was the fourth defendant In the execution application it was stated in the clause specifying the relief sought by the decree-holder, that Sri Dharam Vir Singh used to be the Manager of the College, but now Sr. Khajan Singh was Manager in his place and Sri Shyam Lal Advocate had also ceased to be the Secretary of the College It was further said that Sri Harpal Singh was previously the Principal of the College, but now Sri Kataar Singh was the Principal This is followed by the claim that Sri Khajan Singh Manager and Sri Kataar Singh Principal were now bound to fulfil the terms of the decree This is followed by the averment that Sri Khajan Singh Manager and Sri Kataar Singh Principal had no right to prevent the decree-holder from functioning as the assistant teacher in the College and they had committed a breach of the decree in preventing him from working as an assistant teacher of the said College It was prayed that they may be detained in civil prison and the property of the First judgment-debtor, namely, the College, may be attached

2. This led to an objection on behalf of Sri Kataar Singh, Principal, and Sri Khajan Singh Manager, objecting to the execution of the decree against them on the ground that they were not the judgment-debtors and were not bound by the decree

3 The trial court dismissed the objections by its judgment dated 8-1-1973 and allowed the execution to proceed directing the decree-holder to take further steps within seven days.

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*Against judgment and decree of B K Rathi, 1st Addl Civil Judge, Meerut, D/- 9-1-1976

4 On appeal by the Navjiwan Kisan Intermediate College, through its present Manager and Principal, namely, Sri Khajan Singh and Sri Kataar Singh, in place of ex acting Manager Sri Dharam Vir Singh and the ex-Principal Sri Harpal Singh Gahlot respectively, the lower appellate Court confirmed the order of the trial Court dismissing their objections and allowing the execution to proceed

5 Having heard learned counsel, I find that this appeal must succeed. As noticed above, the decree granted two reliefs First, that of declaration against the defendant No 1, namely, Navjiwan Kisan Intermediate College through Sri Dharam Vir Singh, the acting Manager That part of the decree was clearly not executable The other relief, namely, of injunction was granted against the defendants Nos 2, 3 and 4, namely Sri Shaym Lal Singh, Sri Dharam Vir Singh and Sri Harpal Singh On the own showing of the decree-holder these three gentlemen were no longer connected with the institution and there was no prayer for execution of the decree against them The prayer made in the application for execution was against the present Manager Sri Khajan Singh and the present Principal Sri Kataar Singh They were not parties to the suit and could not be said, in that sense, to be bound by the decree The decree was passed personally against the defendants Nos 2, 3 and 4, namely, Sri Shyam Lal Singh Sri Dharam Vir Singh and Sri Harpal Singh. The present Manager and the present Principal of the institution are not the personal heirs, or representatives of the previous Manager and Principal The question is whether the decree could be executed against the present Manager and the present Principal with the aid of Section 146, C P C The first appellate Court has taken the view that Sri Khajan Singh, the present Manager, was "clearly claiming under Sri Dharam Vir Singh" and has in support relied on the case of Brahm Dutt Sharma v Life Insurance Corporation of India, (AIR 1966 All 474) wherein it was observed that the "expression 'claiming under' in S 146, includes case of devolution of interest pending suit." Now Sri Dharam Vir Singh had no beneficial or personal interest in the affairs of the institution which he was managing He was merely an acting Manager The position held by him was more onerous than beneficial The decree for injunction was passed personally against him There was no decree of injunction against the institution, even if it were assumed that the institution could be sued in its name, although, it was not a juristic person through its Manager Sri Dharam Vir Singh. There was thus no decree for injunction against the institution The new Manager could not, by any stretch, be said to be a person claiming under the Ex Manager simply because he happened to succeed to the office, within the meaning of that expression under Section 146 C P C Brahm Dutt's case (Supra) is clearly distinguishable There the assets and liabilities of the Life Insurance Companies devolved on the Life Insurance Corporation and the Life Insurance Corporation not only had the benefit of all the contracts entered into by its predecessor Life Insurance Companies and their assets, but also had to meet all their liabilities It could therefore, pursue the claims as successor-in-interest of its predecessor Life Insurance Companies There could be no doubt about that, and that case is clearly distinguishable and different from a case of the present kind before me The decree passed against Sri Dharam Vir Singh was passed against him personally It was a decree for injunction No relief was sought in the application for execution either against Sri Dharam Vir Singh or any other persons against whom the decree for injunction had been passed personally The successor Manager and Principal respectively could not be said to claim under their predecessors-in-office

6. The appeal succeeds and is allowed. The judgments and decree, appealed from, are set aside The objection filed by the appellants, paper No 11-C, on the file of the execution case No 210 of 1972 of the Court of Munsif Havali, Meerut, in Suit No 192 of 1962, is allowed, and the execution application for the relief claimed therein is dismissed

7 In the circumstances, the parties are directed to bear their own costs throughout

Appeal allowed.

1981 ALL L J 932

N D OJHA, J

Kunjan Lal, Petitioner v 3rd Addl District Judge, Mathura and others, Opposite Parties

Writ Petn No 7469 of 1979, D/- 9-7-1981

(A) Provincial Small Cause Courts Act (9 of 1887), S 25 (as applicable to U P) — Revisional power — Scope — Finding that house is built after 1960 based upon not relevant documents — District Judge cannot interfere in revision (U. P Urban Buildings (Regulation of Letting, Rent & Eviction) Act (13 of 1972), S 20)

Where the Additional District Judge in a proceeding under the U P Act 13 of 1972 had reversed the order of the Small Cause Court that the house in question was constructed after 1960 without considering the very crucial documents viz, the plan submitted for permission to construct the house and the order of Executive Officer sanctioning the plan which showed the construction of house after 1960, the reversal would be invalid even if it is assumed that the plea as to construction of house related to jurisdictional fact (Para 4)

(B) U P Urban Buildings (Regulation of Letting, Rent & Eviction) Act (13 of 1972), S 39 — Claim for benefit under Section 39 — Permissibility — Order passed by Court not giving benefit to tenant on ground that suit was not pending on 15th July 1972 — Order not valid — The date for purpose of S 39 is not 15th July 1972 but the date on which Act is applicable to the house in question. 1975 All LJ 1, Rel. on (Para 5)

Cases Referred Chronological Paras

1975 All LJ 1 5

A K Sharma, for Petitioner, G N Sharma and Standing Counsel, for Opposite Parties

ORDER — The petitioner is the landlord of an accommodation of which respondent No 2 is the tenant A suit was instituted by the petitioner for ejectment of respondent No 2 and for recovery of arrears of rent on the ground that his tenancy had been terminated and the house having been constructed in the year 1964-65 the provisions of U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U P Act 13 of 1972) were not applicable Respondent No 2 contested the suit asserting that the house had been constructed prior to the year 1960 and consequently U P Act 13 of 1972 was applicable and as no grounds contemplated by Section 20 of the Act were available a decree for ejectment could not be passed In the alternative he, on the basis of certain deposits having been made by him purporting to be under Section 39 of U P Act 13 of 1972, claimed immunity from ejectment under the said section The Judge, Small Cause Court, accepted the case of the petitioner that the house in question had been constructed in the year 1964-65 and the suit having been instituted in 1973, i e before the expiry of ten years from the date of the construction of the house the provisions of U P Act 13 of 1972 were not applicable In regard to the plea raised by respondent No 2 that he was entitled to the benefit of Section 39 of U P Act 13 of 1972 the Judge, Small Cause, held that even if it may be accepted that the necessary deposits contemplated by Section 39 had been made by respondent No 2 he was yet not entitled to the benefit of the said section inasmuch as that section applied only to such suits which had been instituted before 15th July, 1972, the date of the commencement of the Act On these findings the suit filed by the petitioner was decreed. Aggrieved by that order respondent No 2 preferred a revision under Section 25 of the Provincial Small Cause Courts Act before the District Judge The said revision was decided by the 3rd Additional District Judge, Mathura, respondent No 1, on 19th July, 1979, and was allowed The Additional District Judge reversed the finding of the Judge, Small Cause Court, that the house in question had been constructed in 1964-65 Even without recording a categorical finding in regard to the year in which the house in question was constructed he held that respondent No. 2 was entitled to the benefit of U. P Act. 13 of 1972 meaning thereby that since no ground contemplated by Section 20 was available a decree for ejectment against respondent No 2 could not be passed Presumably in view of the above finding the Additional District Judge did not consider it necessary to go into the question as to whether respondent No 2 was entitled to the benefit of Section 39 of U P Act 13 of 1972 or not It is this order which is sought to be quashed in this writ petition

2. It was urged by counsel for the petitioner that exercising the power of a

revisional court under Section 25 of the provincial Small Cause Courts Act it was not open to the Additional District Judge to have reversed the finding of fact recorded by the Judge, Small Cause Court, that the house in question had been constructed in the year 1964-65

3 For the tenant respondent on the other hand it was urged that the plea as to when the house in question was constructed raised an issue about a jurisdictional fact and the Additional District Judge was competent to go into that question even in a revision under Section 25 aforesaid

4 Having heard counsel for the parties I am of opinion that even proceeding on the basis that plea raised was about a jurisdictional fact the order of the Additional District Judge cannot be sustained inasmuch as he has completely ignored two very crucial documents which formed the basis of the judgment of the Judge Small Cause Court One was a plan submitted for permission to construct the house and the other an order of the Executive Officer sanctioning the plan These were of the year 1964 It was on the basis of these documents that the Judge, Small Cause Court, had held that since the plan to construct the house itself was sanctioned in the year 1964 the plea raised by respondent No 2 that the said house had been constructed prior to the year 1960 could not be accepted Another important document which according to paragraph 5 of the writ petition had been filed before the Judge, Small Cause Court, was an order dated 26th July, 1975 passed by the Prescribed Authority inter partes on an application made under Section 26 of U P Act 13 of 1972 by respondent No 2 himself for restoration of the amenity of water pipe It would be seen that whereas in the application made by respondent No 2 under Section 26 of U P Act 13 of 1972 his case was that the house in question had been constructed in the year 1963 the case which he chose to set up in the case for ejectment was that it had been constructed even prior to 1960 Mainly relying on the very two documents referred to above, namely, the plan submitted for sanction of construction of the house by the petitioner and the order of the Executive Officer dated 25th February, 1964, sanctioning the plan it was held by the Prescribed Authority in that case that the house in question had been constructed between 26th Ferbuary, 1964 the date on which the plan was sanctioned, and 31st March, 1965 This decision inter partes also indicated that the house in question had been constructed in the year 1964-65 as was held by the Judge, Small Cause Court, in the instant case The impugned order dated 19th July, 1979, passed by respondent No. 1 cannot, therefore, be sustained.

5 In so far as the order of the Judge Small Cause Court, holding that respondent No 2 was not entitled to the benefit of Section 39 of U P Act 13 of 1972 inasmuch as the instant suit had been instituted in the year 1973 and was not pending on 13th July, 1972, the date of commencement of the Act, is concerned, I am of opinion that that order too cannot be sustained in view of the decision of a Division Bench of this Court in D D Ram Nath & Co v G Lal, (1975 All LJ 1) where inter alia it was held (at p 9) —

"The date of commencement of the Act for purposes of Section 39 of the Act would be the date on which the provisions of the Act become applicable to the building in respect of which the suit for ejectment is pending"

The Judge, Small Cause Court, will now record a fresh finding as to whether respondent No 2 is entitled to the benefit of Section 39 of U P Act 13 of 1972 or not keeping in mind the legal position that the date of commencement of U P Act 13 of 1972 for purposes of Section 39 of the said Act is not 15th July, 1972, but the date on which the Act became applicable to the house in question

6. In the result the writ petition succeeds and is allowed and the order dated 19th July, 1979, passed by respondent No 1 as also the order of the Judge, Small Cause Court dated 13th October, 1977, in so far as she has denied the benefit of Section 39 of U P Act 13 of 1972 to respondent No 2 and decreed the suit for his ejectment are quashed and the Judge, Small Cause Court, is directed to decide the suit afresh in accordance with law keeping in view the observations made above Since the suit was instituted about eight years back the Judge, Small Cause Court, will decide it expeditiously In the circumstances of the case the parties shall bear their own costs

Petition allowed

1981 ALL L J 924

V K MEHROTRA, J

Lateef, Appellant v Town Area Committee, Milak and others, Respondents

Second Appeal 2307 of 1974, D/- 21-5-1981*

(A) U P Town Areas Act (2 of 1914), Ss. 9, 10, 11, 12 — Termination of services of temporary employee — Termination challenged on ground of violation of relevant provisions — Employee must prove his appointment to be valid in accordance with provisions

A perusal of Ss 9, 10, 11 and 12 of the Act indicates that it is the Town Area Committee which has to determine the number of permanent staff that it considers necessary for carrying out the purposes of the Act, and the duties, salary and the allowances to be attached to the said posts All these are to be included in what has been mentioned as 'establishment list of the permanent staff' The Staff so prescribed in an establishment list is to be appointed by the Chairman who has been given the power to impose fine upon any such member of the staff or suspend or dismiss him Section 11 enables the Committee to appoint temporary staff, as may be required, to supplement the permanent staff Any appointment according to the provision in S 12 of the Act, except in the manner provided by the aforesaid sections is prohibited A person claiming relief on the ground of violation of the provisions aforesaid has, therefore, to establish that his appointment has been made in accordance with them (Para 9)

(B) Civil P C (1908), S 100 — Second appeal — New plea — Termination of services of plaintiff, temporary employee by chairman of Town Area Committee — Suit by Plaintiff claiming order of Chairman to be void and for recovery of amount representing salary for one month — Suit allowed partly — Plaintiff failing to assail decree of trial Court dismissing suit in regard to declaration about invalidity of order of termination — Decree became final between parties — It is not open to plaintiff at belated stage in second appeal to contend that the order terminating his services was not valid (U P Town Areas Act (2 of 1914), Ss. 10, 11).

(Para 10)

*Against: Judgment and decree of Civil Judge, Rampur, D/- 13-8-1974

HY/HY/D618/81/SAD

(C) Civil P C (1908), S 100 — Termination of temporary employee by Chairman of Town Area Committee — Suit against — Subsequent order of re-appointment of employee not issue in suit — Second appeal — Any observation in judgment of Court below in regard to validity of re-appointment is uncalled for and would not bind parties (U. P Town Areas Act (2 of 1914), Ss. 10, 11)

(Para 11)

A B Saran, for Appellant; I H Khan, for Respondents

JUDGMENT — This is a plaintiff's second appeal

2 The case of the plaintiff, as set out in the plaint, was that he was a temporary peon in the Toll Tax Section of the Town Area Committee, Milak in district Rampur and that the Committee alone had the power to terminate his services The Chairman of the Committee, however, by an order dated January 21, 1973 terminated his temporary services with effect from the following day on the ground that the Committee did not require his services any longer This order, according to the plaintiff, was without authority of law and void The plaintiff was to be treated as continuing in service of the Committee in spite of this order He was also entitled to salary for the period succeeding the date of the order The plaintiff sought a declaration that the order of the Chairman dated January 21, 1973 was void and that resultantly he continued to remain in employee of the Committee He also sought a decree for recovery of an amount of Rs 125/60 representing the salary for the period between January 22, 1973 and Feb 23, 1979

3 The Committee contested the suit Its plea, in defence, was that the plaintiff had been appointed as a temporary peon by the Chairman for and on behalf of the Committee so that the Chairman was competent to terminate the plaintiff's services on behalf of the committee That order, according to the defendants, was valid The plaintiff was entitled to receive a month's salary in lieu of the period of notice which the defendants were ever ready to pay to him

4. Of the two issues which were framed by the trial Court on the pleadings of the parties, the first was 'whether the termination order dated January 21, 1973 is illegal' Dealing with this issue, the trial Court on consideration of the evidence on record, came to the conclusion that the

plaintiff's services were terminated by the Chairman (Sri Nasir Raza Khan) by order dated January 21, 1973 but he was re-employed with effect from Sept 15, 1973 by the officiating Chairman after he had relinquished the pecuniary claim for the intervening period As such the plaintiff was entitled to declaration that he was in the service of the Committee with effect from Sept 16, 1973 and continued to be in its service and was also entitled to a salary and other emoluments for the period subsequent to Sept 16, 1973

5 In the operative portion, the trial Court mentioned that the suit was being partly decreed (for the aforesaid claim) but it was being dismissed for a declaration that the order of the Chairman dated January 21, 1973 regarding termination of the services of the plaintiff was illegal, null and void as well as for recovery of Rs 125/16 as salary for the period between January 22, 1973 and February 23 1973

6 The plaintiff did not file any appeal against that part of the decree which related to the refusal of relief to him The defendant, namely, the Town Area Committee and its Chairman, however, assailed the decree that had been passed by the trial Court in favour of the plaintiff in an appeal This appeal was allowed by the Civil Judge It was held by the lower appellate Court that the decree which had been passed by the trial Court was being modified to the extent that the plaintiff was not to be treated as continuing in service, since the plaintiff's services had been terminated under the order dated January 21, 1973

7 In the judgment upon which the aforesaid decree of the lower appellate Court was founded, it was held by the learned Civil Judge that the order which had been passed by the Chairman terminating the services of the plaintiff was according to law The learned Judge was of opinion that the fact that there was power under Section 10 of the U P Town Areas Act to appoint permanent staff and dismiss any member of such staff implied the power in him of terminating the services of a temporary member of the staff The correctness of this view has been assailed by the learned counsel appearing for the plaintiff-respondent His submission is that in view of the clear provision contained in S 11 of the Act, it was the Committee alone which had the power to terminate the services of a temporary employee of the Committee

8. The view of the lower appellate court, founded upon its interpretation of Section 10 of the Act, is not sound in law in the form in which it has been expressed in the judgment under appeal Likewise, the contention of the learned counsel for the plaintiff also appears to be unsustainable

9 A perusal of Sections 9, 10, 11 and 12 of the Act indicates that it is the Town Area Committee which has to determine the number of permanent staff that it considers necessary for carrying out the purposes of the Act, and the duties, salary and the allowances to be attached to the said posts All these are to be included in what has been mentioned as 'establishment list of the permanent staff' The staff so prescribed in an establishment list is to be appointed by the Chairman who has been given the power to impose fine upon any such member of the staff or suspend or dismiss him Sec 11 enables the Committee to appoint temporary staff, as may be required, to supplement the permanent staff Any appointment, according to the provision in Section 12 of the Act, except in the manner provided by the aforesaid sections is prohibited A person claiming relief on the ground of violation of the provisions aforesaid has, therefore, to establish that his appointment has been made in accordance with them

10 It has been noticed earlier that the plaintiff did not assail the decree of the trial Court by which it had dismissed his suit in regard to the declaration claimed by him about the invalidity of the order dated January 21, 1973 and Feb, 22, 1973 That decree became final between the parties It is obvious that having submitted to that decree it would not be open to the plaintiff to contend at this belated stage in the present second appeal that the order dated January 21, 1973 was not valid

11 It may be made clear that as far as the subsequent order of re-appointment of the plaintiff on Sept 16, 1973 is concerned, its validity was not in issue in the suit out of which arose the present second appeal Any observation in the judgment of the courts below in regard to its validity or otherwise, therefore, was uncalled for and would not bind the parties

12 On the aforesaid view of the matter, it has to be held that the appeal lacks merit It is, consequently, dismissed but, in the peculiar circumstances of the instant case, the parties are directed to bear their own costs throughout

Appeal dismissed

1981 ALL L J 936

V K MEHROTRA, J

Jagardeo Shukla and others, Appellants v Chandradeo Singh and others, Respondents

Second Appeal No 1921 of 1974, D/- 11-5-1981 *

U P Consolidation of Holdings Act (5 of 1954), Ss 4 (2), 5 — Injunction for restraining from taking electrical line across plot of plaintiffs — Relief can be granted after determination whether plaintiffs were bhumidars of such plot — Such question can be determined by Consolidation Authorities — Case before Civil Court would be abated under S 5 (Civil P C (1908), S 9, Specific Relief Act (47 of 1963), S 38)

Where the relief claimed by the plaintiffs that the defendants be restrained by means of permanent injunction from fitting any pumping set in the well or taking any electrical line across the plot of the plaintiffs could be granted only after holding that the plaintiffs were the bhumidars of the plot and that the defendants had no right therein and the plot in question came within an area which was covered by a notification issued under S 4 (2) The determination of the question as to whether the plaintiffs were bhumidars or not as claimed by them can be done only by the authorities constituted under the Act Hence, such a case before Civil Court would stand abated but of course, without prejudice to the rights of the parties to seek determination of their claim proceedings under the Act Case law discussed

(Para 12)

Cases Referred	Chronological	Paras
1979 All LJ 675		9
1978 All LJ 756	AIR 1978 SC 1398	7
1973 All LJ 278		8
1969 All LJ 768		6
1968 All LJ 46	AIR 1968 SC 714	11
1965 All LJ 1137		10

S K Vidyarthi and A N Misra, for Appellants, M P Dwivedi, for Respondents.

JUDGMENT — The plaintiff-respondents filed the suit, giving rise to the present second appeal, on the allegation that they were bhumidhars of plot No 374 which was in the nature of a grove To the West of this plot lay the house of the defendant-appellants The defendant-appellants, it is alleged, encroached over a portion of plot No 374 by building a dalan Further the defendants were threatening to fix a pumping set in the well of the plaintiffs on this plot. With the other allegations made in the plaint, we are not concerned now The plaintiffs, inter alia prayed that the defendants be restrained by means of a permanent injunction from fitting any pumping set in the well or taking any electrical line across plot No 374 that connection (sic) Also that the defendants be required to hand over possession of the portion of plot No 374 which had been encroached upon by them after removal of that part of the dalan which was located over it

2. The defendant that the appellants took primarily was that plot No 374 was not the bhumidhari of the plaintiffs and that they were themselves in possession over a part thereof for a long time and had perfected their title to it by adverse possession Some other pleas were also taken

3 The trial court framed the first issue in the case to be "whether the plaintiffs are the bhumidhars of plot No 374 in suit" and third issue as "whether the defendants have become owners by adverse possession of the property in suit. If so, its effect" Under the first issue, the trial court concluded that the plaintiffs were bhumidhars of plot No 374 while under issue No 3 it came to the conclusion that the defendants had failed to establish that they were in hostile possession over the land in suit, to the knowledge of the plaintiffs, and had thus become owners by adverse possession It decreed the suit in part It directed demolition of that portion of the disputed Dalan of the defendants which lay on the plaintiffs' plot No 374 and also restrained the defendants from installing pumping set or making any change in the well situate in plot No 374 This well, under issue No. 2 framed by the trial court had been found by it to belong to the

*Against Judgment and decree of 4th Addl Civil Judge, Varanasi, D/- 8-8-1974

plaintiffs The decree of the trial court was affirmed by the lower appellate court without any modification Consequently, the defendants came to this court in the present second appeal which was admitted by this court to hearing on September 17, 1974

4 On March 30, 1979 the defendants filed application No 745 of 1979 alleging therein that during the pendency of the second appeal, the area to which the suit related became subject to a notification under Section 4 of the U P Consolidation of Holdings Act and as such it was prayed that the suit as well as the appeal be ordered to be abated under Section 5 (2) (a) of that Act The averment about the issuance of the notification under Section 4 of the Act has not been controverted on behalf of the plaintiff respondents The question that needs determination is whether on the assertion contained in the plaint and the relief sought by the plaintiff--respondents in the suit, the suit and the proceedings thereafter deserve to be d rected to have abated Considerable arguments have been advanced by the learned counsel for the parties about the applicability of the provisions of Section 5 (2) (a) of the Act to a controversy of the present nature The submission on behalf of the appellants is that before the appellants can be held entitled to the relief sought by them in the suit it has to be determined as to whether they are the bhumidhars of plot No 374 or not It is argued that in case the conclusion on this question is against the plaintiffs, they would not be entitled to seek the relief either of injunction or of possession over a portion of plot No 374 over which stands a part of the dalan of the defendants As such, proceeds the submission, it has to be held that the suit out of which the present appeal arises, was in respect of declaration of rights or interest in land lying in an area which is covered by the notification under Section 4 of the Act It, therefore, has to be abated

5 On behalf of the plaintiff-respondents, on the contrary, it has been stressed that the relief sought in the suit being for an injunction and for demolition of constructions, was not such which could be granted by the consolidation courts so that irrespective of the fact that the grant of relief to the plaintiffs involved a declaration of rights or interest in plot No 374 which is covered by a notification under Section 4 (2) of the Act, the suit or the proceedings arising therefrom and perding in the court in the present second appeal cannot be directed to be abated

6 In Jagarnath Shukla v Sita Ram Pande (1980 All LJ 768), a Division Bench of this Court observed (at page 772) that "the language of the amended S 5 (2) is very wide It provides for the abatement of suits not only for declaration of rights or interests in any land, but also for suits in respect of declaration of rights or interests in any land In consolidation proceedings, the question whether a sale deed is binding or not arises during the course of adjudication upon the rights of parties in the land In substance, the suit is in respect of declaration of rights or interests in the land The form of relief however, is, to our mind, immaterial If the consolidation authorities hold that the sale deed has been obtained by fraud etc and is inoperative, the party will get substantially all the relief which he wants He will be declared to be still the tenure-holder of the plots and will be entitled to a chak in lieu of them Therefore the mere fact that the consolidation authorities cannot grant relief in the form in which the civil court can does not affect the question The suit remains a suit in respect of the declaration or adjudication of the rights of parties in the land"

7 In M M Raza v Hasan Raza (AIR 1978 SC 1399) (1978 All LJ 736) it was held by the Supreme Court that in a suit for recovery of possession of land which comes to be included in an area under Section 4 of the Act, the matter becomes cognizable by consolidation authorities where the parties to the suit claim rights to it under the Zamindari Abolition and Land Reforms Act Such a suit shall stand abated under Section 5 (2) (a) of the Act

8 In Hasrat v Hari Dwar (1973 All LJ 278), a single Judge of this court took the view that where the consolidation authorities are not competent to go into the real controversy involved in the suit, it cannot be abated, and that in a suit seeking mandatory injunction for demolition of constructions, the only effective relief would be to direct the removal of the constructions, so that the relief being beyond the competence of the consolidation authorities that suit could not be abated, and must be decided by the civil court. In that case, the plaintiffs had fil-

ed a suit for mandatory injunction directing the defendants to remove the disputed constructions raised by them in the plaintiffs' land The plaintiffs claimed to be the bhumidhars of the disputed plot whereas the defendants denied the plaintiffs' title and claimed that the constructions in dispute were old and had been raised on their own sehan land They did not claim any title in respect of the plots

9. In Banwari Lal v Tulsi Ram (1979 All L J 675) a Bench of the Court held that in a suit where the relief sought was an injunction and the plaintiff wanted an encroachment to be removed and possession over the site of encroachment restored, it was not a suit for possession simpliciter or of the kind which necessitated adjudication of rights before the relief could be granted The suit was held not liable to be abated In that case, the Bench found that title had already been adjudicated by the revenue court as well as the consolidation authorities and the cause of action for the suit was the alleged trespass by the defendant The plaintiff had sought relief upon the decree of the revenue court and did not desire adjudication of rights in relation to the grove plot

10 In Mukteshwari Prasad Tewari v Ram Wali (1965 All LJ 1137), the question as to whether civil court could take cognizance of a suit for possession of agricultural land and for demolition of unauthorised construction standing thereon or of a suit merely for demolition of unauthorised construction made on an agricultural land was answered by saying that a civil court could not take cognizance of a suit for possession of agricultural land and for demolition of unauthorised construction standing thereon but could take cognizance of the suit merely for demolition of unauthorised construction made on the agricultural land In that case, the Bench was considering the question of jurisdiction in such matters being of the civil court or of revenue court on account of the provisions of the U P Zamindari Abolition and Land Reforms Act It was observed by the Bench (at page 1139) that "in a case where the plaintiff merely asks for demolition, the court may have further to see whether the relief for demolition is really the relief which the plaintiff claims or the plaintiff has framed his relief as one for demolition when he really wants possession over the land If upon the allegations in the plaint the court comes to the conclusion that the plaintiff really wants possession over the land and the relief for demolition has been so framed merely to oust the purview of the civil court, even then the suit would be cognizable by the revenue court and would be barred from the jurisdiction of the civil court But in a case where it is clear that the relief for demolition alone will satisfy the plaintiff and that is his real grievance in such a case the suit will be in the civil court and the revenue court will have no jurisdiction to entertain such a suit"

11 Dealing with the provisions of Section 5 of the Act, after its amendment in the year 1965, the Supreme Court observed in Ram Adhar Singh v Ramroop Singh (AIR 1968 SC 714 at p 716) (1968 All LJ 46) that "the expression 'every suit and proceeding in respect of declaration of rights or interest in any land' are comprehensive enough to take in suits for possession of land, because, before a claim for possession is accepted, the Court will have necessarily to adjudicate upon the rights or interest of the plaintiff in respect of the disputed property, taking into account the claim of the opposite party Therefore, in our opinion, the suit instituted by the respondent, is covered by the amended Section 5 of the Act"

12 It has been noticed earlier that the various assertions in the plaint relate to the plaintiffs' claim that they are the bhumidhars of the plot in dispute over which is located the disputed wall The stand taken by the defendant-appellants is that the plaintiffs are not the bhumidhars and further that they are entitled to the disputed portion of the land also under Section 9 of U P Act No 1 of 1951 On the pleadings of the parties, it has to be held that the basic issue between them relates to a declaration about their right or interest in the land in suit The relief of possession, after demolition of the offending portion of the dalan, could only be granted after holding that the plaintiffs were the bhumidhars of the plot and that the defendants had no right therein Similarly, grant of relief of injunction claimed by the plaintiffs was dependent squarely upon the conclusion that they were the bhumidhars of the plot The determination of the question as to whether the plaintiffs were

bhumidhars or not as claimed by them has been left to the authorities constituted under the Consolidation of Holdings Act for admittedly the plot lies in an area which is covered by a notification issued under Section 4 (2) of the Act In these circumstances, notwithstanding the form in which the relief is couched in the plaint, the conclusion is inescapable that the principal relief sought by the plaintiffs is one of declaration of their interest in the plot in suit as bhumidhars Such a suit, according to the clear provisions of Section 5, has to be abated even while pending in a second appeal without, of course, prejudice to the rights of the parties to seek determination of their claim proceedings under the U P Consolidation of Holdings Act Learned counsel for the defendant-appellants has stated that according to his instruction, the matter relating to the plot in dispute has already been dealt with by the Consolidation Officer in the first instance and is now pending in an appeal

13. As a consequence of the discussion aforesaid, it is declared that the suit, out of which the present second appeal arises, stands abated along with the appeal itself

Order accordingly

1981 ALJ L J 939

DEOKI NANDAN AND K P SINGH, JJ

Prem Singh, Petitioner v State and others, Respondents

Habeas Corpus Petn No 5377 of 1981. D/- 26-6-1981

Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act (1980), S 3 — Salesman not instigating dealer to commit offence — He cannot be detained

(Para 5)

M M Pant, for Petitioner, Dy Govt Advocate, for Respondents

DEOKI NANDAN, J. — The petitioner in this case was a salesman employed in the Malhipur Mahmood Nagla Kisan Seva Sahkari Samiti, district Moradabad He has been detained under the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980, (hereinafter referred to as the 'Act') by the order passed by the District Magistrate, Moradabad, dated 24th February, 1981, confirmed by the State Government by an order dated 6th April, 1981

2. The petitioner's contention is that he could not have been detained under the Act, for only a dealer in essential commodities who commits, or a person who instigates a dealer in essential commodities to commit an offence punishable under the Essential Commodities Act, 1955 (10 of 1955) or under any other law for the time being in force relating to the control of the production, supply or distribution of, or trade and commerce in, any commodity essential to the community could be so detained

3 We have heard the contentions of the learned counsel for the parties

4 Section 3 (1) of the Act says that the person who can be detained, must be a person with respect to whom the detaining authority is satisfied that it is necessary to detain him "with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" Explanation to Section 3 of the Act defines the expression "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as the commission or instigation of any offence punishable under the E C Act, 1955 (10 of 1955), or under any other law for the time being in force relating to the control of the production, supply or distribution of, or trade and commerce in, any commodity essential to the community, or dealing in any commodity which is an essential commodity as defined in the E C Act, 1955 (10 of 1955), or with respect to which provisions have been made in any such other law with a view to making again in any manner which may directly or indirectly defeat or tend to defeat the provisions of that Act or any other law in force for the time being

5 It is clear that only a person who is a dealer can commit such an offence As far as the question of instigation is concerned, there is no allegation that the petitioner instigated any other dealer to commit such an offence as contemplated in the said definition

6. The petition, therefore, succeeds and is allowed The petitioner shall be set at liberty forthwith, unless required in any other offence

Petition allowed

GY/HY/D293/81/HR/RSK

1981 ALL. L. J 940

S. J. HYDER J.

Radha Krishna Chaube and another, Appellants v. Ram Janam and another, Respondents

Second Appeal No. 1442 of 1974, D/- 7-5-1981.*

(A) Civil P. C. (5 of 1908), S. 100 — Second appeal — Plea of jurisdiction — Defendants submitting to jurisdiction of trial court are not estopped from raising plea of want of jurisdiction for first time in second appeal

Determination of rural relations in a dispute between the parties and the authority to pronounce on them which culminates in a binding decree can only be done by a tribunal empowered to do so under the law. Jurisdiction means the legal authority to administer justice according to the means which law has provided and subject to the limitation imposed by that law upon the judicial authority. It, therefore, follows that if a Tribunal or Court has not been conferred with any power to pronounce upon disputed claims the pronouncement by such Tribunal or Court has no binding effect. (Para 9)

When a court has no inherent jurisdiction, no amount of consent, acquiescence or waiver can create it. Estoppel against a party cannot confer jurisdiction on a court where it had none. The general rule stated above is subject to some well defined exceptions. Some of these exceptions are to be found engrafted in S. 21 of the Code of Civil Procedure, S. 11 of the Suits Valuation Act and S. 313 of the U. P. Z. A. and L. R. Act (1886) 13 Ind. App. 134 (PC), Relied. (Para 10)

Held, since the instant case did not fall within the exceptions to the general rule the defendants who had submitted to the jurisdiction of the trial court were not estopped from raising the plea of want of jurisdiction for first time in second appeal. 1954 All. L. J. 551 (SC) and AIR 1951 SC 230, Rel. on. (Para 12)

(B) U. P. Tenancy Act (17 of 1939), Ss. 59/61 — Maintainability of suit under — Suit land legally transferred from State, of Bihar to State of U. P. from appointed date under Bihar and U. P. (Alteration of Boundaries) Act (24 of 1968) but suit filed under Ss. 59/61 before 1968, i. e. when Bihar laws still applied to suit land — Held suit was not maintainable since U. P. laws were not applicable to suit land at the time of filing suit (Bihar and U. P. (Alteration of Boundaries) Act (24 of 1968), Ss. 3 and 26). (Paras 28, 29, 30)

(C) U. P. Tenancy Act (17 of 1939), S. 180 (2) — Hereditary rights — When acquired — Disputed land submerged in flood waters and not cultivable for about 4 months every year during rainy season — Held, land by virtue of seasonal submersion reverted to owner and plaintiffs who were in wrongful possession for over 50 years did not acquire hereditary rights under S. 180 (2). AIR 1965 All. 313, Rel. on. (Para 32)

(D) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 229B — Declaratory suit under — Held suit could not be deemed to be a declaratory suit when the State and Gaon Sabha had not been impleaded as parties thereto, and no notice was issued to State under S. 80 Civil P. C. and to Gaon Sabha under S. 106, U. P. Panchayat Raj Act, (Civil P. C. (1908), S. 80 and U. P. Panchayat Raj Act (26 of 1947), S. 106).

According to the scheme of the Act ownership of all land situated in a village vests in the State Government. The State Government in its turn has vested the management and superintendence of the land in the Gaon Sabha. For this reason sub-sec. (3) of S. 229-B of the U. P. Z. A. and L. R. Act itself states that a declaratory suit by a person claiming to be bhumidhar or sirdar can be instituted by him against the State Government and the Gaon Sabha. The direction to implead the State Government and the Gaon Sabha as a party to such suit is mandatory. Failure to comply with this direction would be a fatal defect in the suit. Moreover, no such suit can be instituted by a plaintiff without first serving the State Government a notice under S. 80 of the Civil Procedure Code and a further notice to the Gaon Sabha under S. 106 of the Panchayat Raj Act. (Para 33)

Cases Referred	Chronological Paras
AIR 1965 All 313	31
1954 All LJ 551 AIR 1954 SC 340	10
AIR 1951 SC 230	11
(1886) 13 Ind App 134 (PC) ILR 9 All 191	9

*Against judgment and decree of A. S. Trench, D. J. B. I. D. 2024 1974

FV/HV/C949/81/HR/RSK

V K S Chaudhary and S N Srivastava, for Appellants H S Chaudhary and R N Singh, for Respondents

JUDGMENT:— Two questions of law arise for consideration in this second appeal Learned counsel for the defendants, who are aggrieved by the decrees of the primary court as well as by the decree of the court of first appeal, hereinafter referred to as the appellate court, has in the first place urged that the suit of the plaintiff respondents under Section 59/61 of the U P Tenancy Act was not entertainable and the decree passed therein was without jurisdiction In the alternative it is submitted that the two courts below have erred in coming to the conclusion that the plaintiff respondents have acquired tenancy rights in the land in dispute by prescription

2. Plaintiffs instituted the suit against the appellants and the Raja of Dumraon for a declaration under Sections 59/61 of the U P Tenancy Act 1939 claiming that they were in possession of the land in dispute for over 50 years and had acquired hereditary rights therein The appellants and the Raja of Dumraon were interfering with the rights of the plaintiffs as such plaintiffs were entitled to claim a decree for a declaration that they were hereditary tenants of the land in dispute

3. The Raja of Dumraon entered into a compromise with the defendant appellants and acknowledged their rights to the land in dispute This court is therefore not concerned with the claim of Raja of Dumraon

4 The defendant appellants traversed the allegation of the plaintiffs They claimed that the land in dispute was their Sir and Khudkast land and they were in possession of the same They denied that the plaintiffs were entitled to the relief sought by them

5 It is common case between the parties that the confluence of the mighty Ganga and the turbulent Ghagra is in close proximity of the land in dispute During rainy season both the rivers are in spate and the fury of the discharge of waters is so tremendous that the land in dispute and the adjoining land is subjected to fluvial action Immediately to the east of the confluence of these two great rivers are the districts of Shahabad and Saran which lie in the State of Bihar The land in dispute formerly lay in the District of Ballia In the year 1901 there were unprecedented floods in the two rivers as a result of which the land was submerged in water and when the flood receded the land reappeared on the eastern bank of river Ganga in the district of Shahabad The land in dispute was a part of the said district until the year 1959 In that year heavy floods once again occurred in the two rivers When the floods receded it was found that the river had changed its course once again and moved towards Shahabad In consequence the land in dispute was re-formed and appeared on the western bank in the district of Ballia

6 It was in these circumstances that the plaintiff respondents instituted the suit giving rise to this appeal in the Court of the Judicial Officer Ballia Then defendant appellants in their written statement submitted to the jurisdiction of the primary court and contested the suit on the grounds stated above The primary court decreed the suit and the appellate court affirmed the said decree The defendant appellants have now come in second appeal to this court

7. On the question of jurisdiction learned counsel for the defendant appellants has launched a multi-pronged attack on the decree passed by the primary court and affirmed by the appellate court In the first place he has urged that after coming into force of the Indian Constitution on January 26 1950 the boundaries of the States were frozen In spite of the fact that by fluvial action the land in dispute reappeared in the year on the western side of the bank towards the district of Ballia it continued to remain a part of the State of Bihar until the appointed date fixed under Section 3 of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, (Act No XXIV of 1968) and the suit could not have been instituted in the court of the Judicial Magistrate Ballia on 16-11-1962 He next submitted that the U P Tenancy Act of 1939 never applied to the land in dispute and the suit instituted by the plaintiff respondents under Sections 59/61 of the said Act was not legally maintainable He also urged that the suit could not be deemed to be declaratory suit under Section 229-B of the U P Zamindari Abolition and Land Reforms Act as the State Government and the Gaon Sabha had not been impleaded as parties thereto I shall deal with each of the submissions made by the learned counsel seriatim But before doing so it is neces-

sary to consider the preliminary objection raised on behalf of the plaintiff respondents

8 Learned counsel for the plaintiff respondents contended that the defendant appellants who have submitted to the jurisdiction of the Ballia Court are precluded from agitating the question of jurisdiction for the first time in second appeal According to him the defendant appellants took a calculated risk in the hope that the decision of the Ballia courts may be given in their favour Once they had exercised their option they are estopped from calling in question the jurisdiction of the said Courts if the decision has gone against them This argument was countered on behalf of the defendant appellants and it was urged that the courts lacked inherent jurisdiction and the decree passed by them are nullities Learned counsel submitted that the rule which the plaintiff respondents have contended is of limited application and the instant case does not fall within the purview of the said rule He urged that a decree passed by the court without jurisdiction is non est and its invalidity can be set up even at the stage of second appeal

9 Determination of jural relations in a dispute between the parties and the authority to pronounce on them which culminates in a binding decree can only be done by a tribunal empowered to do so under the law Jurisdiction means the legal authority to administer justice according to the means which law has provided and subject to the limitation imposed by that law upon the judicial authority It, therefore, follows that if a Tribunal or Court has not been conferred with any power to pronounce upon disputed claims, the pronouncement by such Tribunal or Court has no binding effect Lord Watson in delivering opinion of the Board of Ledgard v Bull (1886) 13 Ind App 134 (PC) observed as follows —

"When the Judge has no inherent jurisdiction over the subject matter of the suit the parties cannot by their mutual consent convert it into a proper judicial process although they may constitute the Judge their arbiter and be bound by his decision on the merits when these are submitted to him."

10. When therefore the court had no inherent jurisdiction no amount of consent, acquiescence of waiver can create it Estoppel against a party cannot confer jurisdiction on a court where it had none The general rule stated above is subject to some well defined exceptions Some of these exceptions are to be found engrafted in Section 21 the Code of Civil Procedure Section 11 of the Suits Valuation Act and Section 313 of the U P Z A and L R Act The instant case does not fall under any one of these categories In Kiran Singh v Chaman Paswan (AIR 1954 SC 340) (1954 All LJ 551) the Supreme Court declared the law in the following terms (at p 553 of All LJ)

"It is fundamental principle well established that a decree passed by a court without jurisdiction is a nullity and that its invalidity can be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution and even in collateral proceedings A defect of jurisdiction whether it is pecuniary or territorial or whether it is in respect of the subject matter of the action strikes at the very authority of the Court to pass any decree, and as such, the defect cannot be cured even by consent of parties"

11. In the case of U C Bank v Their Workmen, AIR 1951 SC 230, Kania C J held (at p 237)—

"Consent cannot give a Court jurisdiction if the condition which goes to the root of the jurisdiction has not been performed or fulfilled No appearance or consent can give jurisdiction to a court of limited jurisdiction which it does not possess"

12. In view of the above discussion I find no force in the preliminary objection raised on behalf of the plaintiff respondents I shall now proceed to examine whether the Ballia Courts lacked inherent jurisdiction to decide the suit giving rise to, this second appeal.

13. Without going into details it may be stated that before coming into force of the Government of India Act, 1919 the administration of what was then known as British India was highly centralised Lord North's Regulating Act of 1877 which in substance continued in force with minor modifications provided for the assumption of complete control of the colony of India by the Secretary of State The method of the Government approximated more and more closely to the method which had long been employed in other dependent territories of the then British Empire which were called as Crown

colonies The basic principle of governance was Parliamentary control, operating through Secretary of State who in his turn operated through the Governors In the first instance there were three separate Governors exercising coordinate authority over the respective areas known as Bengal Presidency, the Bombay Presidency and the Madras Presidency In due course of time the British dominion in India extended and the territories now forming part of Uttar Pradesh were originally part of the Bengal Presidency They were subsequently separated and were put in charge of Lt Governor The Regulating Act gave precedence to the Governor of the Presidency of Bengal who was designated as Governor General The different units of administration including the presidencies of Bombay and Madras were in the charge of Governors who were placed in a subordinate position to the Governor General The Secretary of State henceforth regulated the governance of the Colony of India through the agency of the Governor General The different units of administration which were in the charge either of Governor or Lt Governor were controlled and administered by the Governor General-In-Council The legislative functions of the Governor General were limited and he could frame regulations for the governance of the country in matters of detail It would thus follow that the Government of India before 1919 was a unitary government As already stated provinces were administrative units which had been created by executive fiat and not by legislation Reginald Coupland in his book 'Constitutional Problems of India' has observed at page 10

"There were thus no division of authority No trace of the federal idea in the Constitution of British India before 1919 The Provinces had no rights of their own They were legally no more than administrative sections of the British India and their Governors no more than agents of the Central Government which in its turn was subordinate to the Secretary of State"

14 The idea of self-governing Provinces was mooted in its nascent form in the Montague-Chelmsford Reforms which culminated in the Government of India Act 1919 For the purpose of this second appeal it is unnecessary to go in o details of the system of Government introduced by the 1919 Act Suffice it to say the Act fell short of the expectations of the Indian people and the agitation for Home Rule or Swaraj continued unabated The British Parliament with a view to mollify the Indian sentiments passed the Government of India Act 1935 which carried the principle of federalism a step further The stride taken by the 1935 Act was also not wholly acceptable to the Indian opinion In consequence a brief trial was given to that part of the Act which related to provincial autonomy After the out break of the Second World War this trial was also abandoned and a stalemate followed which culminated in the independence of India and the Constitution of 1950 framed by the Constituent Assembly

15. I have given a brief survey of the constitutional history in order to appreciate the legal position which arises in this second appeal In the year 1825 the Governor-General-In-Council promulgated the Bengal Alluvion and Diluvion Regulation of 1825 (Regulation No XI of 1825) The preamble of the Regulation states

"In consequence of the frequent changes which take place in the channel of the principal rivers that intersect the territories immediately subject to the presidency of Fort William and the shifting of the sands which lie in the beds of those rivers, chars or small islands are often thrown up by the alluvion in the midst of the stream, or near one of the banks and large portions of land are carried away by an encroachment of the river on one side whilst accession of land are at the same time, or in subsequent years gained by dereliction of the water on the opposite side, similar instances of alluvion, encroachment and dereliction also sometimes occur on the sea coast which borders the Southern and the South-eastern limits of Bengal The lands gained from the rivers or sea by the means abovementioned are a frequent source of contention and affray, and although the law and custom in the country have established rules applicable to such cases these rules not being generally known the Courts of Justice have sometimes found it difficult to determine the rights of litigant parties claiming chars or other land gained in the manner above described"

16 In the enacting part of the Regulations certain guidelines are laid down for determining the ownership of the land gained by alluvial action As a general Rule if the accretion was gradual, land so added would go to the owner of the plot to which it accreted But if the land in dispute is identifiable with reference to its physical feature, the landmarks or measurements it should be deemed to continue to belong to the former owner when the land is transferred from one side of the river to the other side by certain change in the course of the river or was the result of the river gradually receding on one side and throwing up land on the other unless a custom to the contrary was established It is necessary to proceed with detailed examination of the provisions of the Regulations Suffice it to say that the Regulations cover cause of dispute between individuals arising out of the process of alluvium and diluvium

17 The Regulation referred to above did not concern itself with the adjustment of the boundaries of the administrative units known as provinces This was inevitable because as already pointed out the provinces were creations of an executive fiat and were not legal entities If a particular piece of land accreted towards the side of one province naturally was governed for administrative purposes by the said province In spite of that the Governor General issued two notifications in the years 1867 and 1871 which provided that the deep stream of the rivers Ganga and Ghagra shall be considered to be the boundary between the districts of Shahabad and Saran of Bihar and the district of Ballia in U P

18. I have already stated above that before coming into force of the Government of India Act, 1919 the Government of India functioned on a unitary pattern The provinces were merely administrative units The 1919 Act gave elementary recognition to the units known as provinces Legislative Councils were formed for the provinces which had some legislative functions The system introduced by this Act did not make any attempt to define the boundaries of the provinces The Act failed to satisfy the aspirations of the people for self-government and the Parliament ultimately passed the Government of India Act 1935 The Act of 1935 continued in operation until India attained freedom and the Constituent Assembly adopted Constitution Act which came into effect from 26th January 1950 In this second appeal I am only concerned with the provisions of the Constitution Act I shall, however, refer to the Government of India Act 1935 whenever found necessary

19 Article 1 of the Constitution Act, hereinafter referred to as Constitution, declares that India, i e Bharat shall be a union of States It further lays down that the States and the territories thereof shall be as specified in the Ist Schedule The territory of India has also been defined by the Article to mean the territory of States, union territories specified in the Ist Schedule and such other territories as may be acquired by it The Constitution makers in order to describe India have deliberately chosen the word "Union" in preference to the words "Federation of States" The reason behind the choice of words by the Constitution makers has no bearing on this second appeal and I do not propose to dwell on this aspect of the Article Suffice it so say that the Constitution makers have deliberately discarded the terminology "Provinces" and in its place have substituted the words 'States' Moreover an endeavour has been made to specify the territories not only of the States but also of the union territories This has been done in the Ist Schedule Incidentally, it may be stated that the Government of India Act, 1935 in Sec 46 was content only with enumerating the provinces The 1935 Act made no attempt to define the boundaries of the Provinces

20 The territories of the State of Bihar are mentioned at item No 3 of the said schedule while those of Uttar Pradesh are mentioned at item No 18. Item No 3 as originally enacted read as follows —

"3 Territories which immediately before the commencement of this Constitution were either comprised in the province of Bihar or were being administerred as if they formed part of that province"

There were some boundary disputes between the State of Bihar on the one hand and the State of West Bengal on the other As a result of this dispute the entry 3 of the Ist Schedule was amended and after the words "that pro-

vince" occurring at the end the following words were added "but excluding the territories specified in sub-sec (1) of Section 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956" At item No 13 of the Schedule the territories of Uttar Pradesh were originally indicated in the following words "Territories which immediately before commencement of this Constatution were either comprised in the province or were being administered as if they formed part of that province"

21. On a reading of items Nos 3 and 13 of Schedule I the conclusion is inescapable that the land in dispute was being governed at the time of the commencement of the Constitution by State of Bihar and formed part of that State The process of alluvium and diluvium would not affect that position since it took place in the year 1959 The matter, however does not end here The Article which is relevant is Article 3 of the Constitution The Article as amended by the Constitution 5th Amendment Act 1955 is important and is quoted in extenso.

"3. Parliament may by law —

(a) Form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State

(b) increase the area of any State,

(c) diminish the area of any State

(d) alter the boundaries of any State

Provided that no bill for the purposes shall be introduced in either House of Parliament except on the recommendation of the President and unless where the proposal contained in the bill affects the area, boundaries or name of any of the States, the bill has been referred by the President to the legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired."

22. Article 4 of the Constitution empowers the Parliament to amend the first Schedule in suitable manner in pursuance of the law referred to in Articles 2 and 3 of the Constitution It is significant that for the purposes of amending the first schedule of the Constitution it is unnecessary to have recourse to the special provisions contained in Article 368 for the amendment of the Constitution In relation to the matters enumerated in Articles 2 and 3 of the Constitution the Union Parliament is empowered to amend Schedule I of the Constitution by passing an Act by a simple majority

23 The legislature of Uttar Pradesh amended the U P Zamindari Abolition and Land Reforms Act first Act XXI of 1962 and then by enacting Act XII of 1965, Section 2-A as it now stands reads as follows —

"2-A The extension of the Act to new territories —

(1) Where any area is added to the territory of Uttar Pradesh by the action of the river or otherwise the State Government may by notification in the Gazette extend this Act to that area

(2) The State Government may, by the same or any subsequent notification make such modification in this Act in its application to that area as it may consider necessary in the circumstances existing in the area.

Provided that no such modification shall be made after the expiry of one year from the date of extension of this Act to the area, or remain in force for a period exceeding two years"

24. The amendment to the U P Zamindari and Land Reforms Act quoted above was a clear indication on the part of the State legislature that it intended to treat the land in dispute and other lands which had accreted to the State of Uttar Pradesh as land belonging to that State The State of Bihar contested the position and a boundary dispute arose between the two States

25. To resolve this dispute the Central Government appointed a one man commission headed by an experienced officer of the Civil Service Sir Chandulal Trivedi. The Commission submitted its report in the year 1964 Learned counsel for the plaintiff respondent has placed reliance on some portions of the report to which I shall refer at the appropriate place At this stage it may be stated that on the basis of the said report the Parliament passed an Act known as Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968 which received the assent of the President on May 22 1968 and came into force on the same day,

Section 3 of the Act laid down principles on which boundaries between the two States were to be demarcated The work of demarcation was to be carried out by an authority appointed in this behalf by the Central Government It was enjoined by the Section that the authority appointed by the Central Government shall carry out its work in conformity with the boundary line described in the schedule to the Act It is not in dispute between the parties that the boundaries have been demarcated by the prescribed authority and in accordance with such demarcation the land in dispute now falls within the territorial limits of the State of Uttar Pradesh The Act of 1968 also substituted the entries against items Nos 3 and 13 of the first Schedule of the Constitution by a new description of the two States The entries as substituted in relation to the State of Bihar and Uttar Pradesh are given below —

BIHAR

"The territories which immediately before the commencement of this Constitution were either comprised in the Province of Bihar or were being administered as if they formed part of that Province and the territories specified in Cl (a) of sub-section (1) of Section 3 of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968 but excluding the territories specified in subsection (1) of the Bihar and West Bengal (Transfer of Territories) Act, 1956, and the territories specified in clause (b) of sub-section (1) of Section 3 of the first mentioned Act"

UTTAR PRADESH

The territories which immediately before the commencement of this Constitution were either comprised in the Province known as the United Provinces or were being administered as if they formed part of the Province and the territories specified in clause (b) of subsection (1) of Section 3 of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968, but excluding the territories specified in clause (a) of subsec. (1) of Section 3 of that Act.

26. The result of the foregoing discussion is that although the State of Uttar Pradesh may have gained de facto control of the land in dispute after the unprecedented flood which occurred in 1959 the de jure transfer of the territory took place only after the Bihar and Uttar Pradesh (Alteration of Boundaries) Act 1968 was passed The suit giving rise to this appeal was instituted under the provisions of the U P Tenancy Act much before 1968 and apart from the question as to whether the Act of 1939 ever applied to the land in dispute no law of Uttar Pradesh could be made applicable to the territories which had accreted to Uttar Pradesh after 1959 until the date appointed under the Act of 1968

27. In this connection reference may also be made to Section 26 of the Act of 1968 which is in terms identical with the provisions of Section 119 the States Reorganisation Act, 1956 Section 26 reads as under —

"The provisions of Sec 3 shall not be deemed to have effected any change in territories to which any law in force immediately before the appointed day extends or applies and territorial reference in any such law of the State of Bihar or Uttar Pradesh, shall until otherwise provided by competent legislature or other competent authority be construed as meaning territories within that State immediately before the appointed day"

The expression "appointed day" has been defined in the said Act to mean the day which the Central Government may by notification in the official gazette appoint Learned counsel for the parties have not been able to place any material before me from which the appointed day may be determined The appointed date, however, must be subsequent to the coming into force of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968.

28. Now Section 26 of the Act gives effect to the well established principle of international law If the territories are transferred from one State to another State by peaceful means the law applicable to such territories would be the law which applied to such territories before the transfer took place This rule is subject to the exception that the law originally applicable to such territory may be modified, altered or abrogated by competent legislature. However, only the acquiring State can make a law altering, repealing or modifying the law applicable to the territories and till such time original law of the territory which has changed hands

will prevail On this principle also it is difficult to accept that the law of Uttar Pradesh applied to the land in dispute on the date when the suit was instituted

29. From the foregoing discussion it is abundantly clear that the law of Uttar Pradesh let alone the U P Tenancy Act, 1939, did not apply to the land in dispute on the date on which the plaintiffs respondents filed the suit giving rise to this second appeal

30. It is still more difficult to appreciate how the plaintiffs-respondents could institute the suit from which this second appeal arises under Sections 59/61 of the U P Tenancy Act It has already been stated above that the land in dispute became a part of the district of Shahabad in the State of Bihar in the year 1901 as a result of fluvial action The U. P Tenancy Act received the assent of the Governor on December 6 1939 It was published in the Government Gazette on December 16, 1939 and it was from that date that it came into force The U P Tenancy Act of 1939 could not have and did not possess any extra territorial operation The land in dispute again reverted towards the district of Ballia in the year 1959 I have already held that it did not become part of Uttar Pradesh until the appointed date under the Bihar and U P (Alteration of Boundaries) Act, 1968 The U P Z A and L R Act came into force with effect from July 1, 1952 Section 339 (a) of that Act repealed the enactments mentioned in List I of Schedule III in their application to all such areas in which the estates had vested in the State of Uttar Pradesh by virtue of the notification issued under Section 4 of the Act Learned counsel for the plaintiffs respondents contended that the U P Z A and L R Act did not apply to the land in dispute at the time of institution of the suit and as such the only law which could govern rural relations between the parties was the U P Tenancy Act of 1939 The only reason on the basis of which it can be said that the U P Z A and L R Act did not apply to the land in dispute is the fact that on the date of the issue of notification under Section 4 of the said Act the land in dispute was part of the State of Bihar Learned counsel for the plaintiffs-respondents has however, not been able to assign any reason why the provisions of the U P Tenancy Act of 1939 would become applicable when the land in dispute emerged on the other side of the river adjoining the district of Ballia I have already exhaustively dealt with the question and have come to the conclusion that the U P Laws did not apply to the land is dispute until the notification fixing the appointed date was issued under the Act of the Parliament in the year 1968 On this ground also the suit of the plaintiffs-respondents under Section 59/61 of the U P Tenancy Act was not legally maintainable and should have been dismissed

31. The only question which now remains to be considered is whether the plaintiff-respondents acquired hereditary rights in the land in dispute on account of their continuous adverse possession extending to a period of over 50 years a held by the two courts below under Section 180 (2) of the U P Tenancy Act, 1939 assuming that the provisions of the U P Tenancy Act, 1939 applied to the land in dispute the findings of the courts below on this aspect of the case are based on a patent misreading of evidence and cannot be sustained The law on the subject is not in doubt Gangeshwar Prasad J in the case of Kapil Deo Rai v Harnarian Ahir, AIR 1965 All 313 after careful consideration of a number of authorities on the subject laid down the law as follows (at p 317) —

"The next point to be considered in relation to the question of limitation is the fact of the submersion of the land under water of the river every year during the rainy season. if the allegation in that respect is found correct It is well established that submersion of a land under water puts an end to the possession of the person who was in wrongful possession of it before submersion and restores the land to the possession of the rightful person who is deemed to be in constructive possession of it during the period of submersion It has then to be considered whether the principle that a land seasonally submerged under water every year reverts to the possession of the owner was applicable to suits under Section 44 of Agra Tenancy Act, 1926 and Section 180 of the U P Tenancy Act of 1939 The principle, it must be conceded is not based on any statutory provision but it is founded on the true concept of possession and dispossession and as such in my opinion there is no reason why its applicability should be limited

to suits which fall under Articles 142 and 144 of the Limitation Act and it should have no application to the suits under the Tenancy Laws For time to run against the rightful person it was necessary that the wrong doer must have been in possession The benefit of doctrine of constructive possession not being available to a person wrongfully obtaining possession, he could not be recorded as having continued in possession even while the land was under water Since the submersion of land under water had the effect of restoring possession to the rightful owner the possession of the person who had wrongfully kept it must be regarded as having come to an end "

The argument was addressed to the first court of appeal on behalf of the defendants-appellants on the lines stated above It however, rejected the submissions with this observation—

"In this particular case there is nothing on record to show that the land used to lie under water for four months every year for these more than 50 years The appellants simply rely on a piece of statement given by Chhatu Misra in which he stated that the land was under water for 10 or 12 years since 1931 "

32. With the help of the counsel for the parties I have gone through the record of the case Kedar P W 2 stated that the disputed land had become a part of the bed of river Ganga, before he attained the age of discretion and that it has emerged from the river bed for the last 8 or 10 years Jagpal Chaudhary P W stated that the land in dispute remained submerged in water every year Chhatu Misra P W 2 admitted that Kharif crop is not grown in the land in dispute Radha Krishna Chaubey stated that the land in dispute remained submerged in water during the rainy season every year This was the position of the land when it was in Shahabad and even thereafter He further stated that no kharif crop is grown in the land in dispute In his cross-examination he disclosed that after the onset of floods the land in dispute remained submerged in water for about 4 or 5 months Ram Jatak P W 2 has made a statement to the same effect The extract of the revenue records filed in the case mentioned land as 'Bal Parchat' which obviously means that it is covered either with sand or water The report of the Boundary Dispute between U P and Bihar prepared by Shri Chandulal Trivedi shows that he flew over the area which was the subject matter of the dispute He stated in his report that the lands which were subject to fluvial action on account of the floods in the rivers of Ganga and Ghagra are locally known as 'Diara' The evidence of the parties clearly shows that the land in dispute was submerged in flood waters and was not cultivable for a period of about four months every year The finding of the first court of appeal referred to above is in the teeth of the evidence on record and cannot be sustained Even if it be assumed that the U P Tenancy Act applied to the land in dispute plaintiffs cannot be said to have acquired hereditary rights under Section 180 (2) of the U P Tenancy Act, 1939 The finding of the first court of appeal on this point is also set aside

33. Learned counsel for the appellant is right in contending that the suit giving rise to this second appeal could not be sustained under Section 229-B of the U P Z A and L R Act. True it is that a person can institute a suit for declaration of his status as bhumidhar or sirdar as the case may be under sub-section (3) of Sec 229-B of the U P Z A and L R Act According to the scheme of the Act ownership of all land situated in a village vests in the State Government The State Government in its turn has vested the management and superintendence of the land in the Gaon Sabha For this reason sub-section (3) of Section 229-B of the U P Z A and L R Act itself states that a declaratory suit by a person claiming to be bhumidhar or sirdar can be instituted by him against the State Government and the Gaon Sabha The direction to implead the State Government and the Gaon Sabha as a party to such suit is mandatory Failure to comply with this direction would be a fatal defect in the suit Moreover, no such suit can be instituted by a plaintiff without first serving the State Government a notice under Section 80 of the Civil Procedure Code and a further notice to the Gaon Sabha under Section 186 of the Panchayat Raj Act The plaintiff respondents therefore cannot invoke the provisions of Section 229-B of the U P Z A and L R Act to save this suit

34. Learned counsel for the plaintiff-respondents has finally referred me to the pages 4, 8, 13, 17 and 49 of the Report on

the Boundary Dispute between Uttar Pradesh and Bihar Volume I in support of the plaintiff's case I have carefully gone through not merely through the said pages but have perused the report in its entirety I do not find anything in the said Report which may be called in aid by the plaintiffs-respondents in support of their claim. I therefore see no merit in the suit filed by the plaintiffs-respondents

35 The result is that this second appeal succeeds and is hereby allowed The decrees of the two courts below are set aside The suit of the plaintiffs-respondents is dismissed with costs throughout

Appeal allowed

1981 ALL. L. J. 949

DEOKI NANDAN J

Sarabjeet Singh and others Appellants v Rajaram Singh and others Respondents

Second Appeal No 2080 of 1974, D/- 7-5-1981 *

(A) Evidence Act (1 of 1872), Sections 65, 90-A, 91, 74 (2) and 79 — Admissibility of evidence — Partition deed — Document kept by Consolidation authorities and certified copy produced — It is a genuine document admissible in evidence

Property of three houses of the common ancestor was possessed by plaintiffs and defendants all the brothers separately The plaintiffs claimed 1/3rd share as son and 1/3rd share under transfer made by defendants claimed partition of property Defendants contested the suit for partition on the ground that a complete partition between the three brothers after the death of their father and three houses were allotted to them respectively The earlier partition was reduced to writing but it was unregistered and therefore it was alleged to be inadmissible in evidence certified copy of which was submitted

Held that the document of partition was a family settlement and not an instrument of partition It was admissible in evidence and the execution of the original was duly proved by the defendants The original document said to contain terms of previous partition and described as phaat was filed in the consolidation proceedings before the Assistant Consolidation Officer and a certified copy thereof was produced in trial court The original document although a private document being part of public record kept by the consolidation authorities it had to be deemed to be a public document within the meaning of Section 74 (2) and the certified copy thereof had to be presumed to be genuine under Section 79 and that being so the certified copy would be admissible as secondary evidence to prove the content of the original under Section 65 that the defendants made statement on oath The document was signed in the presence of the witness and defendants and the Panchas and the stamp papers was with plaintiff who had filed it in the court of the Consolidation Officer and statement of one of the Panchas was made before the consolidation authorities Partition was made with the consent of the parties before the writing of the Phaat and the original was written in the hand-writing of the Panch signed by him and other Panchas recording partition Plaintiff admitted that there was partition and Phaats were reduced to writing His statement showed that the original document was filed by him before consolidation authorities (Para 7)

(B) Evidence Act (1 of 1872), Section 70 — Admissibility of evidence — Partition deed — Property partitioned as a result of disputes between brothers — Document a family settlement — Document admissible in evidence and execution of original proved — Oral evidence reinforcing duly completed partition — It could not be inadmissible because of non-registration — Suit for partition for same property is not maintainable (Registration Act (1908), Section 17). AIR 1961 SC 1077, Rel. on (Para 10)

Cases Referred : Chronological Paras
AIR 1961 SC 1077 9

V K Misra, for Appellants G N Verma, for Respondents

JUDGMENT :— This is a plaintiffs' second appeal in a suit for partition

*Against Judgment and decree of O P Saxena Dist Judge, Azamgarh, D/- 24-5-1974

The trial court had in this case passed a preliminary decree declaring that the plaintiffs had a 1/3rd share only in the Kulhara situate on plot No 182 having an area of 78 Links including the the cane-crusher etc situate thereon The lower appellate court held that the plaintiff's share in the Kulhara and cane-crusher etc on the said plot No 182 was 2/3rd after the defendants' second set had transferred their 1/3rd share to the plaintiffs by sale deeds Exts 13 & 14, the remaining 1/3rd share being the share of the defendants first set Raja Ram Singh and Bhagwan Singh

2 The plaintiffs had in the plaint claimed a 2/3rd share in the three houses with the Sahan Aswara and Pichwara and the well specified at the foot of the plaint

3 According to the plaintiff-appellants Vishwanath Singh was the common ancestor of the parties He had three sons Gopi Singh, Matadin Singh alias Matai Singh and Gauri Singh Matadin Singh again had three sons Sarvjeet Singh who heads the plaintiffs branch Raja Ram Singh the first defendant who heads defendants first set and Udai Raj Singh defendant No 3 who heads the defendants second set It was not disputed that house No 1 was in possession of the defendants second set headed by Udai Raj Singh defendant No 3 house No 2 was in possession of the plaintiffs headed by Sarvjeet Singh, and house No 3 was in possession of the defendant's first set headed by Raja Ram Singh Udai Raj Singh transferred his share on 28-12-1963 to his son-in-law Babu Ram Singh, vide — Ex 14, who is the defendant No 7 of the defendant third set, and he in his turn transferred the same on 16-1-1964 to Sarvjeet Singh plaintiff No 1 vide—Ex 13 Suit No 511 of 1969 which was consolidated and tried together with the suit giving rise to the present second appeal and was dismissed by the trial court, was filed by Udai Raj Singh's son Hardwar Singh and his sons for cancellation of the said two sale deeds and that is how the two suits came to be consolidated The first plaintiff claimed 1/3rd share as the son of Matadin Singh and 1/3rd share under the transfers made vide—Exts 13 & 14. According to the plaintiffs although agricultural land was partitioned in consolidation proceedings, the house property was not partitioned Raja Ram Singh contested the suit for defendants first set and Hardwar Singh contested it for the defendants second set The case taken up by them was that there was a complete partition between the three brothers after the death of Matadin Singh and house No 1 was allotted to Udai Raj Singh, house No 2 to the plaintiffs' branch, and house No 3 to the branch of Raja Ram Singh However there was a Pucca Chhawani towards the east of the road which was in a dilapidated condition at the time of partition, but the bricks and the material thereof were divided among the brothers equally and about 13 or 14 years ago the first defendant constructed a new Pucca house at the place where house No 3 stood, at his own cost and expense, with the result that the present house No 3 was not of the time of Matadin Singh and the parties have been in separate possession of their respective shares since the said partition between the parties, but the Kulhara on plot No 182/1 had remained joint. It thus appears that so far as the decree for partition of the Kulhara is concerned it can be deemed to have been based on consent

4. The trial court upheld the defendants' case and held that there had been a previous partition among the three sons of Matadin Singh, as alleged by the defendants, and dismissed the suit except for granting the relief for partition of the Kulhara on plot No 182/1 The only question which was raised before the lower appellate court was about the correctness of the defendants' case with respect to the three houses in suit having already been divided between the three sons of Matadin Singh The lower appellate court has on an appraisal of the evidence on record upheld the defendants' case

5. The basic point raised by the learned counsel for the appellants was that the earlier partition was reduced to writing but was unregistered and therefore, inadmissible in evidence and that being so the other evidence relied upon by the courts below for upholding the defendants' case of previous partition was wholly excluded by the provisions of Section 91 of the Indian Evidence Act and could not have been relied upon or admitted in proof of the defendants' case of the alleged earlier

partition It was contended that the finding thus arrived at was based on inadmissible or no evidence and, therefore vitiated in law

6. The original document said to contain the terms of the alleged previous partition and described as Phaat was filed in the consolidation proceedings before the Assistant Consolidation Officer and a certified copy thereof was produced at the trial of the suit giving rise to the present second appeal It is Ext A-13 on record The first attack on the admissibility of this document was that it being the basis of the defence no presumption of the due execution of the original could be raised under Section 90-A and the original not having been produced, due execution thereof could not be proved even by leading oral evidence Another attack against the admissibility of and placing any reliance on this document was that it was an instrument of partition and being unregistered its reception in evidence was barred It was suggested that although the original could have been withdrawn from the record of the consolidation proceedings and filed in the suit giving rise to this second appeal but that was not done

7. The original document although a private document being part of the public record kept by the consolidation authorities it has to be deemed to be a public document within the meaning of Section 74 (2) of the Indian Evidence Act the certified copy thereof has to be presumed to be genuine under Section 79 of that Act and that being so the certified copy would be admissible as secondary evidence to prove the contents of the original under Section 65 of that Act The first question however is whether the due execution of the original could be deemed to have been proved in accordance with law Being basis of the defence it could not be presumed that the original was executed by the persons by whom it purports to have been executed under subsection (1) of Section 90-A of the Indian Evidence Act in view of sub-section (2) thereof The defendants met the situation by the statement on oath of the 4th defendant Hardwar Singh D W 1 who stated that the partition that was made by the Panchas was reduced to writing on stamp paper of Rs 2/8/- It was signed in the presence of the witness and his brothers Raja Ram Singh Sarvjeet Singh and Udai Rai Singh and the Panchas, and that stamp paper was with Sarvjeet Singh who had filed it in the court of the Consolidation Officer in the case between the parties and the statements of Sarvjeet Singh Udai Rai Singh and Ram Adhar Singh Panch were recorded in his presence The statement of Ram Adhar Singh one of the Panchas made before the consolidation authorities has been proved vide-Ex A-1 that of Sarvjeet Singh, vide-Ex A-2, and that of Udai Rai Singh vide-Ex A-18 Ex A-1 namely the statement of Ram Adhar Singh before the Consolidation Officer shows that the partition was made in the year 1952 with the consent of the parties a month or two before the writing of the Phaat and that the original Phaat was written in the handwriting of Sabal Singh Panch. It was with the consent of the parties and read out and explained to them and it was signed by him and the other Panchas and was Ex P-1 which recorded the partition of the agricultural land houses and groves Although by his statement Ex A-2 Sarvjeet Singh affirmed that the cultivation was joint, he admitted that there was partition some 5 or 6 years ago and Phaats were reduced to writing His statement was recorded on 28-11-1958 Ex A-4 which is certified copy of the list of papers filed before the consolidation authorities shows that the original document was filed by Sarvjeet Singh before the consolidation authorities on 9-1-1959 and it was proved by the statement of Ram Adhar Singh one of the Panchas which was recorded on 25-1-1959 vide — certified copy of his statement Ex A-1 It is impossible in my opinion to say in face of this evidence that the original of which Ex A-13 is a certified copy was not signed by the persons who purported to have signed it or that it was not a genuine document or even that a partition as recorded therein, had not taken place between the parties

8 The next question which therefore arises is whether the document is inadmissible for want of registration The answer to the question would depend on the answer to the further question whether the document purports to be an instrument of parties or merely a record of

partition which had already been arrived at between the parties Ram Adhar Singh one of the Panchas stated vide—Ex A-1 that the partition had already been agreed to a month or two before the writing of the Phaati and the whole thing was based on the consent of the parties The opening clause of the document reads as under

"आज हम पंचान हस्ब तहरीर एकरारनामा उदय राज सिंह व सर्वजीत सिंह व राजाराम सिंह सा. २-६-५२ ई उनके हरएक झगडो का निपटारा व बँटवारा निम्नलिखित रीति से किया"

Further while in the case of Sir Khudkasht and hereditary tenancy lands it was said that each one of the parties was in possession of his 1/3rd share which appear to be proper and no change was accordingly made therein in the case of groves and trees it was said that three lists were prepared after partition of the same and one list each was given to each one of the three brothers and in respect of the three houses also it was said that one house was given to Udai Raj Singh the second house to Sarvjeet Singh and the third house to Raja Ram Singh and certain further properties were also allotted for equalising the partition Nevertheless it is difficult to say that the document could operate as an award or as an instrument of partition The fact remains that it was a family settlement of the disputes between the brothers with the aid of the Panchas It appears to have been acted upon and followed for about 14 or 15 years until the filing of the present suit for it is said in the plaint itself that the three sons of Matadin Singh had been living separately in a house each of the three houses but it was alleged that was for convenience of management

9 I am accordingly of the opinion that the document Ex A-3, was a family settlement and not an instrument of partition It was admissible in evidence and the execution of the original was duly proved I would in this context also rely on the law declared by the Supreme Court in Kashmathsa Yamosa Kabadi v Narsingsa Bhaskarsa Kabadi (AIR 1961 SC 1077 at p 1084) which is to the following effect

"The records made by the Panchas about the division of the properties, it is true, were not stamped nor were they registered It is, however clear that if the record made by the Panchas in so far as it deals with immovable properties, is regarded as a non-testamentary instrument purporting or operating to create, declare assign limit or extinguish any right, title or interest in immovable property, it was compulsorily registerable under Section 17 of the Registration Act, and would not in the absence of registration be admissible in evidence But in our judgment the true effect of what are called awards is not by their own force to create any interest in immoveable property they recorded divisions already made and on the facts proved in this case their validity depends upon the acceptance by the parties The records made by the Panchas were documents which merely acknowledged partitions already made and were not by law required to be registered On a perusal of Ex 436A which is a translation of the Tippan book in which are recorded the decisions which are signed by the parties it is evident that the Panchas were merely recording what had been actually divided and they were not seeking to set out their decisions relating to division of property to be made The question whether the various decisions recorded in Ex 436A and in the books of account were required by law to be stamped need not be decided. The documents were admitted in evidence by the trial court and no question of admissibility of those documents can be raised at a later stage of the suit or in appeal"

Although I have not agreed with the finding of the lower appellate court to the contrary on this point my view is sufficient to support the conclusion arrived at by it that the plaintiffs were not entitled to re-open the partition of the houses and Sahan land etc. which had already been arrived at between them in the year 1952 It is, therefore, not necessary to consider the point raised by the learned counsel that the lower appellate court was not justified in relying on the oral evidence for coming to that conclusion, nor the authorities cited by the learned counsel in that context On the finding arrived at by me that the document Ex A-13 is admissible in evidence and has been duly proved in accordance with law, the only

evidence only reinforces the inference that there was a duly completed partition of the house property between the three sons of Matadin Singh in the year 1952 and that the suit for partition of the same is not maintainable Of course the decree for partition of the Kulhara land of plot No 182 having an area of 78 acres, based on the admission of the parties that that land was not divided between the parties is maintainable and shall stand undisturbed

10 In the result the appeal fails and is dismissed with costs

Appeal dismissed

1981 ALL L J. 953

M M GUPTA J

Thakur Prasad Appellant v State of U P Respondent

Criminal Appeal No 2233 of 1977 D/- 16-7-1981

Prevention of Food Adulteration Act (37 of 1954). Section 13 (2) — Prevention of Food Adulteration Rules (1955). Rule 9 (i) — Requirement of Rule 9 (i) of sending report of Public Analyst to accused within 10 days of receipt of report — Non-compliance of — Rule 13 (2) requiring copy of report of public Anaylst to be sent after institution of complaint to accused — Mandatory — Failure of prosecution to comply with requirment — Accused is entitled to acquittal.

From the words of sub-section (2) of S 13 it is obvious that the provision is mandatory and after the complaint is instituted the copy of the report of the Public Analyst should be sent to the accused and also the requirement is that the prosecution should inform him that if he so desired within 10 days of the receipt of the copy of the report by him he should make an application to the Court that the sample be sent by the Local (Health) Authority for analysis to the Central Food Laboratory 1980 All LJ 348 Foll (Para 8)

In the instant case the Food Inspector purchased mustard oil from the accused on 7-2-1976 The Public Analyst in his report dated 20-3-1976 reported that the sample contained 7 87% of linseed oil and thus it was adulterated in accordance with the provisions of the Act The postal receipt showed that the report was sent by registered post to the accused on 17-4-1976 Further after the complaint was filed the copy of the report of the Public Analyst was not despatched to the accused

Held that it was obvious that there was no compliance within 10 days as required by R 9 (i) and the prosecution failed to comply with the mandatory provisions of Section 13 (2) also Consequently the accused was entitled to acquittal (Paras 7 8)

Cases Referred Chronological Paras

1980 All LJ 348 7

S R Singh D P Singh and Virendra Saran, for Appellant, Addl. Govt Advocate for Respondent

JUDGMENT — This appeal has been filed by one Thakur Prasad against his conviction under Section 7 read with Section 16 of the Prevention of Food Adulteration Act and sentence of one year's rigorous imprisonment and a fine of Rs 1000/-

2. According to the prosecution case on 7th February 1976 Sri Nirobi Lal, Food Inspector Circle Mirzapur District Azamgarh purchased 375 grams of mustard oil after paying its price Rupees 2 25 at the rate of Rs 6 00 per Kg to the appellant whose shop is situate in Lahidih Bazar Before purchasing the sample the usual notice under Rule 12 in Form No 6 was given The sample was divided into three separate parts and one of those sealed phials was handed over to the appellant one of them was sent to the Public Analyst and the third was retained in the office of the District Medical Officer of Health The Public Analyst in his report dated 20th March, 1976 reported that the sample of mustard oil sent to him contained 7 87% of linseed oil The sample was thus adulterated in accordance with the provisions of the Prevention of Food Adulteration Act and its Rules The report of the Public Analyst was despatched by registered post to the appellant on 17th April 1976 Thereafter it appears that on the report of the Food Inspector to the District Medical Officer of Health sanction was accorded for the prosecution of the appellant on 30th March 1976 A complaint was then filed On 25-6-1976 the case was committed to the court of Session The learned Sessions Judge framed charges under Section 7 read with

Section 16 of the Prevention of Food Adulteration Act The appellant pleaded not guilty to the charge

3. The appellant in the course of his statement under Section 313 Criminal P C denied the allegations of the sample being taken from him or the sample being sealed in separate phials He claimed that he did not receive any report of the Public Analyst His case was that the Food Inspector had come to his shop and had demanded licence from him He had agreed to get a licence for him on receiving payment of Rs 20/- He therefore signed papers Since he had demanded from the Food Inspector the licence and the money he was falsely implicated

4 At the trial the prosecution examined the Food Inspector Niroti Lal P W 1 P W 2 Sita Ram and P W 3 Shyam Sunder Out of these witnesses P W 2 Sita Ram did not support the prosecution case P W 3 Shyam Sunder Lal is a formal witness who had proved that the report of the Public Analyst was sent by Niroti Lal Food Inspector by registered port to the appellant The appellant did not examine any witness in his defence

5 The learned Sessions Judge held that the provisions of Rule 9 (1) and the provisions of Section 13 (2) of the Prevention of Food Adulteration Act were not complied with However in his view these provisions were not mandatory He convicted and sentenced the appellant as stated above

6 I have heard the learned counsel for the appellant as well as the learned counsel for the State

7. On the report of the Public Analyst dated 20th March 1976 there is an order passed by the District Medical Officer of Health, dated 30th March, 1976 which directs the Food Inspector to launch the prosecution against the appellant This means that on 30th March 1976 the report was received in the office of the District Medical Officer of Health Under Rule 9 (1) of the Prevention of Food Adulteration Rules the requirement is that the report received in Form III from the Public Analyst should be sent by registered post to the person from whom the sample was taken within 10 days of the receipt of the said report The postal receipt shows that the copy of the report was sent by registered post to the appellant on the 17th April 1976 It is therefore obvious that there was no compliance within 10 days as required by Rule 9 (1) However it appears from the judgment of the learned Sessions Judge that the report of the Public Analyst was not despatched at the right address to the appellant Therefore no presumption can be made that this report was received by the appellant It does not appear from the record that after the complaint was filed the copy of the report of the Public Analyst was despatched to the appellant In fact it is not disputed that the report of the Public Analyst was ever sent to the appellant after the complaint was filed Section 13 (2) of the Prevention of Food Adulteration Act runs as below —

"On receipt of the report of the result of the analysis under sub-section (1) to the effect that the article of food is adulterated, Local (Health) Authority shall, after institution of prosecution against the person from whom the sample of the article of food was taken and the person, if any, whose name address and other particulars have been disclosed under Section 14-A forward in such manner as may be prescribed a copy of the report of the analysis to such person or persons, as the case may be informing such person or persons that if it is so desired either or both of them may make an application to the Court within a period of ten days from the date of receipt of the copy of the report to get the sample of the article of food kept by the Local (Health) Authority analysed by the Central Food Laboratory"

From the words of this sub-section it is obvious that the provision is mandatory and after the complaint was instituted the copy of the report of the Public Analyst should have been sent to the appellant and also the requirement was that the prosecution should have informed him that if he so desired within 10 days of the receipt of the copy of the report by him he should make an application to the Court that the sample be sent by the Local (Health) Authority for analysis to the Central Food Laboratory This gives a valuable right to the vendor from whom the sample is taken and the provisions by their very nature are mandatory They have been held to be

mandatory in a number of cases I need cite only one authority — Chhatarpal v State of U P (1980 All LJ 348) where it was observed that the report of the Public Analyst would merely give the result of the analysis but the intimation which is sent to him along with it would obviously convey to him information of the fact that the prosecution has been launched against him as also the court where he can make an application within a period of ten days for reanalysis of his sample The period of ten days prescribed is a limitation period within which he must exercise his right provided under Section 13 (2) If the details of the information as required under this subsection are not supplied to him it may in several cases lead to unavoidable delay with the result that the applicant shall be deprived of his valuable right provided under the Act of getting his sample of food reanalysed by the highest authority namely the Central Food Laboratory It was also held that Section 13 (2) was mandatory and that it was incumbent upon the Local (Health) Authority to forward a copy of the report along with the detailed information mentioned therein to the accused so that he may exercise his valuable right guaranteed to him under the Statute

8. In this view of the matter the appellant is entitled to acquittal on account of failure of the prosecution to comply with the mandatory provisions of Section 13 (2) of the Prevention of Food Adulteration Act

9. The appeal is allowed The conviction and sentences imposed against the appellant are hereby set aside The appellant is on bail He need not surrender His bail bonds are cancelled and sureties stand discharged

Appeal allowed

1981 ALL L J 955

SATISH CHANDRA C J AND K N SETH J

U P State Road Transport Corporation Lucknow Appellant v Pt Raja Ram Shukla and others Respondents

F A F O Nos 217 (along with Cross Objection) and 731 of 1979 D/- 9-7-1981

HY/HY/D495/81/SAD/SNV

(A) Motor Vehicles Act (4 of 1939), Section 110-D — Appeal under — No cross objection under provisions of Order 41, Rule 22 of Civil P C is maintainable in connection with the appeal (Civil P C (1908), Order 41, Rule 22) 1979 All LJ 316, (1978) 4 All LR 862, Foll (Para 5)

(B) Motor Vehicles Act (4 of 1939) Section 110-D — Belated appeal under — Application under Section 5 of Limitation Act for condonation of delay — Delay in filing appeal satisfactorily explained — Appeal treated to have been filed within time (Limitation Act (1963), Section 5) (Para 6)

(C) Motor Vehicles Act (4 of 1939), Section 110-B — Negligence — Proof — An unsuccessful attempt made to restart an unroadworthy bus with several defects by driver of State Corporation — Vehicle going out of control and resulting in fatal injuries to victim — Responsibility for accident must be held to be of servants of Corporation on account of their negligence and rashness when there was no material on record establishing any contributory negligence on the part of the deceased (Torts — Negligence) (Para 7)

(D) Motor Vehicles Act (4 of 1939), Section 110-B — Accidental death — Computation of compensation — Deceased, a priest earning about Rupees 300/- per month — His father earning member of family — Deceased leaving behind him three daughters, wife — Compensation of Rs 40,000/- cannot be inadequate

The deceased a priest was killed in bus accident He was 34 years old at the time of his death and said to be earning Rs 700/- per month He left behind him his old parents wife aged about 28 years a widowed sister aged 45 years and three minor daughters The claimants claimed compensation of Rs 1 22 800 Deceased was claimed to have spent Rs 200/- on himself and contributed Rs 100/- towards maintenance of family

Held that the assessment of compensation by Tribunal at Rs 40 000/- could not be said to be either inadequate or excessive so as to justify interference of High Court The deceased could be said to be earning Rs 300/- per month It appeared from the testimony of father of the deceased that he was also

an earning member of the family and consequently the parents and the widowed sister were not entirely dependant on the earning of the deceased The three daughters would have in course of time ceased to be dependants on their marriage Various other factors such as an early natural death of the deceased his becoming incapable of supporting the dependants due to illness or any other natural handicap or calamity also could not be ignored If a multiplier of 15 was applied to the annual figure of dependancy of Rupees 2,400/- the amount of compensation came to Rs 36 000/- if a multiplier of 20 was applied the figure came to Rupees 48 000/- keeping in view the number of members in the family the deceased could not have spent more than Rs 100/- on himself and the rest towards maintaining the family out of approximate figure of his income of Rs 300/- per month Case law discussed (Paras 8 13)

Cases Referred :	Chronological Paras
1979 All LJ 316	5
AIR 1979 Punj & Har 50 (FB)	12
AIR 1978 All 111	11
(1978) 4 All LR 862	5
AIR 1977 SC 1189	11 12 13
1972 All LJ 556 AIR 1972 All 408	11
AIR 1971 SC 1624	9
1969 Acc CJ 312 (1969) 2 WLR 767 Mallett v McMonagle	12
AIR 1966 SC 1750	9 10. 13
AIR 1962 SC 1	9
(1951) AC 601 (1951) 2 All ER 448 (1951) 2 TLR 137, Nance v British Columbia Electric Rly	9
1942 AC 601 111 LJ KB 418 (1942) 1 All ER 657 Davies v Powell Duffryn Associated Collieries Ltd	9

S K Sharma and R N Trivedi for Appellant, P K Burman, for Respondents

K. N. SETH, J :— On 14-2-1969 at about 7 00 P M when U P Roadways bus No 4396 was being taken out of the Bus Station Zero Road, Allahabad to the workshop it went across the road on the northern patri and crushed Pt Tunu Nath Shukla, who was present in the lane near his house Pt Tunu Nath Shukla was immediately taken to the hospital where he died at about 10 20 P M the same night The deceased left behind him his old parents young wife aged about 28 years, a widowed sister aged 45 years and three minor daughters destitute and helpless A petition was filed under the Motor Vehicles Act (No. 4 of 1939) claiming Rs 1,22,800/- as compensation According to the claimants the vehicle was being driven negligently and rashly without due care and caution, without blowing the horn and without having effective brakes It was asserted that the deceased who was a Hindu priest, had a normal income of Rs 700/- per month which used to go up to four figures during the marriage season The deceased was aged 34 years at the time of fatal accident and could normally be expected to live up to the age of 70 years as his parents and grand parents lived beyond that age

2 In defence it was pleaded that after the vehicle driven by Faiyaz Hussain arrived at the Zero Road Bus Station and the passengers cleared off the vehicle, the vehicle could not be started for taking it to the workshop at Rajapur One Ram Khelwan who was not authorised to drive the vehicle attempted to start it. The vehicle began to move and went out of control as the brakes suddenly failed and the accident took place when Tunu Nath Shukla suddenly tried to run away and dashed against the headlight of the vehicle It was also asserted that the compensation claimed was excessive

3 The Motor Accident Claims Tribunal Allahabad held the accident took place while the vehicle was being taken out of the Bus Station by Ram Khelwan, who was authorised to drive the vehicle It was the result of rash and negligent driving of the vehicle and there was no contributory negligence on the part of the deceased While determining the amount of compensation the Tribunal took the view that the deceased could be expected to live up to the age of 70 years Out of his monthly income the deceased expended Rs. 200/- per month on himself and contributed Rs 100/- per month to the maintenance of the family In this manner the total amount came to Rupees 43,200/- (100x 12x 36). Deducting a sum of Rs 3,200/- on consideration of lump sum payment, the net amount of compensation was determined at Rupees 40,000/-

4. In the appeal preferred by the U.P. State Road Transport Corporation the finding that the accident took place

was a result of rash and negligent driving of the vehicle has been assailed as also the quantum of compensation awarded by the Tribunal The claimants filed a cross objection and later on preferred a cross appeal accompanied by an application under Section 5, Limitation Act for condoning the delay in filing the appeal They claimed further compensation amounting to Rs 60,000/-

5. Learned counsel for the U P State Road Transport Corporation urged that the cross objection was not maintainable Reliance was placed on Surian Singh v Smt Sharda Devi (1979 All LJ 316) and Virendra Singh v Smt Phoolmati, ((1978) 4 All LR 862) wherein it has been held that no cross objection under the provisions of Order 41 Rule 22 Civil P C is maintainable in connection with an appeal under Section 110-D of the Motor Vehicles Act These decisions are binding on us and it must consequently be held that the cross objection filed by the claimants is not maintainable

6 The claimants have preferred a belated appeal It is accompanied by an application under Section 5 Limitation Act for condonation of delay After hearing learned Counsel for the parties on this aspect of the case we feel satisfied that the delay in filing the appeal has been satisfactorily explained We accordingly allow the application under Section 5, Limitation Act The appeal preferred by the claimants shall be treated to have been filed within time

7. It is not disputed that as a result of the accident which took place on 14-2-1969 at about 7 00 P M in front of the U P Roadways Bus Station at Zero Road Allahabad, Pt Tung Nath Shukla lost his life. It appears from the statement of Fayaz Hussain (D W 1) that he and Ram Khelwan were both drivers of the said bus The bus arrived at Bus Station Zero Road, Allahabad from Banda After the passengers had cleared off, an unsuccessful attempt was made to restart the vehicle The First Information Report (Ex 1) lodged by the Conductor of the bus at Police Station Kotwali, shows that Ram Khelawan took the driver's seat and a push was given to the vehicle to start it The vehicle went out of control resulting in fatal injuries to Pt. Tung Nath Shukla It is in evidence that before attempting to start the bus a report was made to the time keeper about the defects that had developed in the vehicle The time keeper telephoned to the workshop at Rasulpur and called a mechanic In such a situation the vehicle should not have been permitted to be taken out of the Bus Station It should first have been attended to by the mechanic who had been sent for from the workshop Since the vehicle had become unroadworthy because of several defects that had developed the responsibility for the accident must be held to be of the servants of the Corporation. It was on account of their rashness and negligence that a young life was lost There is no material on record to establish any contributory negligence on the part of the deceased

8. It is not disputed that at the time of his death Tung Nath Shukla was aged about 34 years He left behind him his aged parents a widowed sister his young widow and three minor children According to Pt Raja Ram Shukla the deceased earned about Rs 700/- per months from his profession of a Hindu priest The cross-examination however indicates that this income included the earning of the father also We agree with the Tribunal that the estimate of the income of the deceased given out by this witness appears to be exaggerated and the approximate figure may be taken to be Rs 300/- per month. We however do not agree with the Tribunal that out of this amount the deceased must have spent about Rs 200/- on himself and contributed only Rs 100/- towards the maintenance of the family Keeping in view the number of members in the family the deceased could not have spent more than Rs 100/- on himself and the rest must have gone towards maintaining the family

9 The task of determining a just compensation in such cases is almost always difficult Dealing with this question the Supreme Court in Gobald Motor Service Ltd v R M K Veluswami (AIR 1962 SC 1) cited with approval the following principle elaborated by Lord Wright in Davies v. Powell Duffryn Associated Collieries Ltd (1942 AC 601) (at p 5) —

"The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money

value In assessing the damages all circumstances which may be legitimately pleaded in diminution of the damages must be considered The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing on the one hand the loss to him of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to him by reason of the death"

The same principle was emphasised by Viscount Simon in Nance v British Columbia Electric Railway Co Ltd. (1951 AC 601) in the following words

"The claim for damages falls under two separate heads First if the deceased had not been killed but had eked out the full span of life to which in the absence of the accident he could reasonably have looked forward what sums during that period would be probably have applied out of his income to the maintenance of his wife and family?"

Indicating the mode of determining damages it was observed that at first the deceased man's expectation of life has to be estimated having regard to his age bodily health and the possibility of premature determination of his life by later accidents, secondly the amount required for the future provision of his wife shall be estimated having regard to the amounts he used to spend on her during his lifetime and other circumstances thirdly the estimated annual sum is multiplied by the number of years of the man's estimated span of life and the said amount must be discounted so as to arrive at the equivalent in the form of a lump sum payable on his death. fourthly further deductions must be made for the benefit accruing to the widow from the acceleration of her interest in his estate and fifthly further amounts have to be deducted from the possibility of the wife dying earlier if the husband had lived the full span of life and it should also be taken into account that there is the possibility of the widow remarrying much to the improvement of her financial position It is obvious that the actual extent of the pecuniary loss to the claimants cannot be ascertained accurately, but must necessarily be an estimate,' or even partly a conjecture The Supreme Court adopted the same principle in Municipal Corporation of Delhi v Subhagwanti (AIR 1966 SC 1750) and M/s Sheikhupura Transport Co Ltd v Northern India Transport Insurance Co Ltd (AIR 1971 SC 1624) Winfield in his "Law of Tort" has enunciated the principle in these words —

"The starting point is the amount of wages which the deceased was earning the ascertainment of which to some extent may depend on the regularity of his employments Then there is an estimate of how much was required or expended for his own personal and living expenses The balance will give a datum of basic figure which will generally be turned into a lump sum by making a number of years' purchase That sum has to be taxed down by having regard to the uncertainties The number of years' purchase is left fluid and will vary according to the deceased's expectation of working life as it was at his death, the probable duration of the dependency of the dependants and so on There are in fact so many imponderables in each case that arithmatic, though a good servant is a bad master and accordingly a round figure should be assessed"

10. In the case of Municipal Corporation of Delhi (supra) the deceased was 30 years old at the time of the accident his widow Subhagwanti being aged 28 years and his son 14 and daughters 12 and 2 years old. The High Court found that the widow and the children must have received at least monthly a sum of Rs 150/- for their subsistence and for the education of the children of the deceased The income was capitalised for a period of 15 years and the amount of Rs 27,000/-, was determined as just compensation

11. In Madhya Pradesh State Road Transport Corporation v Sudhakar, (AIR 1977 SC 1189) which was a case of death of an earning wife the lady had 35 years of services before her when she died The assessment of damage was made taking 20 as a suitable multiplier In Vishwa Mitra Chhadda v Smt Amrit Kaur (AIR 1972 All 403) (1972 All LJ 356) out of the deceased income of Rs 500/-. Rs 300/- was taken towards the needs of the family which worked out to Rupees 3600/- per year. In this case a

multiple of 12 was applied when the age of the deceased at the time of accident was 50 years In Smt Neelima Arora v Union of India (AIR 1978 All 111) the deceased was 28 years of age at the time of his death His normal span of life was taken to be 60 years Compensation was calculated by multiplying the monthly amount available for the support of the family by 32 and therefrom 33 per cent was deducted for the lump sum payment In some cases deduction at lower rates had been made for lump sum payment

12. The principle of determining the amount of compensation in such cases came up for consideration before a Full Bench of the Punjab High Court in Lachhman Singh v Gurmit Kaur (AIR 1979 Punj and Har 60) After exhaustively considering the cases on the point six basic principles to be observed and followed in assessing the compensation were formulated The Full Bench did not approve of the method adopted in certain decisions of multiplying the amount of the annual loss to the dependants which the number of years by which the life had been cut short without anything else It followed the principles of a suitable multiplier adopted in Sudhakar's case (AIR 1979 SC 1189) as well as in Mallet v McMonagle, (1969 Acc CJ 312) (HL) by taking into consideration the number of years of the dependency of the various dependants the number of years by which the life of the deceased was cut short and the various imponderable factors such like early natural death of the deceased his becoming incapable of supporting the dependants due to illness or any other natural handicap or calamity, the prospects of the remarriage of the widow the coming up of age of the dependants and their developing their independant sources of income as well as the pecuniary benefits which might accrue to the dependants on account of the death of the person concerned In Sudhakar's case (supra) although the deceased had 35 years of service before her when she died the Supreme Court assessed the damage by taking 20 as a suitable multiplier

13. In the present case the deceased was aged 34 years when the accident took place It appears from the testimony of Pt Raja Ram that he was also an earning member of the family and consequently the parents and the widowed sister were not entirely dependant on the earning of the deceased The three daughters aged 10 7 and 4 years would have in course of time ceased to be dependants on their marriage Various other imponderable factors such as an early natural death of the deceased his becoming incapable of supporting the dependants due to illness or any other natural handicap or calamity also cannot be ignored Keeping in view these factors if a multiplier of 15 is applied as was done in the case of Municipal Corporation of Delhi (AIR 1986 SC 1750) (supra) to the annual figure of dependancy of Rupees 2400/- The amount of compensation comes to Rs 36 000/- If a multiplier of 20 is applied as was done in the case of Madhya Pradesh State Transport Corporation (AIR 1977 SC 1189) (supra) the figure comes to Rupees 48 000/- The assessment of compensation by the Tribunal at Rs 40 000/- cannot be said to be either inadequate or excessive as to justify interference by this Court In view of the the fact that actual extent of the pecuniary loss to the claimants cannot be ascertained accurately but must necessarily be an estimate or even partly a conjecture In the circumstances of the case the amount of compensation awarded by the Tribunal appears to be just and reasonable and must be upheld The claimants are also entitled to the interest as awarded by the Tribunal

14 In the result the appeals and the cross objection fail and are dismissed Parties shall bear their own costs

Appeal dismissed

1981 ALL. L J. 959

MURLIDHAR J

Rajiv Yadav, Applicant v State of U P. Respondent

Criminal Revn No 1815 of 1980. D/- 10-2-1981

Criminal P. C (2 of 1974), Sections 319, 227 — Power of Sessions Court under Section 319 to add a person as accused not committed to it as accused — Recording of some evidence during trial, is a condition precedent

At the initial stage of trial the Sessions Judge, in a police challan case

DY/EY/C57/81/SAD

committed by a Magistrate acts under Section 227 Evidence recorded at the trial cannot include the material before the Court at the stage of S 227 Therefore the Sessions Judge cannot take cognizance of the complicity of person not sent up before it as an accused and thus cannot issue process against him until it was shown by some evidence adduced before him AIR 1979 SC 339. Foll (Para 2)

Cases Referred Chronological Paras
AIR 1979 SC 339 1979 Cri LJ 333 2

P M N Singh, for Applicant

ORDER — Revisionist Rattu Yadav has assailed an order of the Sessions Court by which the court issued process against him as an accused person in the case while dealing with the case of some co-accused which had been committed for trial to the court of Session The ground given by the Sessions Judge is that the Revisionist was nominated in the F I R and the witnesses named in F I R fully corroborated the story with regard to him as with regard to the other accused The argument is that this order could be only under Section 319, Cr P C and so could only be passed on evidence recorded during the trial and not on the basis of the police papers

2. At the initial stage the Sessions Judge in a police challan case committed by a Magistrate acts under Section 227 Almost the whole material before the Sessions Judge at that stage consists of the documents referred to under Section 172, Cr P C This material can be regarded as evidence in the larger sense for this is the basis on which the court acts at that stage for a limited purpose However Section 319 empowers the court to proceed against a person not named as an accused

" Where in the course of any inquiry into or trial of, an offence, it appears from the evidence that any person, " not being an accused has committed any offence In the section the word evidence seems to have been used in the narrow sense canvassed on behalf of the Revisionist Jogender Singh v State of Punjab AIR 1979 SC 339 may be referred to in this connection While referring to the power of the Sessions Court under Section 319 the Supreme Court observed, " ... Once a Sessions Court is properly seized of the case as a result of the committal order against some accused the power under Section 319 (1) can come into play and such Court can add any person not an accused before it as an accused and direct him to be tried along with the other accused for the offence which such added accused appears to have committed from the evidence recorded at the trial " (emphasis mine) This phrase 'evidence recorded at the trial' cannot include the material before the court at the stage of S 227 Cr P C Therefore, the Sessions Judge could not have taken cognizance of the complicity of Revisionist until this was shown by some evidence adduced before him Thus not being the case the order must be quashed It will now be open to the Sessions Judge to either await commitment of the case against the Revisionist by the police or decide the course of action under Section 319 after recording some evidence in the trial

3 The Revision is allowed, the order of the Sessions Judge dated 23rd October of 1980 is set aside

Revision allowed

1981 ALL L. J. 960

N N MITHAL, J

Padmaswar Mahadav, Appellant v. Municipal Board and others, Respondents

Second Appeal No 1279 of 1974 D/- 7-5-1981*

(A) U. P. Municipalities Act (2 of 1916), Section 326 — Notice for suit against Municipality — Land in possession of deity and recorded in its name — Municipality trying to take forcible possession thereof without taking recourse to law — Action of Municipality, held, was not official act and notice for suit was not necessary. 1962 All LJ 165 (FB) Rel on. (Paras 9, 10)

(B) Hindu Law — Deity — Property of deity found in imminent danger — Heirs of Shebait not coming forward to protect property — Even Pujari held had right to file suit for protection of property AIR 1967 SC 1044 and (1904) 31 IA 203 (PC) Foll (Para 14)

*Against judgment and decree of B K. Misra First Civil J Kumaun, Nainital, D/- 11-5-1974.

Cases Referred : Chronological Paras

AIR 1976 All 349 11
AIR 1967 SC 1044 13 14
1962 All LJ 165 AIR 1962 All 174 (FB) 10
(1904) 31 Ind App 203 (PC) 14

J C Joshi, for Appellant. Rajesh Tandon for Respondents.

JUDGMENT :— This is plaintiff's second appeal in a suit for permanent injunction filed against the Municipal Board Haldwani and another restraining them from interfering with the peaceful possession of the plaintiff over plot Nos 538 and 539

2. According to the case set up by him, the land was recorded in the name of Padmaswar Mahadav in the revenue records and is in actual possession of the plaintiff through Sureshananda Giri who claims to be Mahant and Pujari of the plaintiff It was alleged that in early April, 1971 maize crop had been sown on the land in question but on 16th April, 1971, the employees of the defendants wanted to take forcible possession and damaged the maize crop worth Rs 1200/- It was in these circumstances that the suit for permanent injunction was filed

3 The defendants raised a number of pleas but the relevant points were that the plaintiff was not in possession over the land in suit and that the land belonged to the State of U P and was under the management of the defendants who used to realise Tehbazari dues during fairs held on that land It was also said that Sureshanand Giri who has filed the suit was not Mahant and Pujari and as such he had no right to file the suit It was also contended that the suit was bad for want of notice under section 326 of the U P Municipalities Act Some other legal pleas were also raised initially but appear to have been given up in the trial court

4. On the basis of the evidence before it the trial court came to the conclusion that the plaintiff was in possession of the land in question and there were supporting revenue entries also in that regard As regards the right of the plaintiff to file the suit the trial court came to the conclusion that Sureshanand Giri had no right to bring the suit and it was not maintainable. On the question of bar of suit in view of Section 326 of the U P Municipalities Act the court came to the conclusion that the suit was bad for want of notice in that connection On the basis of the last two findings, the court dismissed the suit

5. On appeal before the lower appellate court, once again these two questions were raised and were decided against the plaintiff Consequently the appeal was dismissed

6. Aggrieved, the plaintiff has come up in second appeal before this Court

7 It has firstly been contended that section 326 of the U P Municipalities Act did not apply to the facts and circumstances of the present case According to the learned counsel a notice under Section 326 of the Act is required only when a suit is brought against the Board in respect of "an act done or purported to have been done in its official capacity" In view of the fact that the land belonged to the plaintiff and the defendants had no concern with the same and also the fact that the Municipalities Act does not give any right to the Board to straightway try to take forcible possession of any land without recourse to any court of law the act impugned in the suit could not be said to be an act within the four-corners of the Municipalities Act. Since the very act, by which the dispossession of the plaintiff was threatened was not an act, which could have been performed by the Municipality acting within the limits of its powers, the same was clearly beyond the jurisdiction of the Board and as such was illegal, for preventing such an illegal act, therefore it was not necessary that any notice under Section 326 of the Municipalities Act should be a precondition. In order to appreciate this argument of the learned counsel, let us have the relevant portion of Section 326 of the Act before us

(1) No suit shall be instituted against a board in respect of an act done or purporting to have been done in its official capacity, until the expiration of two months next after notice in writing has been left at its office . explicitly stating the cause of action . "

(2) and (3) .

(4) Provided that nothing in subsection (1) shall be construed to apply to a suit wherein the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the commencement of the suit or proceeding."

8 For the purposes of this appeal the important words in Section 326 of the Act are "in respect of an act done or purporting to have been done in its official capacity" In order that the provisions of Section 326 of the Act may be attracted it is essential that the act complained of must be one which has either been done or was purported to have been done by the Board in its official capacity The powers of the Board are regulated by the provisions contained elsewhere in the Act and the Board cannot do any act which goes beyond the limits of the powers given to it and specified under the Act I have searched in vain to find out any specific provision in the Municipalities Act which may empower the Board to take forcible possession over any land in possession of a person without having recourse to some procedure laid down by law Even the limited powers given to the Board for removal of encroachment from public streets within the limits of the Municipal Board require that the Municipal Board must first give notice to the person concerned to remove the encroachment and then only the Board can remove that encroachment Clearly possession over the land in question was not an encroachment on public street The land was claimed as that of the plaintiff as it had been recorded in the name of the deity and it was in its actual possession also In these circumstances the Municipal Board could not claim to occupy the land immediately by forcibly evicting the plaintiff If there was any dispute about the ownership of possession of the land, the Municipal Board was only entitled to approach the appropriate court for seeking necessary relief In any case [illegible] possession over [illegible] land Nor is [illegible] power [illegible] to the Board [illegible] the provisions of the U P Municipalities Act

9 The learned Sessions Judge in the revision application has found that the plaintiff had been evicted outside by the Municipal Board on 5-4-1971 claiming the land in dispute to be Nazul land This notice is not on the record but a reply thereto is paper No 99-C on the record which appears to have been sent by the plaintiff in reply thereto From this reply, it appears that Municipal Board had claimed the land in question to be Nazul land, which was claimed to have been under management of the Municipal Board This fact was denied by the plaintiff On the basis of this letter it is submitted that the act of the Municipal Board in demanding possession was an official act which was done in discharge of its official duties of managing Nazul property and therefore notice under Section 326 was essential before any suit could be legally filed The answer to this question would depend upon the nature of the rights claimed by the plaintiff and not what was asserted by the defendant Municipal Board The plaintiff throughout has claimed that this land belongs to it and has been in its possession and that Municipal Board has no right to occupy or manage the same The courts below have also found as a fact that the land did not belong to the Municipal Board and in any case it has been in possession of the plaintiff and was also recorded in its name in the revenue papers In such circumstances, the claim of the defendant to occupy the land and allegation in this respect made by the plaintiff in first information report (92-c) as well as reply to the notice (99-c) clearly go to show that an effort was being made by the Municipal Board to forcibly dispossess the plaintiff from the land in question [illegible] the land belongs to the plaintiff and [illegible] Municipal Board forcibly [illegible] evict it from there whether in such circumstances the act of the Municipal Board can be said to be an act which was within its powers granted under the U P Municipalities Act? If such an act could be said to be [illegible] act then certainly a notice [illegible] tion 326 of the Act would [illegible] otherwise no such [illegible] necessary

10 In order to see whether [illegible] to be an act done or [illegible] to have been done in its [illegible] the Board, we have to consider as to what is meant by "official [illegible] In Lucknow Nagar Mahapalika [illegible]

Karamjit Singh (1962 All LJ 165) (AIR 1962 All 174) (FB) the words 'act done' under a statute were held to mean an act expressly or specifically required or permitted to be done by the statute Reference in this regard may be made to 'Words and Phrases' Vol XXIX 372 Permanent Edition—

"All acts of officials are not 'official acts' but only such as are done under some authority derived from the law or in pursuance of prescribed duties"

Some significance has also to be attached to the words 'in its official capacity' which can only mean that the act done must be one which falls within the powers given under the Act or which can be exercised by the Board by virtue of the authority or power given to it under any provision of the Act or law In view of this the act which was complained of by the plaintiff in the circumstances that is, the act of the Municipal authorities trying to forcibly evict the plaintiff from the land recorded in its name cannot be said to be an official act or an act which may have purported to have been done in its official capacity If the act was wholly beyond powers granted to the Board under the Act then certainly the plaintiff would not be required to serve any notice whatsoever under Sec 326 of the Act That being so, I am of the view that in the facts and circumstances of the present case, the plaintiff was not required to serve any notice at all under Section 326 of the Act and the findings of the courts below on this point are erroneous

11. It may also be stated here that S 326 of the Act has been subject of consideration in various cases Suffice here to mention a few of them such as Municipal Board of Faizabad v Edward Medical Hall (AIR 1976 All 349) wherein it was held that where the act has been done in purported exercise of official duties the public servant can defend his act by reference to the nature of duties of his office if he is challenged while doing the act

12. The learned counsel for the parties had also submitted that the provisions contained in sub-para (4) of Section 326 of the U P Municipalities Act do not apply in the present case. It is not necessary for me to enter into that controversy because I have already held that a notice under sub-para (1) of Section 326 of the Act itself was not necessary in the instant case and therefore there would be no purpose served by examining whether exception provided under sub-clause (4) would be attracted in the present case at all

13 We next come to the next important question involved in this appeal The plaintiff has been non-suited in the court below on the ground that he was neither Mahant nor Pujari of the plaintiff temple and as such he was not competent to bring the suit A deity of a temple is a juristic person and this proposition is now not open to question. However deity cannot act on its own and, therefore, some human agency is always to be employed for the purposes of defending its rights According to the well known tenets of Hindu Law, right to act on behalf of the deity vests in a Shebait It is he who normally performs all the functions of the management as well as performance of necessary spiritual functions and worship etc. of the deity Position in this regard has been explained in B K Mukherji's Hindu Law of Religious and Charitable Trusts and in its Second Edition at page 249, it is stated as under

(1) An idol is a juristic person in whom the title to the properties of the endowment vests But it is only in an ideal sense that the idol is the owner It has to act through human agency and that agent is the Shebait who is in law the person entitled to take proceedings on its behalf The personality of the idol might therefore be said to be merged in that of the Shebait.

(2) Where however the Shebait refuses to act for the idol or where the suit is to challenge the act of the Shebait himself as prejudicial to the interests of the idol, then there must be some other agency which must have the right to act for the idol The law accordingly recognises a right in persons interested in the endowment to take proceedings on behalf of the idol

Thus passage from the book of B K Mukherji has been quoted with approval in the case of Bishwanath v Radha Ballabha Ji (AIR 1967 SC 1044) by Hon Subba Rao C J and it was stated by him that the view (sic) as by decisions In this case, Hon Subba Rao C J had this to say :

"The question is, can such a person represent the idol when the Shebait acts adversely to its interest and fails to take action to safeguard its interest On principle we do not see any justification for denying such a right to the worshipper An idol is in the position of a minor and when the person representing it leaves it in a lurch, a person interested in the worship of the idol can certainly be clothed with an ad hoc power of representation to protect its interest It is a pragmatic yet a legal solution to a difficult situation Should it be held that a Shebait, who transferred the property can only bring a suit for recovery, in most of the cases it will be an indirect approval of the dereliction of the Shebait's duty, for more often than not he will not admit his default and take steps to recover the property, apart from other technical pleas, that may be open to the transferee in a suit Should it be held that a worshipper can file only a suit for removal of a Shebait and for the appointment of another in order to enable him to take steps to recover the property such a procedure would be rather a prolonged and a complicated one and the interest of the idol may irreparably suffer This is why decisions have permitted a worshipper in such circumstances to represent the idol and to recover the property for the idol It has been held in a number of decisions that worshippers may file a suit praying for possession of a property on behalf of an endowment"

14 In the case referred to above, the Shebait had illegally transferred the property belonging to the idol and in those circumstances it was held by the Supreme Court that even a worshipper can file a suit challenging the transfer made by a Shebait for and on behalf of the idol The position in the present case is slightly different Here plaint has been filed through one Sureshanand Giri who claims to be the Mahant and Pujari He has not claimed himself to be the Shebait In fact, in cross-examination Sureshanand Giri, who has brought this present suit on behalf of the idol, has pleaded that he has taken charge of the management of the temple only back and since then he was looking after the management of the temple. From the evidence on record a possibility cannot be ruled out that some heirs of the original Shebait may be alive but it appears that none of them is coming forward to protect the property of idol The question, therefore, arises as to whether even in these compelling circumstances when the heirs of Shebait were not coming forward and there was an imminent danger of the Board forcibly occupying the land belonging to the idol, can a worshipper or Pujari not file the suit to protect the property in question of the idol? In my opinion, in such circumstances, a Pujari cannot be denied the right to bring a suit The nature of the plaint and the reliefs claimed clearly go to show that no relief has been claimed by the Pujari in his favour All the reliefs have been claimed in the interest of the idol itself In order to protect the interest of the idol even a person who may not be a Shebait or otherwise qualified to bring suit but if he has sufficient interest in the protection of the rights of the idol can bring a suit for the purposes of protecting the rights of the idol

The view expressed in AIR 1967 SC 1044 (supra) does not say anything against the view which I am taking In that case the circumstances were slightly different and in view of those circumstances, a worshipper was held entitled to bring a suit In the present case also the circumstances may not be similar but they certainly require protection of the property and even if as Pujari Sureshanand had come forward in the name of the idol to protect the property, the suit cannot be said to be to have been improperly brought merely because Sureshanand was not a Mahant or Shebait. It has also come in the evidence that he had been in actual management of the property and was manager of the temple property The view which I am taking also finds support from the case Maharaja Jagadindra Nath Ray Bahadur v. Rani Hemanta Kumari Devi (1904) 31 Ind App 203 PC

15 In Raghavachariya's Hindu Law Sixth Edition page 682, the learned Author has observed "except where there is a statutory provision to the contrary the following may be said to have prescriptive right of suit in respect of the endowed property —

(1) Idol itself, being a juristic person has a right of suit against the infringement of its right

(2) A Shebait through whom the idol acts has a similar right of suit which is in normal case even in supersession of the idol's right of suit .

(3) Prospective Shebait is a person interested in the endowment

(4) the worshipper of the temple and the members of the family of the founder of the endowment

16. Therefore, there was nothing illegal in idol bringing a suit through Mahant or Pujari Even a worshipper could have done so A Pujari (priest) is not in worse position than an ordinary worshipper

17. In view of the above I am of the opinion that the findings on the above two points by the lower appellate court are erroneous and the suit as brought by the plaintiff was legally maintainable

18. In the result the appeal succeeds and is hereby allowed with costs throughout

Appeal allowed

1981 ALL. L. J. 965

= AIR 1981 Supreme Court 1697

(From Allahabad)

S MURTAZA FAZAL ALI AND R. B MISRA, JJ

Criminal Appeal No 492 of 1981. D/- 1-5-1981

Asghar Khan and others, Appellants v State of U P, Respondent

Criminal P. C. (2 of 1974), Ss. 397, 374 (2) — Revision by High Court — Scope — Sentence below 7 years passed — Appeal lies to Sessions Judge — He cannot, consequently exercise revisional powers under S. 397 — Revision lies only with High Court — Order passed in appeal being final, bar under S. 397 (2) would not operate — Decision of Allahabad High Court, Reversed.

(Paras 2 to 5)

JUDGMENT :— We have heard learned counsel for the parties

2. It seems to us that in this case the High Court has taken a wrong view of law regarding the maintainability of the application filed by the appellants for revision under S 397 (1) Criminal P C. (hereinafter referred to as the Code), S 397 (1) is extracted below

"397 (1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record

Explanation — All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398"

In the instant case as the sentence was below seven years, appeal would lie to the Sessions Judge under S 374 (2) of the Code and there was no question of the Sessions Judge exercising any revisional powers in respect of the judgment convicting the appellants Since the Sessions Judge dismissed the appeal, revision would only lie under Sec 397 (1) of the Code to the High Court A second revision would not be competent under Sec 397 (3) of the Code only where both the Sessions Judge and the High Court who have concurrent powers yet one or the other Court has exercised its revisional powers In the case before us, the Sessions Judge being the appellate court, it could not have exercised the power of revision and therefore the power of revision lay with the High Court alone under Section 397 (2) of the Code

3. The only bar contained in subs (2) of S 397 of the Code is that no revision shall be exercised in relation to an interlocutory order passed in any appeal, inquiry, trial or other proceeding In the instant case, indisputably the order passed by the Sessions Court was a final one Therefore, S 397 (2) of the Code would have no application Thus, sub-sec (3) of S 397 as indicated above, applies only in a case where an application in a revision has been filed either before the Sessions Judge or the High Court and either of them has exercised the power, so that no further revision

would lie to the High Court In the instant case, sub-section (3) has no application

4. The present case therefore is clearly covered by S 397 (1) where the High Court alone could exercise power of revision and give relief if any, to the appellants

5 It is, therefore, manifest that the High Court took a legally erroneous view on the interpretation of S 397 (1) of the Code in holding that no revision lay to the High Court In fact one Bench of the High Court took the view that no appeal lay and another Bench took the view that no revision lay, thus holding that the appellants had no remedy at all This is, however not a correct legal position, as envisaged by the provisions of the Code

6. For these reasons, therefore, we allow the appeal and remand the case to the High Court The High Court will convert the appeal into revision and dispose of the revision in accordance with law The appellants will continue on bail

7 Parties to appear before the High Court on July 27, 1981

Appeal allowed

1981 ALL. L. J. 966

= AIR 1981 Supreme Court 1698

(From Allahabad)

R S PATHAK AND BAHARUL ISLAM, JJ

Criminal Appeal No 363 of 1981, D/- 30-3-1981

Shaukin Singh and others, Appellants v State of U P., Respondent

Constitution of India, Art. 136 — Criminal appeal before High Court — Adjournment to counsel of accused not granted — Appeal dismissed — Supreme Court finding that certain aspects were not considered and that the High Court was handicapped by absence of counsel for accused — In view of special circumstances case remanded — Decision of Allahabad High Court D/- 31-10-1980, Reversed (Criminal P ((1971), S 309)

(Para 1)

PATHAK, J :—Special leave granted.

2. This appeal is directed against the judgment dated 31 October, 1980 of the Allahabad High Court upholding the conviction and sentence of the appellants [illegible]

3 The learned Sessions Judge tried the accused for offences under S 302 read with S 34 and S 323 read with S 34 but convicted and sentenced them as mentioned above An appeal was filed in the High Court through counsel, but when it was taken up for hearing counsel did not appear, and when it was taken up again sometime later counsel applied for adjournment on the ground that he was busy arguing a case in another court The learned single Judge of the High Court did not accept the request and proceeded with the case with the assistance of the Deputy Government Advocate for the State, and he thereafter dismissed the appeal The High Court found that the appellants had the intention of causing the death of the deceased But since no appeal had been preferred by the State against the acquittal under S 302 of the Code the Court maintained the conviction and sentence imposed [illegible] Sessions Judge Counsel for the appellants applied for recalling the judgment and restoring the appeal The application was rejected The appellants then applied for special leave against the order of the learned

4 We have perused the record before us and we think that the case should be remanded to the High Court so that the appeal be disposed of afresh by it We need express no opinion on the merits but we would like to point out that certain aspects of the case have not been covered Perhaps if the High Court had had the assistance together of counsel for both the parties a fuller and more considered judgment touching on the different aspects of the case would have resulted The judgment shows that the Court was evidently handicapped by the absence of counsel We are aware that the Special Leave Petition against the order refusing to restore the appeal has been dismissed But here we are concerned with the case on the merits and the absence of counsel during the hearing of the appeal is only another circumstance to be taken into the scales

5 Accordingly in the special circumstances and treating this as an exceptional case, we set aside the judgment dated 31st October 1980 passed by the High Court and remit the case back

CC-0. In Public Domain. Panini Kanya Maha Vidyalaya Collection.

to it for fresh consideration and disposal of the appeal It will be for the High Court to consider the appeal again on its merits and to dispose it of in accordance with law and in the free exercise of its judgment

6. The appellants shall be released on bail to the satisfaction of the Chief Judicial Magistrate, Bijnor But they will appear and surrender before the High Court on 27th April, 1981 and the grant of bail to the appellants thereafter will be entirely in the discretion of the High Court

Case remanded.

1981 ALL. L J. 967

DEOKI NANDAN, J.

Chandrika Prasad Agarwal and others, Appellants v. Vishnu Chandra, Respondent

Second Appeal No 648 of 1979. D/- 8-7-1981 *

(A) Partnership Act (9 of 1932), Ss. 7, 43 (1) — Partnership whether at will — Determination of

In the instance case the terms of the partnership clearly contemplated that the partnership shall continue indefinitely until such time as all the partners agree to dissolve it or the Firm was otherwise dissolved in accordance with law Further the deed gave a partner, acting singly, only the right to withdraw from the partnership by serving one month's notice on the other partners and also the right to the remaining three partners if they were unanimous, to expel the fourth partner from the business of the partnership This is clearly inconsistent with the concept of a partnership-at-will and the right of an individual partner to dissolve it by notice Case law discussed (Paras 9 and 11)

(B) Partnership Act (9 of 1932), S. 44 — Loss of Rs. 1000/- odd within six months — Capital invested Rs. one lac — Such loss could not be a ground for dissolution of partnership.

In the instant case the amount of loss in first six months of the business was only Rs 1032 82 when the capital of the four partners was proposed to be Rupees 60,000/- and the loan taken from the bank was Rs. 39,500/- The loss of Rupees 1,000/- odd in the first six months of the business in a case where the capital invested is Rs one lac could not be said to be such as to justify the dissolution of the partnership on the ground that the business could not be carried on save at a loss Indeed the defendants would not have contested this suit unless they were making profit out of the business of the partnership The defendants were not in the wrong and that it was the plaintiff who was in the wrong and was acting in a manner prejudicial to the interests of the partnership by serving notices for dissolution of partnership (Para 21)

Cases Referred.	Chronological Paras
AIR 1976 Bom 405	15
AIR 1968 Gau 157	15
AIR 1961 SC 1225	14
(1936) 3 All ER 823	81 SJ 53 Abbott v Abbott 14

S N Agarwal, for Appellants, Dhru Narain P C Sharma, S C Verma, P K Jain and B N Misra, for Respondent

JUDGMENT :— This is a defendants' second appeal in a suit for dissolution of a partnership and for accounts

2 The three defendants-appellants and the plaintiff-respondent entered into a partnership for carrying on the business of manufacturing brickets from Coke-breeze The Instrument of Partnership was executed on 18-12-1975 Each of the four partners was to invest Rs 15,000/- in the business Rs 39,500/- was borrowed from the Canara Bank for the business of the Firm The production could start in the beginning of March 1976 According to the Instrument of Partnership, originally executed, the plaintiff was to maintain the accounts He could keep Rs 2500/- in cash with him The rest of the money had to be kept deposited in the Firm's account with the bank which was operated upon by the plaintiff and the third defendant There was a change in the terms of the partnership with effect from 1-6-1976 Under the Instrument executed that day the first defendant was entrusted with the responsibility of keeping accounts and he could employ a Munim All the cash and the documents of the Firm were handed over by the plaintiff to the first defendant. It was the plaintiff's case that he paid Rs 3,000/- to the first defendant after 1-6-1976. The Firm suffered heavy

*Against judgment and decree of J C Gupta, 7th Addl Dist J, Etah D/- 17-2-1979

loss' amounting to Rs 1,032/- during the period that he maintained accounts on account of the low production which started very late and the heavy amount of interest paid to the bank

Further, according to the plaintiff, the defendants who were in league with each other ignored him, did not take his advice in the affairs of the partnership, did not pay him the sum of Rs 250/- per month which was payable to each partner and also did not supply him 1/4th of the goods produced by the Firm for resale in accordance with the terms of the partnership Thus, according to the plaintiff, there was a loss of faith between the partners and the business of partnership could not be carried on, whereupon he served a notice dated 20-11-1976 dissolving the partnership which was served on the defendants Nos 1 and 3 on 23-11-1976 and the partnership stood dissolved from that date The plaintiff also asked the first defendant to render accounts He did not pay any heed. Hence, the suit.

3 The three defendants filed a common written statement Apart from the technical pleas they admitted the partnership, but denied that it was 'at will' They pleaded that under Paragraph 20 of the Instrument of Partnership, as amended on 1-6-1976 no partner could retire from the Firm until the loan taken from the Canara Bank was paid off They asserted that the plaintiff had no right to dissolve the partnership nor even to retire from the firm until the loan was paid off Further, according to the defendants the plaintiff did not invest the full amount of Rs 15,000/- He invested only Rs. 12,000/- initially and the sum of Rs 1,000/- on 14-8-1976, and after deducting his share of loss his net capital in the Firm was Rs 12,741 80 It was suggested that the business of the partnership was running at a loss About the plaintiff's case that he was not supplied 1/4th of the goods produced it was pleaded that the plaintiff wanted the goods on credit, when according to the terms of the partnership they could be supplied only against cash payment About the payment of Rs 250/- per month it was pleaded that the payment was not made to any of the partners as the business of the Firm was running at a loss

The trial court raised as many as 7 issues Issues Nos. 5 and 6 namely, whether the suit was bad for non-joinder of necessary party or that it was barred by Section 69 of the Indian Partnership Act, were not pressed at the trial Issue No 4 was whether the plaintiff contributed Rs 15,000/- towards the partnership's capital or only Rs. 13,000/- That issue was left to be decided at the Final Decree stage. The two substantial issues on which the parties went to trial were Issues Nos. 1 and 3, namely— (1) "Whether the partnership entered into between the parties to this suit was partnership-at-will? If so, its effect? If not, its effect? and "(3)— Whether the defendants violated the terms of the partnership agreement? If so, whether the plaintiff is entitled to a decree of dissolution of Firm even if it be held that the partnership was not at will?" On the first issue the trial court held that the partnership was at will and on the third issue that the defendants had violated the terms of the partnership and further that even if it were held that the partnership was not at will, the plaintiff was entitled to a dissolution of the Firm. It may be here mentioned that Issue No 2 raised the question whether the suit was premature? That was also answered by the trial court in favour of the plaintiff, and a preliminary decree, declaring the Firm as dissolved on 23-11-1976 and directing the first defendant to render accounts was passed

5 On appeal by the defendants, the lower appellate court affirmed the trial court's decree Hence, this second appeal

6. The two questions on which the second appeal was admitted after hearing under Order 41, Rule 11 C P C by this Court were the question Nos 1 and 3 formulated at page 6 of the Memorandum of Appeal. They are —

"(i) Whether the partnership was at will or for a fixed duration?

"(iii) Whether the respondent was entitled for retirement from the partnership or for the dissolution of the firm itself?"

7 I have heard learned counsel for the parties and am of the view that the two courts below have gone wrong in holding that the partnership in question was a partnership-at-will

8 Section 7 of the Indian Partnership Act 1932 reads as follows —

Where no provision is made by contract between the partners for the

duration of their partnership, or for the determination of their partnership, the partnership is "partnership-at-will"

Having read the Instrument of Partnership, I find that the following terms thereof make provision for the duration, or the determination of the partnership, namely— clause 7, which provides that if any of the parties unfortunately dies then in that case the partnership shall not be dissolved, but his sons will become partners of his share and that person will become the partner who may have been nominated by the deceased partner, clause 18 which is to the effect that if any party wanted to separate from the business of the partnership he could do so by giving one month's notice to the other partners, but in that case the partnership would not be dissolved and if the majority of the partners were unable to pull on with any partners, then the majority of the partners will have the right to expel that partner if they consider just after asking his explanation, clause 20, as it originally stood which provided that none of the partners would be entitled to withdraw any part of his capital and further that no partner would be allowed to go out from the partnership before the expiry of one year and even if he did so, his capital would not be returned before the end of the year, and lastly, the amended clause 20 which provided that no partner could withdraw from the partnership so long as the loan taken from the Canara Bank, Etah, was not repaid.

9. The terms of partnership, referred to above, do clearly contemplate that the partnership shall continue indefinitely until such time as all the partners agree to dissolve it or the Firm was otherwise dissolved in accordance with law

10. Clause 7 of the Instrument of Partnership, referred to above, provides against the contingency of the dissolution of the partnership by the death of a partner under Cl (c) of S 42 of the Partnership Act It is thus a provision made by contract between the partners for the 'duration' or for the 'non-determination' of the partnership in spite of the death of one of them

11. A dissolution of partnership has been defined by S 39 of the Partnership Act as the dissolution of partnership between all the partners of a firm and in case of a partnership-at-will S 43 (1) gives a partner the right of dissolving such a partnership by notice in writing to all the other partners of his intention to dissolve the firm, and may be against their will Seen in this context, clause 18 of the Instrument of Partnership is clearly a provision made by contract between the partners for the non-determination of the partnership between all the partners at the instance of one partner only. That clause gives a partner, acting singly, only the right to withdraw from the partnership by serving one month's notice on the other partners and also the right to the remaining three partners if they were unanimous to expel the fourth partner from the business of the partnership. This is clearly inconsistent with the concept of a partnership-at-will and the right of an individual partner to dissolve it by notice

12 Clause 20, as it originally stood, clearly implied that no partner could withdraw from the partnership before the end of a year and even if he did, his capital would not be paid back by the Firm. That was clearly a provision, fixing by contract, the duration of the partnership at least one year The amended clause 20 extended that period of one year to such time as the loan taken from the Canara Bank was repaid

13. I find it impossible to agree with the view of the two courts below that the partnership was a partnership-at-will.

14. I may here refer to the cases cited at the Bar and referred to in the judgments of the two courts below The first of these cases is that of Karumathu-Thagarajan Chettiar v E M Muthappa-Chettiar, (AIR 1961 SC 1225) In that case the partnership consisted of only two persons Even so, the Supreme Court held on an interpretation of the terms of the partnership that it was not a case of a partnership-at-will The case of Abbott v Abbott (1936) 3 All ER 823, is referred to therein with approval That was a case where there were more than two partners and it was provided that the retirement of a partner would not terminate the partnership and there was an option for the purchase of the retiring partner share by the other partners It was held that in such circumstances the partnership could not be said to be partnership-at-will Similar is the case here under clause 18 of the Instrument of Partnership referred to above I have looked into the report of Abbott's case

One of the terms of the partnership in that case was that the death or retirement of any partner shall not terminate the partnership Another term was, as noticed by the Supreme Court, that if any partner shall die or retire, the surviving or continuing partners shall have the option of purchasing the share of the deceased or retiring partner The question posed by Clausom, J, in that case was whether on a reading of the deed as a whole, the parties could be said to have agreed that anyone of them could bring the business to an end in a moment or whether there was some agreement inconsistent, with that being done

On reading the first of the conditions, referred to above, namely, the condition that death or retirement of any partner shall not terminate the partnership, the learned Judge observed that that constituted a limitation upon the character of the partnership being a partnership-at-will, inasmuch as a single partner could not determine the partnership although he could determine it as between himself and the others That clause further showed that the partners had agreed that the partnership shall continue notwithstanding that one partner goes out or even notwithstanding the death of one partner Clause 18 of the Instrument of Partnership, referred to above, is closely similar and does show that no single partner could dissolve the partnership by notice He could only terminate the partnership between himself and others and not between all of them by notice, and further that the partnership was to continue notwithstanding the retirement or expulsion of a single partner who was in minority, by the remaining partners continuing the partnership I may here observe that the learned Additional District Judge who heard the appeal, is not right in saying that the intention of the parties was not to be seen in a matter like this In interpreting the terms of an instrument, it is the intention of the makers which has to be gathered by a court In Thagaraian's case (supra) even the Supreme Court approached the matter by saying "As we read the terms of the agreement it seems to us clear that the intention could not [illegible]

[illegible] cases cited before me [illegible] (supra) [illegible] Kashavlal Lallubhai [illegible] Bhagat Narandas (AIR 1968 Gui 157), and (2) Iqbalnath Premnath Anand v. Rameshwarnath Premnath Anand, (AIR 1976 Bom 405) In Keshavlal's case (supra) one of the terms of the Instrument of Partnership expressly declared that the partnership shall be a partnership-at-will and that was one of principal reasons on which the Gujarat High Court held that there was no room or scope for taking the view that the partnership was not a partnership-at-will The case is thus clearly distinguishable Iqbalnath's case is a single Judge decision of the Bombay High Court and in that case also in the partnership deed itself there was a clause opening with the words "Partnership being at will", which according to the learned Judge was sufficient to disclose to the Court the intention of the parties that the partnership was a partnership at will within the meaning of the Act and that in view of such an express declaration by the parties there would be no question of a contrary implication" This case too is, therefore, clearly distinguishable and could be no authority for holding that the partnership in the case before me was also a partnership-at-will, although having read the terms of the Instrument of Partnership I find that there are definite indications to the contrary

16. The second question "whether the respondent was entitled for retirement from the partnership or for dissolution of the partnership itself" is answered by clause 18 of the Instrument of Partnership, referred to above and does not call for a separate answer

17 For a complete disposal of the case I consider it necessary to add that in my view the defendants-appellants were not guilty of breach of any of the terms of the partnership when they did not supply 1/4th of the goods produced to the plaintiff for resale and did not pay him Rs 250/- per month, and that the plaintiff was not entitled to sue for dissolution of partnership on any such ground

18. I shall take up the second point first Clause 14 of the Instrument of Partnership provided that each party would be entitled to draw Rs 250/- every month for his own expenses Clause 15 [illegible] time provided that no partner would be entitled to any salary or honorarium for attending to the business of the partnership It is the plaintiff's

own case that the partnership suffered loss The non-withdrawal of the amount of Rs 250/- by the plaintiff and also by the other partners was in the interest of the partnership There is nothing to show that the plaintiff demanded the sum of Rs 250/- from the defendants-appellants after 1-6-1976 and the defendants unreasonably refused to pay that amount to him On the other hand, Ext A-5, which is a reply dated 20-11-1976 to the plaintiff to the latter's notices dated 5-11-1976 and 16-11-1976 goes to show that it was the plaintiff himself when he was in charge of the affairs of the partnership up to 31-5-1976 who had agreed that the amount of Rs 250/- per month would not be paid because of the loss in the business The notices dated 5-11-1976 and 16-11-1976 were not filed by the plaintiff. On the other hand the defendants have filed two notices one dated 5-11-1976 and the other undated, both of them addressed to M/s Bharat Coal Company, which are Exts A1 and A2 respectively. They only show that the plaintiff was bent upon wrecking the partnership

19. With regard to the non-supply of 1/4th production to the plaintiff, the defendants' case was that the plaintiff did not want to pay in cash and wanted the same on credit There is a reference in the notice which the plaintiff purported to serve for dissolving the partnership about the non-payment of Rs 250/- per month and the non-supply of 1/4th part of the goods produced, but there does not appear to be any other notice or document on record from the side of the plaintiff to establish that he ever demanded the same and the other partners refused to supply him 1/4th of the production against cash payment It is highly probable that the defendants' case was true, and the two courts below do not seem to be justified in accepting the plaintiff's word in support of his claim that the defendants committed a breach of the terms of the partnership by not supplying him 1/4th of the production every month for resale The term clearly was that the supply shall be made against cash payment and there does not appear anything on record to prove that the plaintiff ever tendered the price of the 1/4th production in cash and was yet denied supply by the defendants

20. It is thus clear that neither of the two grounds, i. e. the non-payment of Rs 250/- p. m. to the plaintiff and the non-supply of 1/4th of the production to him could be an adequate ground for dissolution of the partnership under Section 44 of the Indian Partnership Act

21 As to the point whether the plaintiff was entitled to a decree for dissolution on the ground that the business of the Firm was running at loss, I am afraid that here too the courts below have gone wrong What is required to be proved under clause (f) of Section 44 of the Indian Partnership Act is that the business of the Firm cannot be carried on save at a loss It is not unusual to find a manufacturing business suffering loss in the first few years of its being set up Indeed the plaintiff himself has alleged that there was loss in the beginning because the production was low on account of having been started late and the heavy amount of interest payable to the bank. The amount of loss up to 31-5-1976 in the first six months of the business was only Rs 1032 82 when the capital of the four partners was proposed to be Rs. 60,000/- and the loan taken from the bank was Rs 39,500/- I do not think that a loss of Rs 1,000/- odd in the first six months of the business in a case where the capital invested is rupees one lac could be said to be such as to justify the dissolution of the partnership on the ground that the business could not be carried on save at a loss Indeed the defendants would not have contested this suit unless they were making profit out of the business of the partnership It appears to me that the defendants were not in the wrong and that it was the plaintiff who was in the wrong and was acting in a manner prejudicial to the interests of the partnership by serving notices of the kind which he served on M/s Bharat Coal Company vide Exts A1 and A2

22 In the result, the appeal succeeds and is allowed with costs The judgments and decree of the two courts below are set aside The plaintiff's suit shall stand dismissed with costs throughout.

Appeal allowed

1981 ALL L J. 972

P N GOEL, J

Mindhai and others Appellants v
State Respondent

Criminal Appeal No 1072 of 1977, D/- 18-12-1980

(A) Penal Code (45 of 1860). Sections 304 and 325 — One of accused alleged to have given one blow to deceased with lathi and other accused one blow with Kassi, a sharp-edged weapon — Medical report not indicating any injury with sharp-edged weapon — Accused having Kassi if can be held to have given blow with blunt side of Kassi.

Where it was alleged that one of the accused gave one blow to the deceased with a lathi and the other accused gave one blow with a Kassi, a sharp-edged weapon, in the natural course it must be presumed that the accused having Kassi would use the sharp-edge of the Kassi first and when the post-mortem report does not indicate any injury caused by a sharp-edged weapon the accused having the Kassi must be taken to have caused no injury at all in the absence of evidence to show that he used the reverse blunt side of the Kassi in assaulting the deceased 1979 Cri LJ 161 (Raj) and AIR 1971 SC 296 Dist (Paras 19 22)

(B) Penal Code (45 of 1860). Sections 325 and 304 — Occurrence taking place suddenly — After exchange of abuses accused giving two lathi blows to deceased causing his death — Accused held was guilty under Section 325 and not under S. 304.

Where the accused on being asked by the deceased not to plough the land as it had been allotted to him there was exchange of abuses and grappling and suddenly in the heat of the moment the accused gave two lathi blows to the deceased one on the head which was not fatal and the other on the back which was so severe that it caused fracture of the ribs and resulted in his death on the spot, the accused was held guilty under Section 325 and not under Section 304 as the occurrence was sudden and ordinarily the back is not considered a vital part of the body and lathi blows on the back do not ordinarily cause fracture of (Para 25)

Cases Referred : Chronological Paras

1979 Cri LJ 161 (Raj) 21
AIR 1971 SC 296 1971 Cri LJ 285 21

S I Jafri, for Appellants

JUDGMENT :— Mindhai, Liladhar and Ram Prasad, real brothers inter se, residents of village Mandaiyan Jolpur, police station Patwai, district Rampur have been convicted under Section 304 read with Section 34 I P C. Mindhai and Liladhar have been sentenced to undergo R I for 4 years and a fine of Rs 250/- Ram Prasad has been sentenced to undergo R I for 2 years and a fine of Rs 100/-

2. The occurrence took place on 1-6-1976 a little after sun rise in village Jolpur In this occurrence Ishwari aged about 45 years, nephew of Vidhya Ram (P. W 1) was assaulted As a result of the injury received he died on the spot Report of the occurrence was lodged verbally by Vidya Ram at 8 30 A M at the police station, which is 5 miles away R S Yadav, Station Officer (P W 6) entered upon investigation

3 On the date of occurrence at 5 50 P M, Dr B R Bhatnagar conducted post-mortem examination on the dead body of Ishwari and found following ante-mortem injuries :

(1) Lacerated wound 4 cm x 1 cm x bone deep on left side of head 12 cm above the left ear and 14 cm away from the middle line

(2) Abrasion 3 cm x 1 cm on the back of right shoulder

(3) Abrasion 3 cm x 1 cm, on the outer aspect of right arm 7 cm below the right shoulder

(4) Contusion 9 cm x 2 cm on right side of back 9 cm below right shoulder

4. Internal examination indicated fracture of 6th, 7th and 8th ribs of the right side under injury No (4) Pleura and right lung were lacerated Right lung had a lacerated wound 2 cm x 1/2 cm, x 1½ cm on its posterior surface under injury No (4)

5 In the year 1975, the Government had decided to give land for cultivation to landless labourers In this connection Mitthan Lal Pradhan (P W 5) executed a Patta of some land Ex Ka 2 on 29-12-1975 to Ishwari. The Lekhpal carved out the pieces of land from the main plots on a map, which were approved by the S. D. M. On 17-5-1976 Ichha Charan Lekhpal (P W 4) went

to the spot and delivered possession. According to the prosecution Ishwari was given possession on plot No 372/2 It appears that the entire plot No 372 was in actual cultivation of the appellants for the last about 7-8 years Consequently, on 1-6-1976 the three appellants were ploughing the entire plot including the portion allotted to Ishwari Ishwari his uncle Vidya Ram along with Zorawar, brother of Ishwari were on the Oalei field of Zorawar These persons saw the appellants ploughing the field. Consequently, Ishwari proceeded to ask the appellants not to plough the land which had been allotted to him Vidya Ram and Zorawar continued to remain at the Palei field of Zorawar As soon as Ishwari reached the disputed field and asked the appellants not to cultivate the appellants gave him abuses Ram Prasad then grappled with Ishwari It is said that Mindhai gave a blow on the head of Ishwari with a Kassi, a sharp edged weapon and Liladhar gave a lathi blow on his back. Thereafter all the three appellants ran away

6. It appears that during rainy season the plot in dispute goes under water It comes out after the rainy season There is sand in the disputed plot and the land around it Therefore there does not remain mend of the plot which go under water

7. The appellants did not admit to have assaulted Ishwari and asserted that they had been implicated on account of enmity Precisely speaking there was no enmity between the appellants on one side Ishwari Vidya Ram and the witnesses examined in the case from before the occurrence

8 The prosecution examined Vidya Ram Ram Lal and Balak Ram (P Ws 1 to 3) as eye witnesses of the occurrence besides Mitthan Lal Pradhan and Lohri Charan Lekhpal The III Additional Sessions Judge, Rampur believed the evidence of the prosecution witnesses He however observed "In any case even if the evidence of Vidya Ram (P W 1) and Balak Ram (P W 3) is ignored there still remains the absolutely disinterested, impartial and independent testimony of Ram Lal (P W 2) who was a natural witness of the occurrence".

9. With regard to the nature of offence, the Addl. Sessions Judge observed, "In view of the circumstances that the accused were in actual possession of the land and that even Kassi was used as a lathi, no intention to commit murder of the deceased can be inferred Otherwise also it was the deceased who provoked the accused to commit the crime and it was the deceased who was initially at fault in objecting to the ploughing of the land by the accused If the deceased really put any obstruction in ploughing the land the accused had a right of private defence to oust him out Of course as already mentioned above in that case they must be held to have exceeded the right of private defence by using more force than was necessary to oust the deceased from the field The offence therefore falls under Section 304 I P C and not under S 302 I P C"

10. Learned counsel for the parties have been heard and record has been examined with their assistance

11. Statement of Ram Lal shows that there used to be crop in the disputed land from before the date of occurrence He has clearly stated that the Arhar crop had been harvested prior to the date of occurrence, that the said crop was sown by Mindhai appellant that even before there used to be crop in the plot and that Mindhai used to sow the plot for the last 7 or 8 years and harvest its crop It is thus evident that the appellants were in actual possession of the land from before the date of occurrence

12. It is undisputed that Mitthan Lal Pradhan gave Patta of a portion of plot No. 372 to Ishwari on 29-12-1975 It is then evident from the statement of Lohri Charan Lekhpal that his predecessor had prepared a map showing the land to be given to landless labourers/allottees and that the said map was approved by the S D M Lohri Charan then stated that he went to deliver possession to the allottees on 17-5-1976 and that he did deliver possession to Ishwari on the said date He has indicated the manner of delivery of possession in this way that head of mud was placed on the four corners of the land In cross-examination he stated that there was no mend between the land allotted to Ishwari and the field of the appellants and that after measurements on 17-5-1976 a mend was constructed to demarcate the land of Ishwari from the land of the appellants. This part of his state-

ment is not correct The Lekhpal did not prepare any record of the manner of delivery of possession Vidya Ram did not mention in the report nor he stated before the investigating officer that Ishwari had constructed mend of the land given to him This clearly shows that in fact Ishwari had not constructed any mend of the land which was allotted to him It is thus obvious that the Lekhpal gave symbolical possession of that land which was shown by his predecessor in a map

13 In view of the above, the appellants had gone to plough the disputed land. As the land was allotted to Ishwari he had a right to go to the land and ask the appellants not to plough it Therefore the learned Additional Sessions Judge was not justified in saying that the deceased was initially at fault in objecting to the ploughing of the land by the appellants

14. The main question which arises is as to which of the appellants had actually assaulted Ishwari and whether all the three appellants are guilty of the offence punishable under Section 304 or under any other section of the Code

15. It is abundantly clear that it is not a case of preplanned assault Ishwari happened to go to the land and ask the appellants not to plough it In this way it is a case of sudden occurrence It appears that the appellants first of all gave abuses to Ishwari It also appears that Ishwari gave abuses to Ram Prasad (vide statement of Ram Lal) After the exchange of abuses Ram Prasad grappled with Ishwari Thereafter Ishwari is said to have been assaulted by Mindhai and Liladhar In these circumstances Section 34, Indian P C does not come into operation, and therefore Ram Prasad cannot be convicted for any offence with the aid of Section 34

16. It is now to be considered whether Mindhai assaulted Ishwari with a Kassi [illegible] The [illegible] counsel [illegible] the [illegible] of Balak Ram and Vidya Ram [illegible] the time of occurrence [illegible] highly doubtful Balak Ram [illegible] stated that he [illegible] of the Pale's field and [illegible] hearing [illegible] In cross-examination he [illegible] stated that he did [illegible] hear about the disputed land He is an employee of the Hydel department as a Store Khallasi He says that on the date of occurrence he was on leave and that he had come to the village on one month's leave In cross-examination he further stated that both parties were assaulting each other with fists and kicks He stated that first of all there took place grappling between Ishwari on one side and the three appellants on the other side and that at the time of grappling there was Kassi in one hand of Mindhai and lathi in one hand of Liladhar These facts have not been stated by any other prosecution witness, nor they find place in the first information report Taking all these facts together it appears that Balak Ram had not seen the occurrence The Additional Sessions Judge has referred to the above facts He has observed

"No doubt no other witnesses stated so but it is quite probable that the earlier part of the scuffle as stated by him might not have been seen by the other witnesses, namely Ram Lal"

This observation is not correct because Ram Lal was nearest to the scene of occurrence and Balak Ram was at a more distance Hence Ram Lal was the best person to see the entire occurrence.

17. With regard to Vidya Ram he was also at a more distance than Ram Lal He did not accompany Ishwari when the latter proceeded to ask the appellants not to plough the land Vidya Ram has stated in cross-examination that he heard exchange [illegible] about 15 minutes after the [illegible] of Ishwari from the Pale [illegible] Zorawar Ram Lal was at [illegible] which is to the east of the [illegible] land Field of one Jiwaram [illegible] the field of Ram Lal and the [illegible] land According to Ram Lal [illegible] is about 100 steps from the scene [illegible] cence Pale field of Zorawar [illegible] 200 steps away from the field [illegible] Ram Lal In this way it is evident [illegible] Ram was at a sufficiently long distance [illegible] place of occurrence Therefore [illegible] that he [illegible] the entire occurrence [illegible] would have been [illegible] Hence it appears that Vidya Ram reached the scene of occurrence after Ishwari had been assaulted There is however nothing to show that Vidya Ram was not present even at the Pale

field of Zorawar at the time of occurrence

18 Ram Lal was at 100 steps from the scene of occurrence He saw the entire occurrence from his field He is not interested in the deceased or Vidya Ram nor he is hostile to the appellants Therefore he can easily be termed as an independent and natural witness of the occurrence

19 The post-mortem report does not indicate any injury caused by sharp edged weapon According to the prosecution Mindhai gave only one blow to Ishwari with a Kassi He gave this blow on the head of Ishwari Therefore, in the natural course it will be presumed/expected that Mindhai must have assaulted Ishwari with the sharp edge of the Kassi Vidya Ram stated in chief examination that Mindhai assaulted Ishwari from the reverse side of the Kassi He did not state so in the first information report nor he stated so before the investigating officer Ram Lal stated in chief examination that Mindhai assaulted Ishwari with the reverse side of the Kassi In cross-examination he asserted that he had told the investigating officer that Mindhai had assaulted Ishwari with the reverse side of the Kassi His attention was drawn to his statement under Section 161 Cr P C and then he stated that he could not say as to why the investigating officer had not written so It is thus apparent that Vidya Ram and Ram Lal both are making improvements in their statements before the trial court They did not disclose at the earliest opportunity that Mindhai assaulted Ishwari with the back side of the Kassi

20 In this connection it will be noticed that Ishwari had only two injuries — (i) a lacerated wound and (ii) another a contusion These two injuries could easily be caused by Liladhar with a lathi in the heat of the moment The learned Additional Sessions Judge has dealt with this aspect of the matter and concluded that

"Either one blow from the Kassi from the blunt side and one blow from the lathi was received by the deceased or the blow from the Kassi missed the target and both the blows were received by lathi of Liladhar"

It is thus evident that the learned Additional Sessions Judge has not expressed a definite opinion on the point

21 The learned State counsel urged that a sharp edged weapon can be used from its reverse side He has placed reliance on two cases

(1) Banwari v State of Rajasthan, 1979 Cri LJ 161 (Raj) — In this case there were 9 assailants Most of them had lathis Banwari appellant had a lathi It was said that Banwari later on took a Barchhi Shivprasad an injured stated in cross-examination that the accused holding Pharsis also caused injuries to him It was observed (at page 169)

'But that does not mean that 'Pharsis' were used from their sharp side Injuries could have been caused from the reverse side of the 'Pharsis' We do not find any unnaturality in the statement on this point No doubt normally when a witness states that a 'Pharsis' or an axe was used, there is no warrant for supposing that what the witness means is that the blunt side of the weapon was used but where as here the witness clarifies as to whether the sharp side or the blunt side of the weapon was used there is no reason to doubt such a statement Many a time 'Pharsis' and spears are wielded as lathis

Reference was made to the case of Angnoo v State of U P, AIR 1971 SC 296

(2) Angnoo v State of U P AIR 1971 SC 296 — In this case there were 10 assailants Five of them had spears and the other five had Kantas One Mahadeo received 27 injuries out of which 4 were blunt-weapon injuries It was argued that a spear or a Kanta could not have caused contusion bruises or depression on the head Therefore the evidence of the eye-witnesses did not fully explain all the injuries received by Mahadeo On these facts mentioned above it was observed (at pages 297, 298)

'It appears to us that most of these witnesses arrived at the scene of occurrence after the attack had already started and were able to see only part of the incident so that some blows must have been inflicted on Mahadeo before their arrival and some after their

arrival It may be that they failed to notice that some of the assailants were carrying lathis or, more probably, some of the assailants used their spears like lathis They gave blows wielding spears as lathis rather than thrusting the spears every time They may have done so even before some of the witnesses arrived The use of a spear in such a manner will not be very unnatural if a large number of persons surround one single man and try to beat him In such a situation it may be easier to wield the spear as a lathi than to try and thrust it at the person being attacked There is therefore in our opinion no conflict at all between the medical evidence and the evidence given by the eye-witnesses"

22. The observations in the two cases relied upon are not of help in the present case Its reason is that the assailants were not many in number and that only one blow is said to have been caused by Mindhai with a Kassi Therefore, in the normal course Mindhai would use the sharp edge of the Kassi first Had there been many injuries on the person of Ishwari some caused by sharp edge and some by blunt side, then it could be said that Mindhai had caused several injuries to Ishwari with Kassi.

23. It will further be noticed that Ram Lal stated that he had told the investigating officer at the earliest opportunity that Mindhai had assaulted Ishwari with the reverse side of the Kassi But this was not correct

24. Taking into consideration the manner of occurrence in the present case, it is extremely doubtful that Mindhai assaulted Ishwari with a Kassi It has been said above that Liladhar alone could have caused two injuries to Ishwari with a lathi in the heat of the moment Therefore benefit of doubt can be extended to Mindhai

25 With regard to Liladhar there is good evidence of Ram Lal that he had assaulted Ishwari with a lathi

26. It appears to be considered that Liladhar is guilty of the offence punishable under Section 304 I P C or Section 325 Indian Penal denly Ishwari reached the land in dispute and asked the appellants not to plough the land as it was allotted to him There took place exchange of abuses In the course of exchange of abuses Ram Prasad began to grapple with Ishwari Then Liladhar gave two blows with a lathi Lathi blow which fell on the head did not cause any fracture of the skull bones, nor it caused any damage to the brain The second lathi blow which fell on the back happened to cause fracture of the ribs The ribs then lacerated the pleura and lung Ordinarily back is not considered a vital part of the body It is unfortunate that the blow on the back fell so severely that it caused fracture of three ribs Instances are not lacking where lathi blows on the back do not cause any fracture of the ribs As the ribs were fractured and they lacerated pleura and right lung Ishwari died on the spot In these circumstances Liladhar can more appropriately be guilty of the offence punishable under Section 325 I P C. and not under Section 304, I P C.

27. Looking to the manner of occurrence and the injuries caused the sentence of four years' R. I under Section 325 I P C, to Liladhar will meet the ends of justice

28. In the result, conviction and sentence of Mindhai and Ram Prasad under Section 304/34. I P C recorded by the Second Additional Sessions Judge Rampur are set aside They are acquitted in the case They are on bail They need not surrender Their bail bonds are discharged.

29. Appeal by Liladhar is dismissed in this way that his conviction under Section 304/34, I. P. C. is altered to one under Section 325. I P C He will undergo R I for four years under the section The sentence of fine of Rs 250 - awarded to him is dropped Liladhar is on bail He must surrender to serve out the sentence

Order accordingly

1981 ALL. L. J. 977

= AIR 1981 Supreme Court 1708

(From Allahabad)

V R KRISHNA IYER AND A P SEN, JJ

Civil Appeals Nos 1308 of 1977 and 1135 of 1979. D/- 2-4-1980

U P State Electricity Board, Appellant v Abdul Sakoor Hashmi and others etc., Respondents

Electricity (Supply) Act (54 of 1948), Ss. 79 (c) and (k) and 15 — Regulation framed by U. P. Electricity Board on 18-12-1970 — Delegation of power by Board — Regulation empowering making appointments and terminating them — Regulation not invalid. (Constitution of India, Art. 245). Decision of Allahabad High Court, Reversed.

The Regulation framed by the U P State Electricity Board laying down the mode of appointment to various posts, the appointing authorities competent to terminate their services, is not invalid on the ground that the Board had no power to delegate in that regard Decision of Allahabad High Court, Reversed (Paras 4, 5)

Section 79 (k) is a residuary provision which embraces the power to make regulations in regard to functions of the Board Section 79 (c) is more restricted and confines itself to defining the duties of officers and other employees of the Board and their allowances and other conditions of service The appropriate provision which will empower the Board to make regulations regarding termination of service and disciplinary action vis-a-vis employees of the Board is Section 79 (k) Concerned language used is sufficient to cover making up of provisions to terminate employment It is undoubtedly a clear function of the Board under S 15 to make appointments of its officers and employees The power, so vested by necessary implication carries with it the power also to take disciplinary action or to terminate employment It, therefore, follows that S 79 (k) takes within its sweep the power to maintain or to take disciplinary action (Paras 4, 5)

KRISHNA IYER, J.:— Although there are two questions, one of fact and one of law, which arise in these two appeals, the learned Attorney-General fairly left the final outcome on the question of fact untouched because he was more concerned with a correct construction of Section 79 (k) read with S 15 of the Electricity (Supply) Act, 1948 and the validity of regulations framed by the U P State Electricity Board on December 18, 1970 in exercise of the powers conferred by S 79 (c) of the Act That regulation lays down the mode of appointment to various posts under the Board, the appointing authorities thereof, the authorities who are competent to impose punishment on the employees and the authorities competent to hear appeals against disciplinary action The said regulation was published in the U P Gazette dated 2-1-1971 pages 65-71 (Part I)

2. This regulation was struck down by the High Court on the score that there was no power of delegation by the Board which made the appointments and which ordinarily would be clothed with the power of terminating appointments It is common ground that there is no specific provision under the Act which authorised the Board to delegate its powers and, therefore, the question turns upon the correct meaning and amplitude of Section 79 (c) & (k) of the Act We think that while S 79 (c) has been relied upon by the authority making the regulation, the appropriate provision is S 79 (k) which we read at this stage

"79 The Board may make regulations not inconsistent with this Act and the Rules made thereunder to provide for all or any of the following matters, namely —

(k) any other matter arising out of the Board's functions under this Act for which it is necessary or expedient to make regulations"

3. Section 79 (c) which has actually been relied on may also be extracted here

"79 (c) The duties of officers and other employees of the Board, and their salaries, allowances and other conditions of service"

4. It is obvious that S 79 (k) is a residuary provision which embraces the power to make regulations in regard to functions of the Board Section 79 (c) is more restricted and confines itself to defining the duties of officers and other employees of the Board and their allowances and other conditions of service In our view the appropriate provision which will empower the Board to make regulations regarding termination of service and disciplinary action vis-a-vis employees of the Board is S 79 (k) Concerned language used is sufficient to cover making up of provisions to terminate employment It is undoubtedly

HY/HY/B957/80/MVJ

a clear function of the Board under S 15 to make appointments of its officers and employees That provision reads

"S 15 The Board may appoint a Secretary and such other officers and employees as may be required to enable the Board to carry out its functions under this Act

Provided that the appointment of the Secretary shall be subject to the approval of the State Government"

5. The power, so vested by necessary implication carries with it the power also to take disciplinary action or to terminate employment It, therefore, follows that S 79 (k) takes within its sweep the power to maintain or to take disciplinary action We cannot, therefore, agree with the High Court that the regulation is invalid

6. We are reinforced in this view by the pragmatics of the situation The Electricity Board is an enormous undertaking which employs several thousand employees We are told that over a lakh of employees serve under the Board currently It would be virtually impossible for the Board to carry on its functions if every time every minion under it were to be subjected to disciplinary action only by the Board which is the top body acting as a corporate entity We do not think that the provisions of the Act can be interpreted into an impossible position for the Board On the other hand a more viable construction is what we have indicated above

7. In this view, we reverse the finding of the High Court in regard to the interpretation it has put on the validity of the regulation and hold that the Board was competent to make the regulation in question Even so, having regard to the special facts of this case the learned Attorney-General has rightly agreed that the order reinstating the employees may be allowed to stand We, therefore, allow the appeal in part to the extent of the vires of the regulation but otherwise dismiss it in so far as the factual conclusion is concerned There will be no order as to costs

Appeals partly allowed

1981 All. L. J. 978

= AIR 1981 Supreme Court 1709

(From: Allahabad)

P N BHAGWATI AND BAHARUL ISLAM, JJ

Civil Appeal No 798 of 1981. D/- 25-2 1981.

Manazir Hussain, Appellant v Dy Director, Consolidation, U. P. and others Respondents

Constitution of India, Arts. 136, 226 – Appeal arising out of dismissal of writ petition against order of Dy. Director (Consolidation in revision – Question in regard to certain khatas, not properly considered – Orders of High Court and Dy. Director set aside – Case remanded to Dy. Director for disposal of the case within two months – Decision of Allahabad High Court, Reversed. (U. P. Consolidation of Holdings Act (5 of 1954), S. 48). **(Para 2)**

JUDGMENT:– Special leave granted

2. It appears from the order of the Dy Director (Consolidation) that he has not considered the question in regard to Khatas Nos 135 and 356 on merits and he has set aside the order of the Assistant Settlement Officer (Consolidation) without proper consideration of the matter We would, therefore, set aside the order passed by the High Court as also the order of the Dy Director (Consolidation) in so far as these orders relate to khatas Nos. 135 and 356 and remand the case to the Dy Director (Consolidation) so that he may consider the revision application of respondents Nos 4 to 11 in regard to khatas Nos 135 and 356 and dispose it of on merits after considering the oral and documentary evidence in regard to these two khatas Since the case is an old one we direct the Dy. Director (Consolidation) to dispose of the case as early as possible and in any event not later than the expiration of two months from today

3. The parties will appear before the Dy Director (Consolidation) at 11 a m. on 9th March, 1981 for further directions in regard to the hearing of the case

4. Status quo as on today will be maintained until disposal of the case by the Dy Director (Consolidation)

HY/HY/D573/81/SSG

5. There will be no order as to costs

Order accordingly

1981 ALL. L. J. 979

A N VARMA, J

Om Prakash Nigam and Another, Applicants v. Ved Prakash Gupta, Respondent

Civil Revn No 180 of 1980, D/- 3-9-1981 *

U. P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act (13 of 1972), Ss. 20(2)(a) and 7 — Suit for eviction on basis of non-compliance of notice of demand for arrears of rent — Many tenants in building — Notice not disclosing basis for water rate claimed therein — Suit is liable to be dismissed.

Where the landlord instituted a suit for eviction on basis of non-compliance of notice demanding arrears of rent, the same would not be maintainable when there were many tenants in the building and the landlord did not disclose the basis in the notice of the water rate claimed at 6¼% of monthly rental, even though the premises were not separately assessed to water tax (Para 15)

Assuming that in view of the language of S 7 particularly the words "in addition to and as part of the rent", a default in respect of the water tax liability of a tenant could also be a ground for eviction of a tenant under S 20(2) (a), before a landlord could take advantage of such a default he must give a proper notice of demand informing the tenant of the precise amount which the latter is bound to pay as water tax in respect of the portion under his tenancy Where there is no separate assessment of the portion in occupation of the tenant this responsibility becomes all the greater For, it would not be easy for the tenant to work out his proportionate liability in respect of the water tax in such cases in view of the provisions of S 7 fixing the liability of a tenant to water tax The landlords must, in cases where the building under tenancy is not separately assessed, indicate truly and correctly the precise liability of the tenant disclosing the entire tax determined in respect of the building and the proportion which the annual value" of the entire building as determined by the Municipal authorities bears to the annual value of the portion under occupation of the tenant These facts are within the special means of knowledge of the landlord and consequently he must disclose the same truly and correctly to the tenant before he could invoke the penal provisions of S 20(2) (a) of the aforesaid Act (Para 15)

S M Dayal, for Applicants, D P Bahadur, for Respondent

ORDER:— This is a Plaintiff's application in revision under S 25 of the Provincial Small Cause Courts Act It arises out of a suit for eviction of the defendant-opposite party from a house of which the applicants are admittedly the owners and landlords The relief for recovery of arrears of rent and damages for use and occupation was also claimed The court below has decreed the suit only for recovery of arrears of rent amounting to Rs 1400/- The rest of the suit has been dismissed

2. Shortly stated the plaint case was that the defendant was a tenant of the plaintiff on a monthly rental of Rs 200/- in the first floor portion of the building no 106/396 P Road, Kanpur of which the plaintiffs were the owners and landlords The defendant was liable to pay water tax at Rs 12-50 P per month (calculated at the rate of 6¼% of the rental) The defendants fell in arrears of rent and water tax from 1-2-1974 Consequently a registered notice of demand and termination of tenancy was served on the defendants on 10-9-1974 The defendant failed to pay the arrears of rent and water tax or to vacate the premises The plaintiff was thus entitled to a decree for eviction of the defendant as well as for recovery of Rs 1770-50 P as arrears of rent and water tax for the period 1-2-1974 to 10-10-74 and a further sum of Rs 1870/- as accrued damages from 11-7-1974 till the date of the suit The plaintiff was also entitled to pendente lite and future damages at the rate of Rs 212-50 P

3. The defendant contested the suit on the assertion that he was a tenant on a monthly rental of Rs 200/- which included the water tax also He had been paying a sum of Rs 200/- regularly to the plaintiff There was no agreement to pay water tax separately The defendant tendered the rent demanded through money orders to the Plaintiffs which

*Against judgment and decree of U S Gupta, Ist Addl Dist J Kanpur, D/- 23-1-1980

was unlawfully refused The defendant, therefore, deposited the rent in the court of Munsif in Misc case no 876 of 1974 The defendant also pleaded that the plaintiffs had stopped carrying out the annual repairs and white washing from 1974 The defendant, therefore, carried out the repairs himself after serving due notice and spent a sum of Rs 400/- towards the repairs In subsequent years, also the defendant had been carrying out the repairs and white washing in regard to which he was entitled to deduct a sum of Rs 400/- per year

4. On the pleadings of the parties, the learned I Additional District Judge, exercising the powers of the small cause court framed various issues arising out of the pleadings of the parties

5. On issue no 2 which was whether the defendant was liable to pay water tax at the rate of Rs 12-50 P per month, the court below found that the sum of Rs 200/- which the defendant was paying to the Plaintiff was inclusive of the water tax and the plea of the Plaintiffs that the defendant was paying Rs 12-50 P as water tax separately to the plaintiff was not true Having recorded its findings, the court below went into further question whether the defendant was not liable to pay water tax under S 7 of U P Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972 On a consideration of the evidence on the record it held that even after 15th of July, 1972 (the date on which the aforesaid Act came into force), the payment of Rs 200/- which the defendant was making to the plaintiffs was inclusive of the liability of the defendant under S 7 of the said Act The court below further found that there was no statutory provision which authorised the plaintiff to claim water tax from the defendant at the rate of 6¼% of the monthly rental payable by the defendant.

6. On the issue of default the lower appellate court held in favour of the defendant-opposite party and against the plaintiff-applicants Its conclusion was that the defendant had been remitting the arrears by money order which the plaintiffs had been unjustifiably refusing and if those amounts were taken into consideration, there was no default.

7. The net result was that the suit of the plaintiff applicants was decreed only for recovery of Rs. 1400/- as arrears of rent while the rest of the reliefs claimed were refused. The court below while passing the decree also directed that the amounts deposited in the court by the defendant in miscellaneous case No 876 of 1974 shall be payable to the plaintiff towards the arrears of rent due from 1-2-1974

8. The first submission of the learned counsel for the applicant was that the finding of the court below that the sum of Rs 200/- which the defendant-opposite party was paying to the plaintiffs was inclusive of the water tax is patently perverse and is not based on any evidence on the record

9. Having heard learned counsel for the parties, I am of the view that the above argument is well-founded While the conclusion of the lower appellate court that the plaintiff failed to prove that the defendant was paying a sum of Rs 12-50 P per month to the plaintiff as water tax separately is correct, its finding that the rental of Rs. 200/- was inclusive of the water tax even after 15-7-1972, the date on which the U P Act No XIII of 1972 came into force is not supported by any evidence on the record

10. I have perused the statement of the defendant's witnesses on this point and I do not find that there is even a bald assertion that the sum of Rs 200/- was inclusive of the water tax even after 15-7-1972 The defendant's tenancy was continuing from 1971 He was paying Rs. 200/- per month from before 15-7-1972 He does not even allege that there was any agreement between the parties subsequent to the coming into force of U P Act No. XIII of 1972, that this sum of Rs. 200/- would be inclusive of even the defendant's statutory liability under S 7 of the aforesaid Act The fact that according to the defendant, there was no separate agreement for payment of water tax did not and could not lead to the inference that there was an agreement between the parties that the sum of Rs 200/- would be inclusive of the defendant's statutory liability. Again the further fact that even after 15-7-1972, the defendant had been paying Rs. 200/- as rent to the plaintiff and that the plaintiffs were issuing receipts therefor also could not justify the conclusion reached by the court below The receipts relied on by the courts below, too, could not constitute legal evidence of the fact that the sum of Rs 200/- was inclusive of the statutory liability of the defendant under S. 7

11. Thus the conclusion of the court below that the rental of Rs 200/- was inclusive of the defendant's liability of

ten other occupants in the building including the landlords The water tax payable by the various tenants would, therefore, depend on the proportion which the annual value of their portions bears to the annual value of the entire building The plaintiff led no evidence whatever to indicate the share of the water tax payable by the defendant It is indisputable that the burden to prove this was on the plaintiff The court below was, therefore, right in stressing the failure of the plaintiff to discharge this burden

15. Assuming that in view of the language of S 7 of U P Act No XIII of 1972, particularly the words "in addition to and as part of the rent", a default in respect of the water tax liability of a tenant could also be a ground for eviction of a tenant under S 20(2) (a) of the aforesaid Act, in my opinion, before a landlord could take advantage of such a default he must give a proper notice of demand informing the defendant of the precise amount which the latter is bound to pay as water tax in respect of the portion under his tenancy, where there is no separate assessment of the protion in occupation of the tenant this responsibility becomes all the greater For, it would not be easy for the defendant to work out his proportionate liability in respect of the water tax in such cases The landlords must, in my opinion, in cases where the building under tenancy is not separately assessed, indicate truly and correctly the precise liability of the tenant disclosing the entire tax determined in respect of the building and the proportion which the "annual value" of the entire building as determined by the Municipal authorities bears to the annual value of the portion under occupation of the tenant These facts are within the special means of knowledge of the landlord and consequently he must disclose the same truly and correctly to the tenant before he could invoke the penal provisions of S 20(2)(a) of the aforesaid Act

16. In the present case the plaintiffs did not do so On the contrary, they demanded water tax at the rate of 6¼% of the monthly rental payable by the defendant This was an entirely misconceived demand As the plaintiff did not disclose the relevant particulars in the notice of demand dated 9-9-1974, the said notice cannot constitute a valid notice in regard to the claim for arrears of water tax There was, hence no question of default in respect thereof

17. Another important aspect to be noted is that the claim for the recovery of the payment of water tax under S 7 is not supported by any evidence on the record and is perverse

12. This, however, by itself does not entitle the plaintiffs to a decree for ejectment I agree with the court below that the plaintiffs had no right to claim water tax at the rate of 6¼% of the monthly rental from the defendant as water tax. Counsel for the applicant was unable to point out any statutory provision authorising the plaintiff to charge or demand water tax from the defendant at the rate of 6¼% of the monthly rental The plaintiffs demanded water tax from the defendant under the notice dated 9-9-1974 on the basis of which the present suit has been filed at the same rate, namely, 6¼% of the monthly rental The defendant was not liable under any statutory provision to pay water tax at this rate to the plaintiff The notice of demand was, therefore, on the face of it entirely wrong and illegal so far as the demand for water tax payable by the defendant was concerned

13. Under S 7 of the U P Act No XIII of 1972 the tenant has been made liable to pay to the landlord in addition to and as part of the rent water tax or "proportionate part thereof, if any, payable in respect of the building or part under this tenancy" The defendant was, therefore, under this provision, liable to pay only proportionate water tax In a case where the building under tenancy or the portion of the building under tenancy of the tenant is not separately assessed the tenant would be liable to pay only a proportionate part of the water tax in the ratio which the assessed "annual value" of the entire building bears to the "annual value" of the portion under the tenancy of the tenant

14. The court below has observed that the building in a portion of which the defendant is residing consists of a large number of units occupied by various tenants The portion under tenancy of the defendant is not separately assessed to water tax, The plaintiff filed no papers or Municipal assessments to indicate the total amount of water tax which was payable in respect of the entire building or even of the portion under tenancy I, however, find that the defendant had filed municipal assessment in respect of the quinquennial assessments for the years 1973-78 and 1978-83 In regard to the quinquennial assessment for the period 1973-78 a sum of Rs 257-50 P was levied as water tax for the entire premises The lower appellate court has observed that there are

is that water tax cannot be said to be payable within the meaning of S 7 of the U P Act No XIII of 1972 unless the water tax has become due Until the water tax becomes due under the relevant local law, the same cannot be said to be payable under S 7 of the U P Act No XIII of 1972 There is nothing on the record to indicate that in respect of the period 1st of February, 1974 to 10th of October, 1974 water tax had become due on the date of the notice of demand and, therefore, payable The water tax is payable annually and until it becomes due it cannot be said to be payable by the tenant even under S 7

18. For all these reasons, I hold that the plaintiff has failed to prove that the defendant committed a default in respect of the water tax so as to entitle the plaintiff to a decree for eviction In regard to the rental of Rs 200/- payable as rent for the house, the finding of the lower appellate court is that the defendant was not in default in respect thereof The said finding of fact was not challenged before me

19 Thus in either view of the matter, the decree passed by the courts below dismissing the suit except to the extent mentioned in the operative portion of the decree under revision cannot be said to be contrary to law even on the premise that the sum of Rs 200/- payable by the defendant as rent to the plaintiffs was not inclusive of the liability of water tax under S 7

20. In the result, the revision fails and is dismissed There will, however, be no orders as to costs

Revision dismissed

1981 ALL. L. J. 982

P N HARKAULI, J.

Lala Ram, Petitioner v Gauri Shanker, Respondent

Election Petn No 30 of 1980, D/- 5-8-1981

(A) Constitution of India, Art. 19 — Representation of the People Act (43 of 1951), S. 10 — Govt. servant — Who is — Person initially employed in U. P. Govt. Roadways placed on deputation with U. P. State Road Transport Corporation — He continues to be a Govt. servant. 1981 All W C 481 (F B), Rel. on. (Para 5)

IX/IX/D917/81/SMA

(B) Constitution of India, Art. 191 — Representation of the People Act (43 of 1951), S. 36 — Govt. employee contesting the seat — Resignation of employee not accepted till filling of his nomination paper — He did not cease to be Govt. employee when nomination paper was filed — Rejection of his nomination paper, valid.

It is well settled that mere tendering of resignation is not sufficient for putting an end to the service of a Govt servant In order to bring about the termination of the service of a Govt servant acceptance of resignation is necessary Hence, when the resignation of a Govt servant contesting the Vidhan Sabha seat had not been accepted till the date on which he filed his nomination paper he did not cease to be a Govt servant Consequently, the rejection of the nomination paper of the employee was liable to be rejected (Para 5)

Cases Referred : Chronological Paras

1981 All W C 481 (F B) 5

ORDER:— This Election Petition arises in the following circumstances :—

In the year 1980 General Elections to the U P. Vidhan Sabha were held. The respondent Gauri Shanker filed his nomination for the 302 Ajraulı (Reserve) Vidhan Sabha Seat, Constituency of district Etawah The petitioner also filed his nomination paper for contesting the aforesaid seat The petitioner's nomination paper was, however, rejected by the Returning Officer on the ground that at the time of the filing of the nomination paper he was working as a Booking Clerk in the Auraiya Depot of U P State Road Transport Corporation and was thus holding an office of profit under the U P Government and he could not, therefore, be validly nominated as a candidate In the election Gauri Shanker, respondent, was declared elected.

2. Thereupon the petitioner filed this Election petition contending that his nomination paper was wrongly rejected by the Returning Officer and on account of this wrong rejection of his nomination paper the election of the respondent was liable to be set aside His contention that his nomination paper was wrongly rejected is based on two grounds The first ground is that the petitioner had tendered his resignation on 28-4-1980 before filing his nomination paper on 1-5-1980 and thus he could not be said to be in service of the U P State Road Transport

Corporation on the date on which he filed his nomination paper The second ground was that a person employed as a Booking Clerk in the U P State Road Transport Corporation, which was a corporate body and had a juristic entity of its own independent of the U P Government, could not be said to be a servant of the U P Government and consequently even if the resignation tendered by the petitioner on 28-4-1980 did not become effective upto the date on which he filed his nomination, it could not be said that he was holding an office of profit under the Government

3. The petition has been contested by the respondent, who contends that since the petitioner was admittedly initially employed in the U P Government Roadways, which was a Government Department, and his service had merely been placed on deputation with the U P State Road Transport Corporation, he did not cease to be a servant of the U P Government and his status as a Government servant continued Accordingly, it was contended that the petitioner was disqualified from contesting the election As regards the resignation tendered by the petitioner the respondent contended that the resignation submitted by the petitioner on 28-4-1980 had never been accepted and unless the resignation was accepted it could not become effective and it could not by itself have the effect of terminating the petitioner's service

4. On these pleadings the following issues were framed —

1 Was the petitioner, as a Clerk in the Auraiya Depot of the U P State Road Transport Corporation, not holding an office of profit under the Government of U P?

2 Was acceptance of the resignation of the petitioner not necessary to make it effective and did the resignation of the petitioner become effective the day it was submitted, that is to say, prior to the date of nomination, as alleged?

3 Was the nomination of the petitioner improperly rejected by the authority concerned?

4 To what relief, if any, is the petitioner entitled?

5. FINDING

ISSUE No 1 — The learned counsel for the petitioner in his statement recorded on the date of issues expressly admitted that initially the petitioner was a temporary employee in the U P Government Roadways, which was admittedly a Department of the Government. The learned counsel also admitted in the aforesaid statement that after the formation of the U P State Road Transport Corporation the petitioner was sent on deputation to the said Corporation and since then he had been in service of the U P State Road Transport Corporation The contention of the petitioner is that since the said Corporation is an autonomous body and a juristic entity independent of the Government of Uttar Pradesh it cannot be said that at the time he filed his nomination paper he was a servant of the Government and was holding an office of profit under the Government This question came up for consideration in U P State Road Transport Corporation v State of U P (Writ petn No 168 of 1980 which was decided by a Full Bench of the Lucknow Bench on December 24, 1980*) In this case also the question arose as to whether the employees of the Government Roadways whose services were placed at the disposal of the U P State Road Transport Corporation continued to be Government servants or not, and T S Misra, J speaking for himself and Hari Swarup, J clearly observed as follows —

"A Government servant continues to enjoy the status of a Government servant even when he is sent on deputation . "

In view of this Full Bench decision, which is binding on me, it must be held that even after the petitioner was sent on deputation to the U P State Road Transport Corporation, he continued to be a Government servant Issue No 1 is decided accordingly

ISSUE No 2 — It is proved by the unrebutted evidence of Kanhai Singh (PW 1) that the petitioner submitted his resignation (Ex P 4) on 28-4-1980 prior to the filing of his nomination on 1-5-1980 But the evidence of the petitioner's own witness Kanhai Singh (PW 1) shows that this resignation had not been accepted upto the date he came to give evidence Indeed, it is interesting to note that according to Kanhai Singh, the petitioner drew subsistence allowance for the whole month of April 1980 and that he continued to draw the subsistence allowance till as late as February 1981 In other words, it is an undisputed fact that the petitioner's resignation had not been accepted till the date on which he filed his nomination paper It is well settled that mere tendering of resignation is not sufficient for putting an

*Reported in 1981 All W C 481 (F B)

end to the service of a Government servant. In order to bring about the termination of the service of a Government servant acceptance of resignation is necessary Consequently, in view of the admitted fact that the resignation of the petitioner had not been accepted till the date on which he filed his nomination paper (indeed it was never accepted), I have no difficulty in holding that the petitioner did not cease to be a Government servant on 28-4-1980 and that he remained a Government servant on the date on which he filed his nomination paper Issue No 2 is decided accordingly

ISSUE No 3 — It is clear from Art 191 of the Constitution of India as well as S 36 of the Representation of the People Act, that a Government servant is disqualified from seeking election to the Vidhan Sabha and that if a Government servant files a nomination paper for such an election the Returning Officer shall reject his nomination paper Accordingly, I hold that the nomination paper of the petitioner was rightly rejected by the Returning Officer Issue No 3 is decided accordingly

ISSUE No 4 — In view of the above findings, the petitioner is not entitled to any relief In the circumstances of this case particularly the fact that there has not been much contest and only one witness was examined in all in the case, I am of the opinion that the parties should be directed to bear their own costs

6. ORDER

The petition is dismissed The parties will bear their own cost Let intimation of the result be sent to the Election Commission and Hon Speaker Vidhan Sabha as required by Section 103 of the Representation of the People Act, 1951.

Order accordingly

1981 ALL. L. J. 984

R M SAHAI, J

State of U P, Petitioner v. Civil Judge, Jhansi and others, Respondents

Writ Petn Nos 6583 and 682 of 1980, D/- 20-1-1981

(A) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 5(6) Proviso (b) — Finding on adequacy of consideration is not vitiated by absence of evidence about market price of land — Market value cannot be a substitute nor guiding factor to decide the willingness of a seller. (Para 2)

(B) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 5(3) & (1) — Petitioner whether is entitled to additional two hectares as his family members exceeded five has to be considered as on the date of commencement of the Act — Sub-ss. (3) and (1) have to be read together — Held daughter born after the material date viz. 8th June 1973 could not be considered to be of petitioner's family. (Para 3)

A P Singh, for Petitioner; N B Nigam, for Respondents

ORDER:— These are two petitions one by the State and other by tenure-holder against common order passed by Additional District Judge in appeal arising out of proceedings for determination of ceiling area under U P Imposition of Ceiling on Land Holdings Act The appellate authority held that sale deeds dated 8th July and 14th July 71 were saved by proviso (b) to sub-s. (6) of S. 5 as they were for adequate consideration and in good faith In respect of other contention that petitioner was entitled to two additional hectares under S. 5(3) as his family consisted of more than five members, the appellate authority held that daughter being born after the material date that is 8th June 1973 she could not be considered to be of petitioner's family, under S. 5(3)

2. Both the findings of appellate authority appear to be sound in law The finding that sale deed was for adequate consideration and in good faith is based on consideration of evidence It is challenged by the State only on the ground that in absence of evidence about market price of land situate in near vicinity the finding on adequate consideration is vitiated The argument appears to be devoid of any substance. Adequacy cannot be judged on any hard and fast rule Market value cannot be a substitute nor can it be guiding factor to decide the willingness of seller It may be one of the circumstances There may be factors which may force a seller to dispose of his property on lesser consideration than another placed in a better situation having better bargaining capacity. That does not vitiate the sale or render consideration inadequate. Apart from it the land in dispute is situated in district Jhansi The land has been sold at approximately Rs. 1000/- per acre. It is not

Deputy Director after de-notification of village u/s. 52 — Order being without jurisdiction, suit against order is not barred by S. 49. (Para 7)

(B) U. P. Consolidation of Holdings Act (5 of 1954), S. 49 — Bar of jurisdiction — Order passed by Deputy Director u/s. 48(1) without notice to aggrieved party — Order is null and void — Suit is not barred. (Para 8)

(C) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 229 (B) — Jurisdiction of Revenue Court — Suit for declaration of rights in respect of agricultural land is cognizable by Revenue Court and not by Civil Court. (Civil P. C. (1908), S. 9). (Para 9)

G N Verma, for Petitioner. K B Garg, for Respondents

ORDER :— This petition is directed against the judgment of the Board of Revenue dt 15-7-76, setting aside the judgment and decree of the trial Court

2. The dispute involved in the present case relates to old plot No 401, new plot No 160 having an area of 24 acre situate in village Chandpur Khurd, Tehsil Mat, District Mathura Initially Dongar Chhajan and Rati Ram, sons of Nem Singh, were bhumidhars of this plot In Mar 1964 Smt Onkar Kuer petitioner entered into an agreement with the erstwhile owner of the said plot as a result of which they exchanged the said plot with plot No 477/4 having an area of 47 acre of the petitioner The exchange was made with the permission of the Assistant Collector (Sub Divisional Officer) in accordance with S 111 of the U P Zamindari Abolition and Land Reforms Act 1950 After the exchange the petitioner continued in possession over plot No 401 and S/Sri Dongar, Chhajan and Rati Ram continued to be in possession over plot No 477/1 The names of the parties were recorded in the revenue papers in accordance with exchange as a result of which the petitioner's name was recorded over plot No 401 The petitioner got plot No 401 in exchange for the purpose of using the same as Sahan and later on as abadi site as the plot was quite adjacent to the petitioner's house which was on plot No 401/2 It appears that the plot No 401 had special utility to the petitioner and as such she gave larger area in exchange

3. Subsequently the proceedings under the U. P. Consolidation of Land Holdings Act 1953 were taken in the village. On 21-3- averred that this was inadequate At least the State did not lead any evidence The tenure-holder was required to prove that consideration was adequate He could not prove the negative

3. Similarly, there is no merit in the submission of the learned counsel for petitioners that the strength of family for purposes of S 5(3)(b) has to be found out on the date of issue of notice u/s 10 or on the date of determination of ceiling area. Section 5(1) lays down that on and after commencement of the Act no tenure-holder shall be entitled to hold land in the aggregate throughout Uttar Pradesh, any land in excess of ceiling area applicable to him The Act came into force on 8th June 1973 On and after this date land in excess of ceiling area cannot be held Then the ceiling area has to be computed as provided in various sub-sections of S 5 Sub-section (3) provides that ceiling area of tenure-holder having family of not more than five members shall be 7 30 hectares In certain contingencies contemplated in the sub-section a tenure-holder is entitled to a maximum of 6 hectares One of the circumstances in which additional hectares can be granted is if the members of family exceed five But this has to be considered on the date from which petitioner is not entitled to hold land in excess of ceiling area Sub-sections (3) and (1) have to be read together Otherwise, it would create anomaly, and the date on and after which land cannot be held in excess shall become the date of notice or the time when determination is done This would be contrary to the Act as sub-s (3) itself does not provide any date or time

4. In the result both petitions fail and are dismissed Parties shall bear their own costs

Petitions dismissed

1981 ALL. L. J. 985

K N SINGH, J

Smt Onkar Kaur, Petitioner v Board of Revenue and others, Respondents

Writ Petn No 3984 of 1976, D/- 25-11-1980

(A) U. P. Consolidation of Holdings Act (5 of 1954), S. 49 — Bar of jurisdiction — Order allowing exchange of plots set aside by

1964 the petitioner made an application before the Consolidation Officer, raising objection on the proposed valuation of the plot She asserted that the plot was adjacent to her residential house and she had been using the plot for keeping her cattle and for using the same for non-agricultural purposes She further asserted that the plot had special value to her and for that reason she had got the same in exchange by giving an area double in size to previous owner The She requested that the plot No 401 be earmarked as abadi and a proportionate land on valuation may be adjusted from her chaks Her application was allowed by the Settlement Officer, Consolidation by his order dt 15-5-1964. In pursuance of that order, the Consolidation Officer by his order dt 9-3-1966 modified the statement of proposals and directed that the plot No 401 be left to the petitioner as the land was appurtenant to her building. One Chhetrapal filed appeal against the order of the Consolidation Officer The Settlement Officer Consolidation by his order dt 12-4-1966 rejected the appeal firstly on the ground that the petitioner had been in continuous possession over the plot No 401 and that she had been using the same for her domestic purpose if the said plot was allotted to anyone else, there will be constant trouble and dispute Secondly the appeal was dismissed on the ground that Chhetrapal was not at all affected by the order of the Consolidation Officer and as such he had no locus standi to maintain the appeal Chhetrapal thereupon preferred a revision u/s 48 of the Act against the order of the Settlement Officer, Consolidation The Deputy Director of Consolidation by his order dt 13-9-1966 modified the order of the subordinate authorities and directed that the plot No 401 shall be deemed to be Bachat land and the allotment of the same in favour of the petitioner shall stand modified

4. The effect of the order of the Deputy Director was that the plot No. 401 was earmarked for Gaon Samaj The petitioner did not challenge the order of the Deputy Director instead she initiated exchange of plot No 401 with Gaon Samaj The Gaon Samaj agreed to exchange the plot No 401 with petitioner's plots Nos 587, 288, 289 and 294 having an area of 32 acre Under the agreement the petitioner agreed to offer a larger area of agricultural land to the Gaon Samaj in exchange for plot No. 401 which was of special utility to her The petitioner made an application under S 53 of the Act before the Settlement Officer, Consolidation for giving effect to the said exchange. The Settlement Officer by his order dt 21-1-1967 allowed the exchange. In pursuance of the order of the Settlement Officer, Consolidation, the petitioner took possession of the plot in dispute and handed over the possession of plots Nos. 288, 289, 294 and 587 to the Gaon Samaj On completion of the consolidation operation the State Government issued notification on 20-2-1967 under S 52 of the Act de-notifying the village in question Much later thereafter i.e. on 12-7-67 Chhetrapal made an application before the Deputy Director for setting aside the order of the Settlement Officer, Consolidation dt 21-1-67 permitting the exchange The Deputy Director by his order dt 29-11-67 set aside the order of the Settlement Officer, Consolidation dt 21-1-67.

5. The petitioner thereupon filed a suit before the revenue court under S. 229-B of the U. P Z A. & L. R Act 1950 for declaration that she continued to be the Bhumidhar of plot No 160 (old No. 401) The suit was contested by the State of U. P and the Gaon Samaj. The trial court decreed the suit by its order dt. 22-9-69. No appeal was filed against that order although an appeal lay against that order. At the instance of the unsuccessful party, Chhetrapal who had been making persistent efforts, to deprive the petitioner of the plot in dispute and who was not even a party to the suit made an application in revision before the Commissioner for setting aside the judgment and decree of the trial Court The State of Uttar Pradesh also filed an application in revision The additional Commissioner made a recommendation to the Board of Revenue for allowing the revision and setting aside the order of the trial Court The Board of Revenue accepted the reference, by its order dt 15-7-66 and it set aside the order of the trial Court Aggrieved, the petitioner has approached this Court by means of this petition under Art. 226 of the Constitution

6. The Board of Revenue held that the petitioner's suit was not maintainable in view of S 49 of the U. P. Consolidation of Land Holdings Act 1953. It further held that the Revenue Court had no jurisdiction to set aside orders of the consolidation authorities Learned Counsel for the petitioner has challenged the findings of the Board of Revenue He urged that orders passed by the consolidation authorities in excess of their jurisdiction are not final and binding on the parties and it is always open to an aggrieved person to challenge the same before the

appropriate Court and in that event bar of S 49 will not be applicable He further assailed the observation made by the Board of Revenue that the suit could not be filed before the Revenue Court, instead it could be filed before the Court

7. Section 49 lays down that declaration of rights of tenure-holders in respect of land shall not be questioned by means of any suit or proceeding in any Court of law The section imposes bar against the filing of a suit challenging or questioning the decision of the consolidation authorities given during the proceedings taken under the Act No suit or proceeding is, therefore, maintainable against the order of consolidation authorities The bar, however, would come into play only when the order is with jurisdiction If consolidation authorities passed orders without jurisdiction, in that event the bar as contained in S 49 will not be applicable The petitioner filed the suit for declaration on the ground that the order passed by the Settlement Officer, Consolidation on 21-1-1967 had become final and the Deputy Director had no jurisdiction to set aside that order after the village was de-notified This premise was well founded as the Settlement Officer, Consolidation had passed the order on 21-1-67 whereas the Deputy Director interfered with that order in July 1967 although the village had already been de-notified on 22-2-1967 There is no dispute that no proceedings were pending between the parties on the date of issue of the notification u/s 52 of the Act The Deputy Director set aside the order of the Settlement Officer, Consolidation at a time when he had ceased to have jurisdiction Counsel for the respondents have failed to point out any provision of the Act under which the Deputy Director could assume jurisdiction to set aside the order of the Settlement Officer, Consolidation, after the village was de-notified It is thus evident that the Deputy Director did not act with jurisdiction in setting aside the order of the Settlement Officer, Consolidation In this view of the matter the bar of S 49 was not applicable and the petitioner's suit was maintainable

8. Learned counsel for the petitioner brought to my notice the averments contained in the petition to the effect that the Deputy Director had failed to give any opportunity of hearing to the petitioner before passing the order dt 29-11-1967 The averments contained in the petition to this effect are not denied On perusal of the order of the Deputy Director itself, it is clear that on the application of Chhetrapal a reference was made by the Settlement Officer, Consolidation to the Deputy Director for setting aside his earlier order dt 21-1-67 It appears that even though the Settlement Officer, Consolidation had given opportunity to the petitioner but no notice or opportunity was given by the Deputy Director to the petitioner before passing the order dt 27th Nov, 1967 While making a reference u/s 48 (3) the Settlement Officer is required to give opportunity to the parties The Deputy Director decides the same in accordance with the provisions of S 48 (1) of the Act which clearly lays down that no order shall be passed unless parties are given opportunity of hearing On the admitted facts of the case, it is evident that the Deputy Director had not given any opportunity of hearing to the petitioner before passing the order dt 27-11-67 The order was thus passed in violation of the principles of natural justice and for that reason also the order of the Deputy Director is null and void In this view, the order of the Deputy Director could not operate as a bar to the filing of the suit

9. The Board of Revenue's observation that the petitioner's remedy lies before the Civil Court and not before the Revenue Court is wholly misconceived The petitioner was claiming declaration of Bhumidhari rights in respect of the plots in dispute, obviously such a suit could not be filed before the Civil Court u/s 331 of the U P Z A & L R Act A suit for declaration of rights in respect of agricultural land is cognizable by the Revenue Court and not by Civil Court The Board of Revenue committed patent error in making observation that the order of the Deputy Director, Consolidation could not be set aside by the Revenue Court The petitioner had not filed her suit for setting aside the order of the Deputy Director, Consolidation instead she had claimed relief for declaration of her right on the basis of the order of the Settlement Officer, Consolidation which had been set aside by the Deputy Director of Consolidation in an unauthorized manner

10. For the reasons stated above, I hold that the petitioner's suit was maintainable and the Board of Revenue committed patent error in setting aside the judgment and decree of the trial Court on the ground that the petitioner's suit was barred by S 48 of the Act The matter, however, requires further consideration by the Board of Revenue on other grounds raised by the respondents In

the result I allow the petition and quash the order of the Board of Revenue dt. 15-7-1976 and direct it to dispose of the case in accordance with law, and in the light of the observation made in this judgment Parties shall bear their own costs

Petition allowed

1981 ALL. L. J. 988

(LUCKNOW BENCH)

K N GOYAL, J

M/s Asian Cables Corporation Ltd., Applicant v State of U P and others, Respondents

Civil Revn No 460 of 1978, D/- 16-1-1980

Arbitration Act (10 of 1940), Ss. 31, 5, 9 and 33 — Cause of action not arising at Lucknow — Party to be sued viz., Government Industries Secretary stationed at Lucknow — Application under Ss. 5, 9 and 33 could be entertained in Lucknow Court. (Civil P. C. (1908), S. 20).

Although no part of the cause of action arose at Lucknow and the Director of Industries appointed the sole arbitrator for the dispute at Kanpur, the Officer to be sued viz., the Industries Secretary of the Government being stationed at Lucknow, which was also the Headquarters of the State of U P, the Government should be held to 'carry on business' within the meaning of S 20, C P C at Lucknow and the Court at Lucknow had the jurisdiction to entertain an application under Ss 3, 9 and 33, Arbitration Act AIR 1963 S C 1681 and (1977) 2 W L R 450, Foll (Paras 3 & 4)

Cases Referred : Chronological Paras

(1977) 2 W L R 450 (1977) 1 All E R 813 Town Investments Ltd v Department of Environment 3
AIR 1963 S C 1681 3

ORDER :— This revision is directed against an order of the Civil Judge, Lucknow dated 1-2-1978 returning the application of the petitioner under Ss 5, 9 and 33, Arbitration Act for presentation to the proper Court This application was given because of the appointment of a sole arbitrator by the Director of Industries, Uttar Pradesh in connection with a dispute with the petitioner The contention of the petitioner was that there was no arbitration agreement and as such the appointment of arbitrator was invalid. On behalf of the State a preliminary plea was taken that no part of the cause of action arose within the jurisdiction of the Lucknow Court It was also contended that the appointment of arbitrator was made by the Director of Industries not at Lucknow but at Kanpur. The learned Civil Judge agreed with this contention raised on behalf of the Government.

2. It is not disputed that no part of the cause of action arose in Lucknow district The only question that arises for consideration is whether the application of the petitioner could be filed at Lucknow on the ground that the Headquarters of the State Government of U. P were situated at Lucknow

3. The learned Civil Judge has placed reliance on Union of India v Ladu Lal Jain (AIR 1963 S C 1681) In para 7 of this report their Lordships observed as follows

"The expression 'voluntarily resides or personally works for gain' cannot be appropriately applied to the case of the Government The Government can however carry on business. The mere fact that the expression, carries on business, is used along with the other expressions, does not mean that it would apply only to such persons to whom the other two expressions regarding residence or of personally working for gain would apply."

The learned Civil Judge has quoted only the first sentence out of this paragraph He has ignored the rest. It is true that the Government cannot be said to reside or work for gain, but the Government, as held by the Supreme Court, can carry on business In the particular case their Lordships were considering a commercial activity (running of railways) carried on by the Government and the suit was held to lie in the Court within whose jurisdiction the headquarters of the railway were situate In Town Investment Ltd v. Department of Environment, (1977) W L R 450, the House of Lords has, in the context of business tenancies, construed the expression "business" as including the business of Government. There seem therefore, no doubt that the State Government, which had to be sued through its Industries Secretary stationed at Lucknow does carry on the business of Government at Lucknow, and as such could be sued at Lucknow. Accordingly, under S 31 of the

Arbitration Act the application could be filed at Lucknow

4. I, therefore, hold that the Lucknow Court did have jurisdiction The revision is accordingly allowed and the order dated 1-2-1978 passed by the learned Civil Judge is set aside The Court below shall now proceed with the hearing of the case on merits No order as to costs

Petition allowed

1981 ALL. L. J. 989

C S P SINGH, J

Smt Krishna Devi, Applicant v Shobha Chandra, Opposite Party

Civil Revn No 2217 of 1977, D/- 8-1-1980 *

(A) Provincial Small Cause Courts Act (9 of 1887), S. 17 (1) Proviso — Decree not prepared and amount due under judgment worked out by Court office at particular figure — Half of amount deposited and for rest security given by defendant as ordered by Court — Held, there was compliance with proviso — Fact that larger amount was found due on re-investigation did not change position as judgment that stood did not specifically set out exact amount.

(Para 4)

(B) Provincial Small Cause Courts Act (9 of 1887), S. 17 (1) Proviso — Deposit and security — Whether must remain intact till disposal of suit.

Although the proviso to S 17 (1) has been incorporated to protect the interest of the decree holder, its language does not justify the contention that the amount deposited or the security furnished should remain lying in the court till such time that the suit is disposed of The deposit and the security under the proviso have to remain intact during the pendency of the application for setting aside the ex parte decree In case the application for setting aside the ex parte decree is dismissed the amount deposited will be adjusted towards the decree and the security furnished enforced for the same purpose In the event of the decree being set aside the purpose of the deposit and the security comes to an end, for there is no decree left to be satisfied and the defendant is free to withdraw this amount

(Para 5)

S C Tripathi, for Applicant, S M Dayal, for Opposite Party.

ORDER :— The plaintiff is the applicant in this revision He had filed a money suit and an ex parte decree was passed on the 2nd December, 1975 The defendant moved an application under O IX R 13, Civil P C on the very day on which the ex parte decree was passed. In the application he alleged that he was a monthly tenant of the premises on a rent of Rs 5/- per month, and that he had deposited the entire rent due up to the 30th June, 1975 at that rate in the Court of the Munsif, Kanpur It was prayed that rent for the period subsequent thereto at the rate of Rs 5/- per month be permitted to be deposited by him and that he may be allowed to furnish security for the balance of the decretal amount It appeas that by that time the decree had not been prepared, and the office made a tentative report that an amount of Rs 904 25 was due to the plaintiff, and should be deposited by the defendant in view of S 17 of the Provincial Small Cause Courts Act On the basis of this report the Court ordered that half amount be deposited in the Court and security be given for the rest This was done by the defendant When the application came up for final disposal it was found that deposit made by the defendant was insufficient The Munsif, however, allowed the application by recourse to S 151, C P C, on the view that the deficiency had occurred on account of the wrong report of the office and as such the defendant should not be penalised for making a short deposit The plaintiff's revision against this order failed

2. Counsel for the plaintiff-applicant has urged that it was incumbent on the defendant to comply with the provisions of S 17, Small Cause Courts Act, and inasmuch as the defendant had made a short deposit, the Court had no jurisdiction to set aside the ex parte decree It was also urged that inasmuch as the defendant had withdrawn the amount after the ex parte decree had been set aside, before the disposal of the suit the Courts below were in error in setting aside the ex parte decree It was also urged that the security furnished by the defendant not being

*Against judgment and decree of H C. Lal, Addl Dist J. Kanpur, D/- 26-5-1977

a registered one should not have been accepted by the trial Court

3. Coming to the first contention. The proviso to S 17 Small Cause Courts Act may be extracted —

"17 (1) The procedure prescribed in the Code of Civil Procedure, 1908, shall, save in so far as is otherwise provided by that Code or by this Act, be the procedure followed in a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits

Provided that an applicant for an order to set aside a decree passed ex parte or for a review of judgment shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give such security for the performance of the decree or compliance with the judgment as the Court may on a previous application made by him in this behalf, have directed

(2) Where a person has become liable as security under the proviso to sub-s (1), the security may be realized in manner provided by S 145, Civil P C, 1908"

4. A reading of this proviso shows that at the time of presenting the application for setting aside the ex parte decree the applicant has to deposit the amount due under the decree, or, in pursuance of the judgment, or to give security for the performance of the decree, in accordance with the directions of the Court obtained earlier In the present case the decree had not been prepared, and as such the defendant had either to deposit the amount due from him in pursuance of the judgment, or, give such security for compliance with the judgment as the Court directed The Court, as has been seen, accepted the defendant's application for depositing half of the amount due under the judgment and accepting security for the remainder The amount due under the judgment had been worked out by the office of the Court at a particular figure, and the defendant deposited half of that amount and gave security for the rest This satisfied the requirement of the proviso, at the time when the application for setting aside the decree was made The fact that a larger amount was due under the judgment when the matter was re-investigated, will not affect the position, as the judgment that stood did not specifically set out the exact amount which the defendant had become liable to pay as a result thereof The amount payable in pursuance of the judgment could have been calculated by the defendant and equally so by the ministerial officials of the court who prepare decrees The defendant acted prudently in relying on the figures calculated by the decree clerk of the Court It cannot, in these circumstances be held that the defendant had not given security for the compliance of the judgment Thus, the application for setting aside the ex parte decree was properly made

5. The second contention is without substance The amount deposited by the defendant and security furnished remained intact till such time that the ex parte decree was not set aside It is only after the ex parte decree had been set aside that the amount and the security were withdrawn Although the proviso has been incorporated in S 17 to protect the interest of the decree holder, but its language does not justify the contention that the amount deposited or the security furnished should remain lying in the Court till such time that the suit is disposed of The deposit and the security under the proviso have to remain intact during the pendency of the application for setting aside the ex parte decree In case the application for setting aside the ex parte decree is dismissed the amount deposited will be adjusted towards the decree and the security furnished enforced for the same purpose. In the event of the decree being set aside the purpose of the deposit comes to an end, for there is no decree left to be satisfied and the defendant is free to withdraw this amount Counsel urged that this Court had passed an order restraining the defendant from withdrawing the amount or the security at the time when this revision was admitted Without deciding as to whether the defendant committed a breach of the direction of this Court, the withdrawal would not affect the validity of the application, for the deposit and the security have to be maintained in case where the application is allowed, only till such time that the application is not decided in favour of the defendant

6. The third contention cannot be considered in this revision, for the revisionist has not challenged the order accepting the security furnished by the defendant

7. The revision fails, and is dismissed with costs The stay order is discharged

Revision dismissed.

1981 ALL. L. J. 991

H N SETH AND R B LAL, JJ

Bahoran and others, Appellants v State, Respondent

Criminal Appeal No. 1183 of 1979. D/- 14-5-1981

(A) Evidence Act (1 of 1872), S. 3 — Case resting solely on circumstantial evidence — Principles of appreciation of evidence.

In a case resting solely on circumstantial evidence, the principles of appreciation of evidence are that in the first place, the circumstances relied upon must be fully established in cogent and convincing manner Further, the circumstances found proved should show that within all human probabilities the crime was committed by the accused, and that such circumstances should be inconsistent with an inference of innocence of the accused The above circumstances are to be judged in the light of these principles (Para 14)

(B) Evidence Act (1 of 1872), S. 27 — "Fact discovered" — Statement of accused distinctly relating to object produced, the place from where it was recovered and knowledge of accused about its location — Statement is admissible in evidence.

The words "fact discovered" used in S 27 have been held to mean not only the object produced but also to embrace the place from which the object was produced and the knowledge of the accused about its location The information relating distinctly to this fact understood in the aforesaid larger perspective, is admissible in evidence Only information as to past user or the past history of the object produced is not admissible in evidence as it does not relate to the discovery of the object produced 1960 All L J 733 (S C) Foll (Para 39)

(C) Evidence Act (1 of 1872), S. 30 — Confession — Test to determine whether a statement is a confession.

To determine whether a statement is a confession or not, the test is to see whether it is sufficient by itself to support the conviction of the person making it, of the offence for which he is being jointly tried with other persons against whom the statement is tendered A statement which is incriminatory in nature, but is not by itself sufficient to form the basis of conviction for an offence, cannot be regarded as a confession AIR 1978 S C 1025 Foll (Para 49)

(C) Evidence Act (1 of 1872), S. 30 — Confession by co-accused affecting himself and other co-accused — Evidentiary value.

Section 30 does not enlarge the scope of S 27 A confession by a co-accused cannot be made the foundation of conviction of the other co-accused It can be pressed into service only when the Court is inclined to accept other evidence against the co-accused, and feels the necessity of seeking for an assurance in support of its conclusion deducible from other evidence AIR 1964 S C 1184 Foll (Para 49)

(E) Evidence Act (1 of 1872), S. 10 — Proof of existence of conspiracy — Actual proof of conspiracy is not required — It may be proved from surrounding circumstances and conduct of accused. (Penal Code (1860), S. 120A).

The condition precedent for the application of S 10 is that there should exist a reasonable ground to believe that two or more persons have conspired together to commit an offence Actual proof of conspiracy is not required; even some prima facie evidence leading to a reasonable belief that two or more persons had conspired together is sufficient So also conspiracy need not be proved by direct evidence The same may be proved from the surrounding circumstances and conduct of the accused (Para 51)

(F) Evidence Act (1 of 1872), S. 10 — "Anything said, done or written" — When acts done by co-conspirators as appearing from their statements were relevant against other conspirators even though their statements were not relevant — Instance.

In the instant case, the circumstances established were leading to a reasonable belief that the accused had conspired together to commit the murder Statements were made by the co-conspirators before the Investigating Officer that they had concealed the dead body of the deceased and the weapon with which the head of the deceased was severed, at a particular place

Held that the statements were not covered by the expression "anything said" But the acts done by the co-conspirators as appearing from their statements i e concealment of the dead body and the bloodstained weapon can

be taken into consideration as a relevant fact against other conspirators (Para 51)

(G) Penal Code (45 of 1860), S. 120-A — Criminal conspiracy — Very fact of conspiracy constitutes offence — It is immaterial whether anything has been done in pursuance of conspiracy. AIR 1956 S C 469 Foll. (Para 56)

(H) Penal Code (45 of 1860), S. 120-A — Criminal conspiracy — It is separate offence and separate sentence can be passed for it — It is not merely a principle of constructive criminal liability as is to be found under S. 34 or S. 149. AIR 1960 S C 661 and AIR 1970 S C 45, Foll. (Para 58)

(I) Penal Code (45 of 1860), Ss. 302, 149 — Scope — All accused charged with offence of murder under S. 302 read with S. 120-B — Section 149 not called in aid — Circumstances not sufficient to lead to conclusion that the accused had actually committed murder — Whether accused can be held guilty of offence of murder under S. 302 read with S. 149.

All the accused were charged with the offence of murder under S 302, I P. C simpliciter Section 149, I P C, was not called into aid to charge the accused with the offence of murder Circumstances were not sufficient to lead to the conclusion that all the accused had actually committed the murder Some of the accused might have actually committed the murder while others aided and helped them in doing so The circumstances relied upon did not help in fixing the identity of those accused who actually committed the murder The first charge clearly indicated to all the six accused that they had agreed before the day of occurrence to commit the murder The second charge indicated that they had committed the murder in pursuance of the aforesaid criminal conspiracy

Held that S 149, I. P C, can be invoked to hold the accused guilty of the offence of murder and this would not be taken to cause any prejudice to the accused because they had full notice of the relevant ingredients which were incorporated in the charges. Section 464, Cr P. C, can also be invoked to cure the omission of framing a charge under S 302 read with S 149 by the lower court. (Paras 62, 69)

In the instant case, the charge under S. 120B, I. P. C., had all the ingredients of the definition of unlawful assembly under S 141, I. P. C Section 149 lays down the principle of constructive criminal liability The ingredients of first part of S. 149 are to be found in the second charge relating to the offence of murder though S 149 was not specifically mentioned. There is no difference between the common object and the common intention Thus, all the ingredients of S 149 were also implied in the second charge read in the light of the first charge 1955 All L J 429 (S C) and AIR 1958 All 255, Distng (Paras 67, 68)

Cases Referred : Chronological Paras

AIR 1980 S C 439 1980 Cri L J 388 59
AIR 1980 S C 1382 1980 Cri L J 965 59
AIR 1978 S C 1025 1978 Cri L J 968 49
AIR 1970 S C 45 1970 Cri L J 9 57
AIR 1965 S C 682 1965 (1) Cri L J 608 59
AIR 1964 S C 1184 1964 (2) Cri L J 344 49
AIR 1960 S C 661 1960 Cri L J 1013 57
1960 All L J 733 AIR 1960 S C 1125 1960 Cri L J 1504 39, 43
AIR 1958 All 255 · 1958 Cri L J 424 70, 74
AIR 1956 S C 469 1956 Cri L J 831 56, 57
1955 All L J 429 AIR 1955 S C 419 1955 Cri L J 1004 70, 71, 73, 74
1954 All L J 209 AIR 1954 S C 204 67

Viresh Misra, for Appellants.

R. B. LAL, J. :— Bahoran, Amar Singh, Sompal Singh, Ram Kumar, Birbal and Karan Singh preferred this appeal against the order dated 30-3-1979 passed by Sri G. L. Tandon, 4th Additional Sessions Judge, Moradabad. All the six appellants were convicted for an offence under S 302, I P C., read with S 120B I P. C., and each of them was sentenced to undergo imprisonment for life Sompal Singh and Amarsingh were further convicted for an offence under S 201, I P C, and sentenced to undergo rigorous imprisonment for two years each

2. All the appellants were residents of village Mandua, within P. S Kud Fatehgarh district Moradabad. Five of these appellants were related inter se Karan Singh appellant was on friendly terms with the remaining appellants. These appellants were working as labourers on the fields of Jodha Singh (deceased) who was also a resident of village Mandua Jodha Singh was a strict taskmaster and treated the appellants with strictness. The appellants were putting up with this treatment of the deceased because they were indebted to him Three or four days before the incident, the deceased had given some slaps to Ram Kumar.

3. On 11th June, 1978 Jodha Singh had asked the appellants to load sugarcanes in his trolley so that the same may be taken to sugar mills The appellants said that they would do the loading after dinner Jodha Singh, his brother Vijat Singh and his son Yeoraj Singh (P W 1) went to sleep at their dalan. At about 1 30 A M in the night the six appellants came and woke up Jodha Singh and said that they were ready to load sugarcanes in the trolly Jodha Singh, Yeoraj Singh and the six appellants went to the sugarcane field which lay in village Nameni Udha. to do the loading Jodha Singh also took his tractor and trolley to the field for the purpose When the appellants started loading sugarcanes, Jodha Singh lay himself on sugarcane leaves at a nearby place and Yeoraj Singh went away to the tubewell which was about one furlong away In the morning from the tubewell Yeoraj Singh went to his house He did not care to find out about his father because he presumed that he (Jodha Singh) must have taken sugarcanes to Bilari Sugar Mills

4. On 12-6-1978 at about 5 A M Kuber Singh (P W 9) found the tractor of Jodha Singh coming from the side of village Mandua driven by Amar Singh appellant The remaining appellants were also sitting on the tractor The tractor got struck up in mud at some distance from village Sarthal Ram Kishore (P W 4) proceeded from village Sarthal to village Mandua at about 4 P M on 12-6-1978. and found the tractor of Jodha Singh stuck up in mud and abandoned He conveyed this information to Yeoraj Singh Yeoraj Singh and some others went to that place and took out the tractor They looked around for Jodha Singh, but could not find him Yeoraj Singh brought back the tractor and then proceeded to the sugarcane field and found that the trolley laden with sugarcanes was standing in the field Blood was found lying in the sugarcane field of Mohan Jatav. That place was about 200 yards from the trolley Jodha Singh was not found in the jungle Yeoraj Singh went back to his house and prepared a written report and handed it over at the police outpost Nareli at 10 P M

5. Srj Mata Din Yadav, Sub Inspector Incharge of Police Outpost, Nareli (P W 16) took up investigation of this case He reached village Mandua at about 2 A M in the night and searched the appellants at their houses but they were not available Thereafter he went to the sugarcane field and found blood on a heap of sugarcane leaves in the field of Mohan Jatav He also found a bloodstained brick with some hair and pieces of bones in that field He took all these articles in his possession and made them into a sealed bundle At about 8 A M. on 13th June, 1978 a special informer informed the Investigating Officer that Sompal Singh accused was going towards the fields of village Ibrahimpur The Investigating Officer along with Mohan Singh (P W 3) and Makhan Singh proceeded to arrest Sompal Singh Thus appellant was arrested at a distance of one and a half or two furlongs from the field of Mohan Jatav On interrogation Sompal Singh told the Investigating Officer about the dead body of Jodha Singh and said that he could do Nishandahi of the place where the dead body was concealed This appellant led the Investigating Officer and the public witnesses to a place near the well in the field of Lalji and brought out headless dead body from under a heap of sugarcane leaves, which was lying near the well Mohan Singh identified the headless dead body to be that of Jodha Singh Yeoraj Singh and the members of the family of Jodha Singh also came from the village and identified the headless dead body to be that of Jodha Singh They also identified the clothes which the dead body was wearing The dead body was wearing a shirt, a baniyan and an underwear A pajama was lying over the headless dead body There was blood in the sugarcane leaves The bloodstained pajama was sealed in a bundle The inquest report and other papers were also prepared in respect of the headless body

6. When the Investigating Officer was busy in preparing the inquest report, some constables brought Amar Singh appellant under arrest The Investigating Officer interrogated Amar Singh in the presence of Ajay Vir Singh (P W 5) and Tika Ram, and Amar Singh offered to point out the gandasa which was used to murder Jodha Singh Amar Singh took the Investigating Officer and the public witnesses to a heap of sugarcane leaves in the field of Mohan Jatav and took out a bloodstained gandasa (Ex V) from under that heap The gandasa was also sealed

7. The Investigating Officer interrogated Yeoraj Singh some other witnesses and the witnesses of recovery While he was going back, he found two appellants Bahoran and Birbal sitting at a tea stall at bus stand Nareli These appellants tried to run away, but were arrested Eight bundles and the four arrested persons were taken to police Outpost Nareli at 4 P M. on 13-6-1978

8. The post-mortem examination on the headless dead body of Jodha Singh was performed by Dr V K Sinha (P W 15) on 14-6-1978 at 12 O'clock noon The Investigating Officer completed the investigation and submitted charge sheet against all the six appellants on 29-6-1978 By then Ram Kumarand Karan Singh had not been arrested

9. Ram Kumar surrendered in the court of the Chief Judicial Magistrate, Moradabad on 3-7-1978. Sri Mahipal Singh Sub Inspector incharge of Police Outpost Nareli (P W 18) came to know about this surrender on 11-8-1978 and interrogated Ram Kumar in jail and Ram Kumar offered to point out the head of Jodha Singh The Sub Inspector took Ram Kumar on police remand and on 16-8-1978 Ram Kumar pointed out a skull in a pit covered with sugarcane leaves in the sugarcane field of Dhokal Singh, in village Nameni Udia This recovery was made in the presence of Maksoon (P W 12) and Bhikam Singh The inquest report of the skull was prepared and it was sealed and sent for post-mortem examination which was performed by Dr S K Sharma on 17-8-1978 at 6 P. M Karan Singh also surrendered in court later on.

10. The appellants denied that they were working as labourers of Jodha Singh and were indebted to him They also denied the other prosecution allegations and alleged false implication Sompal Singh denied having made Nishandahi of the headless dead body and Amar Singh denied having pointed out the bloodstained gandasa to the Investigating Officer Ram Kumar denied having pointed out the skull to the Investigating Officer

11. The appellants did not adduce any evidence in defence Dr. S K Sharma had stated that the skull was that of a male, but it was not possible for any one to say whose skull it was Hence, the Trial Judge excluded the evidence of the recovery of the skull from consideration He accepted the remaining evidence adduced by the prosecution as correct and convicted and sentenced the appellants as stated above

12. Ram Kumar appellant was reported dead and his appeal was abated by an order dated 19-12-1980 passed by the Bench of H N Kapoor and M P. Saxena JJ.

13. This case rests solely on circumstantial evidence. The circumstances on which the prosecution placed reliance to bring the guilt home to the appellants were not set out by the Trial Judge in his judgment, but the same may be enumerated as under :

1 Five accused were related inter se and the sixth, namely Karan Singh was friendly with them All the six accused were working as labourers on the fields of Jodha Singh deceased The treatment of the deceased towards the six accused was harsh. Three or four days before the murder the deceased had slapped Ram Kumar accused for not working properly.

2 On the evening of 11th June, 1978 the deceased had asked all the six accused to load sugarcane on his trolley so that the sugarcanes may be taken to Bilari Sugar Mills The accused replied that they would come after taking meals. All the six accused actually came to the dalan where the deceased, his brother Vijay Singh and son Yuvaraj Singh were sleeping at about 1 30 a.m. on the night between the 11th and 12th June, 1978 and told the deceased that they were ready to load the trolley The deceased took his tractor and trolley to his sugarcane field situated in the jungle of village Nameni Udiya, accompanied by all the six accused

3 Yuvaraj Singh (P W. 1) son of the deceased, who had also accompanied the deceased, saw that all the accused started to load the trolley with sugarcanes and the deceased lay down on sugarcane leaves at a short distance from the trolley.

4 Kuber Singh (P. W. 9) of village Sarthal saw all the six accused going on the tractor of Jodha Singh in the outskirts of village Sarthal on 12-6-1978 at about 5 a m. Amar Singh accused was driving the tractor, and on enquiry he informed Kuber Singh that Jodha Singh was present in village Tanda and had called for the tractor there. After proceeding some distance the tractor got stuck up in marshy mud. The sugarcane loaded trolley was not with the tractor and the deceased was also not present on the tractor

5. On 12-6-1978 at about 5 p m. Ram Kishore (P. W. 4) saw the stuck up tractor of Jodha Singh and he came to village Mandua (to which the deceased belonged) and informed Yuvaraj Singh (P W 1) about it

6 Yuvaraj Singh and others went to salvage the tractor. He searched for Jodha Singh, but he was not to be found

7. On 13-6-1978 at 5 p m the Investigating Officer went to the sugarcane field of the deceased and found the loaded trolley

standing in the field At a distance of about 200 yards from the trolley in the sugarcane field of Mohan Jatav, there was a heap of sugarcane leaves which had bloodstains A brickbat stained with blood and having hair and some bloodstained pieces of bones were also found there Blood was also found on the earth There was no trace of Jodha Singh

8 The deceased was done to death at about 3 30 or 4 a m on 12-6-1978 in the field of Mohan Jatav at a distance of about 200 yards from the place where sugarcanes were loaded in trolley in the field of the deceased

9 Murder must have been committed by a number of persons It could not be committed by one or two persons alone The head was severed from the trunk and the headless body was concealed at a distance of about 200 yards from the field of Mohan Jatav and the head was concealed at some other place

10 None of the accused reported on duty the next day, i e on 12-6-1978 On the night between the 12th and 13th June, 1978 at about 2 a m the Investigating Officer searched the accused at their houses in village Mandua but they were not available Two of them namely Ram Kumar and Karan Singh could not be arrested for a long time and surrendered in court in July and Aug . 1978, respectively

11 On 13-6-1978 at about 8 a m the Investigating Officer arrested Sompal accused from the rasta leading to Ibrahimpur and this accused informed the Investigating Officer (P W 16) in the presence of Mohan Singh (P. W. 3), that they had concealed the dead body of Jodha Singh under a heap of sugarcane leaves near the well in the field of Lalji Morao of village Ibrahimpur and thereafter Sompal accused took the Investigating Officer and witnesses to a place near the said well which was about 200 yards away from the field of Mohan Jatav and pointed out a headless body from under a heap of sugarcane leaves The body was of Jodha Singh and was identified by its built and the clothes which it was wearing and a green pyjama which was lying over the dead body All these clothes were bloodstained and there were bloodstains as well inside the heap of sugarcane leaves

12 On 13-6-1978 at about 11 a m some constables brought Amar Singh accused under arrest and the accused told the Investigating Officer (P W. 16) in the presence of Ajay Vir Singh and others that the gandasa with which the head of Jodha Singh was severed had been concealed by him under a heap of sugarcane leaves in the sugarcane field of Mohan Jatav, and thereafter, Amar Singh accused pointed out the bloodstained gandasa (Ex V) from under a heap of sugarcane leaves lying in the south-eastern corner of the field of Mohan Jatav This place was about eight or ten paces from the place where the bloodstained brickbat and other articles were found

13 On 16-8-1978 a skull was recovered by the Investigating Officer on the pointing out of Ram Kumar accused

14 The serologist found that the gandasa, the bloodstained brickbat with hair, the pajama which was lying over the headless body of the deceased and the two samples of patai (sugarcane leaves) were all stained with human blood of group 'O' The blood group of the deceased was 'O'

14. In a case resting solely on circumstantial evidence, the principles of appreciation of evidence are that in the first place, the circumstances relied upon must be fully established in cogent and convincing manner Further, the circumstances found proved should show that within all human probabilities the crime was committed by the accused, and that such circumstances should be inconsistent with an inference of innocence of the accused The above circumstances are to be judged in the light of these principles

15. Although the trial judge did not enumerate the circumstances individually, he considered them and accepted the prosecution evidence with regard to them He did not use the circumstances of recovery of skull against Ram Kumar accused, because it was not possible to identify as to whose skull it was This finding has not been challenged before this Court

16. The learned counsel for the surviving appellants has assailed each and every circumstance and contended that each circumstance was a concoction of the investigating agency He has also questioned the evidence of identity of the headless body He has also emphasised that the clothes, namely, the baniyan, the shirt and the underwear which the dead body was wearing, were not sent for the opinion of the Chemical Examiner and the serologist and, therefore, the finding of the Serologist that certain bloodstained articles bore human blood of 'O' group, was of no consequence

17. Now, we proceed to examine if the various circumstances have been proved by reliable and convincing evidence

18. Five of the accused were related inter se Amar Singh and Ram Kumar accused were sons of Bahoran accused Birbal accused was brother-in-law of Sompal accused Birbal and Amar Singh accused were sarhus inter se Karan Singh was said to be friendly with the remaining accused All the six accused were Jatav by caste and were residents of village Mandua, to which the deceased also belonged These facts were not denied by the defence except that Karan Singh accused had friendship with the remaining accused Yuvaraj Singh son and Vijay Singh brother of the deceased have deposed about the friendship of Karan Singh with the remaining accused persons This evidence is to our mind, worthy of acceptance These witnesses had no enmity with Karan Singh or any other accused and could have no interest in making a false averment Since Karan Singh was of the same caste as the other accused and was residing in the same village and working for the same master, it was natural for him to have developed friendship with the other accused Hence, the first part of circumstance No. 1 stands proved in a convincing manner

19. Yuvaraj Singh, son and Vijay Singh, brother, (P Ws 1 and 2) of the deceased also stated about the second part of circumstance No 1 They did not produce any documentary evidence in support of this part of their case or to show that the accused were indebted to the deceased However, we are inclined to accept the testimony of these witnesses with regard to this part as well It is noteworthy that the defence did not suggest that the deceased was not having any labourers at all, or that some other persons were working as labourers on his fields. The statement of Yuvaraj Singh shows that the deceased had large cultivation which could not be managed without the help of outside labour. The defence did not allege any enmity with the deceased or his son or brother These persons could have no reason to falsely aver that these six accused were working as labourers on the fields of the deceased This fact was mentioned in the report that the treatment of the deceased was harsh towards his labourers and he had also slapped Ram Kumar accused a few days earlier. The expression 'indebted' (Karz tha) used by these witnesses in their depositions was an imprecise and loose expression The first information report shows that the accused persons had taken large amounts as advances from the deceased against the work which they were to do later on for the deceased. This kind of dealing is not uncommon in villages and is resorted to create a moral binding on the workers to work for the particular person making the advance payments No formal document is obtained for such payments and it may be that the deceased had made some informal note about these advance payments and these two witnesses had no knowledge of the same. Having regard to all these facts we take that this part of circumstance No. 1 also stands fully proved

20. The evidence shows that Bahoran accused was working as a labourer for the deceased for the last several years, notwithstanding this, the general harsh conduct of the deceased towards his labourers could cause resentment to Bahoran as well as to the other accused persons Slapping Ram Kumar could heighten that resentment. It may be said that the incident of slapping Ram Kumar or the general harsh conduct could not be strong motive for the accused to commit the murder of the deceased However, it all depends on one's psychic sensitivity

21. There is evidence of Yuvaraj Singh and Vijay Singh P Ws. with regard to circumstance No 2 They were cross-examined at some length regarding this part of the prosecution story, but remained unshaken There is no good reason to doubt or disbelieve these witnesses with regard to this circumstance. It was natural for these witnesses and the deceased to have slept in the same dalan Yuvaraj Singh accompanied his father to the sugarcane field because he had to go to the tubewell which was at a distance of two furlongs. It appears that there was no electricity at the tubewell at about 10 or 11 p.m. and, therefore, this witness thought of going to the tubewell at about 1 30 a.m. The deceased must have been anxious to take sugarcanes to the sugar mills early in the morning before the day became very hot and, therefore, he could agree to proceed to the field at about 1 30 a.m. in the night to get the trolley loaded with sugarcanes. It is not denied that the deceased was having a tractor and a trolley. The deceased himself would have taken the trolley to the sugarcane field, The trolley was found present in the field in the evening of 12-6-1978 by Yuvaraj Singh and others and later on by the Investigating Officer. All these circumstances also go to

support this part of the prosecution case In our opinion this circumstance also stands proved by the cogent evidence of Yuvaraj Singh and Vijay Singh

22. There is solitary testimony of Yuvaraj Singh (P W 1) with regard to circumstance No 3 For the reasons discussed in connection with the preceding circumstance we find the statement of Yuvaraj Singh worthy of reliance with regard to this circumstance We hold that this circumstance stands proved by the testimony of Yuvaraj Singh which is reliable in regard to this circumstance

23. Circumstance No 4 is important, and there is solitary testimony of Kuber Singh (P W 9) with regard to it Village Sarthal is about three miles away from village Mandua Kuber Singh said that at about 5 a m he was returning home from his fields and he saw the tractor of Jodha Singh outside village Sarthal The six accused were sitting on the tractor, and he had a talk with Amar Singh accused who was driving the tractor The tractor got stuck up in marshy mud Thereafter he went home The learned counsel for the appellants has assailed the testimony of this witness as wholly unreliable Kuber Singh is a Thakur by caste His admissions show that there was party bandi and bad blood between the Thakurs and the Jatavas of his village and it had led to criminal proceedings This witness admitted that he was on friendly terms with the deceased who used to visit him off and on The deceased was not a Thakur, he was a Jat However, the fact remains that this witness could have no love lost for Jatavas as there was enmity between the Thakurs and the Jatavas in his village

24. Kuber Singh (P W 9) was interrogated by the Investigating Officer on 18-6-1978, i e about six days after The record does not show how the Investigating Officer came to know that this witness also knew something about the movements of the accused and the tractor of the deceased The story given out by this witness does not sound natural and convincing It also does not fit in with the time of the occurrence Yuvaraj Singh said that it takes about two hours to oad a trolley Since the trolley was found aden, it can safely be concluded that the murder had taken place after the loading was completed The deceased was done to death and beheaded The headless body was concealed at one place which was about 400 yards from the sugarcane field of the deceased The head was concealed elsewhere and if the prosecution version is to be accepted, it (head) was concealed in the field of one Dhokal Singh in the jungle of village Nameni Udia All this would have taken some time After doing all this, the six accused could not be found at 5 a m at a distance of about three miles from village Mandua It also does not seem natural that after committing the murder and disposing of the dead body and the weapon of assault all the six accused would have continued together and proceeded on the tractor of the deceased The impulse of the accused would have been to disperse as early as possible

25. Kuber Singh was nothing but a chance witness He came to know about the recovery of the headless dead body of Jodha Singh on 13-6-1978, but did not go to see the dead body or to contact Jodha Singh's son even though he claims to have been friendly with the deceased In the ordinary course this witness would have met Jodha Singh's son soon after coming to know about the murder of Jodha Singh His failure to do so assumes importance because of his delayed interrogation by the Investigating Officer The name of this witness was not mentioned in the first information report and a good explanation may be given for the same However, the delay in interrogating this witness cannot be ignored

26. Taking into consideration all the facts discussed in the preceding paras, we find ourselves unable to accept the testimony of Kuber Singh We, therefore, hold that circumstance No 4 has not been proved in a satisfactory and convincing manner and this circumstance should be ignored from consideration

27. Ram Kishore (P W 4) has proved circumstance No 5 He is a resident of village Hazrat Nagar Garhi He had gone to Chandausi on 12-6-1978 and on his way back home he got down from the bus at Sarthal From there he proceeded on foot to village Mandua in order to meet his maternal uncle Sohanlal Outside the abadi of the village Sarthal he saw the tractor of the deceased stuck up in marshy mud He reached village Mandua at about 5 p m and conveyed this fact to Yuvaraj Singh (P W 1) Learned counsel for the appellants has taken great pains to show that the testimony of this witness was unworthy of reliance However, we see no good reason to disbelieve Ram Kishore. It appears that in the statements under S 161, Cr P C, the Investigating

Officer mentioned that this witness (Ram Kishore) was related to Jodha Singh deceased Yuvaraj Singh and Ram Kishore both denied this fact Ram Kishore pointed out that he was a Brahman while Jodha Singh was a Jat and, therefore, there could be no question of any relationship between them To us it appears that the Investigating Officer mentioned about the relationship of Ram Kishore and Jodha Singh under some misconception This witness had not proceeded to village Mandua, which was about three miles away, simply to inform Yuvaraj Singh He had gone to Mandua to meet his maternal uncle and by the way conveyed the information regarding the tractor to Yuvaraj Singh The name of Ram Kishore does not find mention in the first information report, but the fact that information regarding the presence of the tractor outside the abadi of village Sarthal was given is there in the report The absence of the name of Ram Kishore is, in our opinion, not of any consequence As a matter of fact circumstance No 5, which this witness has proved is by itself not an incriminating circumstance It is an innocuous link, and does not go to improve the prosecution case in any manner The explanation given by Ram Kishore is quite natural. There is nothing else to doubt or disbelieve his statement, hence, we are inclined to believe Ram Kishore and hold that circumstance No 5 stands proved

28. Circumstance No 6 stands proved by the testimony of Yuvaraj Singh and has not been challenged before us

29. Circumstance No 7 stands proved by the unimpeachable testimony of Sri Matadin Yadava, the Investigating Officer (P W 16) and Mohan Singh (P W 3) This circumstance has not been assailed before us

30. Circumstances Nos 8 and 14 may be considered together for the sake of convenience Learned counsel for the appellants has strenuously urged that the Serologist's report (Ex Ka 28) that Patai were found stained with human blood of group 'O' could not be relied upon because the shirt, banyan and the underwear which were on the headless dead body were not sent to the Chemical Examiner and the Serologist. On a careful consideration we are of the view that the appellants cannot derive any benefit from the failure of the Investigating Officer to send the aforesaid three clothes to the Chemical Examiner and the Serologist for report By making this observation we do not mean to condone this lapse of the Investigating Officer However, we find that in the instant case this omission is not very material The two samples of patai found in the field of Mohan Jatav and in the field of Lalji were both stained with human blood of group 'O' This, in our opinion, is sufficient to show that the blood of the deceased was of group 'O' The recovery memo of the pajama (Ex. Ka 12) shows that the pajama had sufficient bloodstains on it. These bloodstains could not be of some other human blood. Yuvaraj Singh and others proved that this pajama belonged to the deceased and he was putting it on when he had gone with the accused to get the trolley loaded Hence, circumstance No 14 to the effect that the bloodstained gandasa, the bloodstained brickbat with hair, the bloodstained pajama which was lying over the headless body of the deceased and the two samples of patai (Sugarcane leaves) were all stained with human blood of group 'O' which was the blood group of the deceased, stands proved in a convincing manner. From these findings it can also be reasonably concluded that the blood group of the deceased was 'O'

31. Circumstance No 7 with regard to the presence of bloodstained brickbat with hair, bloodstained patai and bloodstained pieces of bones and earth has already been held to have been established This circumstance along with circumstance No 14 discussed supra lead to the conclusion that the deceased was done to death in the field of Mohan Jatav which was only at a distance of about 200 yards from the sugarcane field of the deceased where the trolley was loaded Unless this was so, blood would not have been found in the field of Mohan Jatav Sufficient quantity of blood was found on the ground and also on the sugarcane leaves (patai). Blood was not found either in the sugarcane field of the deceased or in any other neighbouring field or even in the field of Lalji where the headless body was concealed In this connection the presence of bloodstained brickbat having some hairs also relevant It is true that the group of the bloodstains found on the pieces of bones and the earth could not be ascertained but this much was clear that the stains on these articles were also of human blood

32. The deceased had reached his sugarcane field at about 1-30 A M As the statement of Yuvaraj Singh shows it takes about two hours to load a trolley The trolley

was found fully laden and hence, it can reasonably be said that the murder had taken place after the loading work was completed, i e after about 3-30 A M As mentioned earlier, extensive bloodstains were found in the adjacent field of Mohan Jatav. The deceased was not seen by any one after 3-30 A M on 12-6-1978 Had the deceased not been done to death soon after the loading of the trolley, the murder could not have taken place in the field of Mohan Jatav The deceased would have started with the trolley for the Sugar Mills He would have also taken some labourers with him to help him unload sugarcanes in the mills Thus, on his way to the Sugar Mills, the deceased could not be all alone The presence of the loaded trolley in the field itself and the presence of the tractor three miles away in the evening at about 5 P M on 12-6-1978, shows that someone else had taken away the tractor from the field of the deceased The murder would not have been committed after daybreak In the month of June, the sun rises quite early, say at about 5-30 A M , or even a little earlier The time of murder at about 4 P M on 12-6-1978 is not inconsistent with the findings of the post-mortem examination and the statement of Dr Sinha (P W 15)

33. In view of the above discussion we hold that circumstances nos 8 and 14 stand fully established

34. Circumstance no 9 also stands proved. The deceased was taken from his sugarcane field to the sugarcane field of Mohan Jatav There he was murdered and most probably his head was also severed there The headless body was then carried to a distance of about 200 yards and was concealed under a big heap of sugarcane leaves (Patai) near the well of Lalji The head was concealed at some other place The deceased could not be overpowered and done to death unless there were several persons to commit the crime It would have taken several persons to carry the headless body for a distance of 200 yards and conceal it under a big heap of patais. All these factors, therefore, strongly point that the offence was committed not by one or two persons alone, but by a larger number of persons

35. Now we come to circumstance no 10 None of the accused reported on duty on the next day, i e. on 12-6-1978. It is not the case of the accused that some of them had reported for work on 12-6-1978 The statements of Mata Din Yadav the Investigating Officer (P.W 16), Mohan Singh (P.W 3) and Yuvaraj Singh go to prove that the accused were searched at their houses in village Mandua at about 2 A M on the night between 12th and 13th June, 1978, but they were not available These witnesses were not assailed and disledged on this particular point Four accused arrested on 13-6-1978 contended that they were arrested from their houses by the police This was denied by the Investigating Officer and the witnesses These accused did not adduce any evidence to substantiate this contention We see no good reason to disbelieve the prosecution on this point The prosecution evidence which has not been challenged. further shows that Ram Kumar accused had surrendered in court in July, 1978, while Karan Singh accused had surrendered in court in August, 1978. Hence, in our opinion. circumstance no 10 also stands proved in a cogent and convincing manner

36. Circumstance no 11 is an important one The prosecution examined Mohan Singh (P W 3), and the Investigating Officer (P W 16) to prove the recovery of the dead body The prosecution examined Mohan Singh, Yuvaraj Singh and Vijay Singh to prove that the headless body was that of Jodha Singh The Investigating Officer (P W 16) said that on 13-6-1978 at about 8 A M he was present in the field of Mohan Jatav, and there received information from a special informer that Sompal was going towards village Ibrahimpur. He along with Mohan Singh (P.W. 3) and others went to the rasta leading to village Ibrahimpur and arrested Sompal in that rasta He added that on enquiry Sompal told him that they had concealed the dead body of Jodha Singh under a heap of sugarcane leaves near a well in the field of Lalji Morao of Ibrahimpur and he offered to point out the dead body He (Sompal) took him and the witnesses to a place near the well in the field of Lalji and pointed out a headless body which was lying under a heap of sugarcane leaves Mohan Singh identified that headless dead body to be that of Jodha Singh deceased Mohan Singh (P W 3) also made a similar statement He said that he was with the Investigating Officer since 5 A M He added that he recognised the headless body to be that of Jodha Singh by its built. The son, brother and wife of Jodha Singh also came and recognised the dead body to be that of Jodha Singh The witness added that the well of Lalji was about 200 yards away from the field of Mohan Jatav

Mohan Singh is a Jat by caste but we are not inclined to reject his testimony on this ground Nothing else has been pointed out to us which would show that the witness was not reliable Liladhar, uncle of this witness was a co-accused with Jodha Singh in murder case This is not enough to dub this witness as partisan A criminal case was pending against this witness. (Mohan Singh) and some others at the time when the recovery in question was made This again is no circumstance to consider this witness as unreliable In our opinion, Mohan Singh (P W 3) is worthy of reliance The dead body was found at a distance of 200 yards from the field of Mohan Jatav There was no trail of blood or dragging marks from the field of Mohan Jatav up to the well of Lalji and, therefore, the presence of blood in the field of Mohan Jatav could not lead to the recovery of the headless dead body in the ordinary course The Investigating Officer and others would have searched the dead body in the neighbourhood of the field of Mohan Jatav, but they could have no reason to think that special search for the body should be made under the leaves lying near the well of Lalji Hence, it cannot be said that the headless body would have been available to the Investigating Officer without its being pointed out by anyone else It has been argued on behalf of the appellants that after the arrival of the police in the village no accused would have remained loitering in the neighbourhood so as to be available to the police. This argument is not well founded. The evidence shows that Sompal accused was trying to slip away to another village in order to evade the police It was on account of the information given by a special informer that the Investigating Officer succeeded in arresting him We see no good ground to doubt the story of arrest of Sompal appellant by the Investigating Officer and the statement made by this accused to the Investigating Officer and the public witnesses, and consequent recovery of the headless dead body on the pointing out of this appellant

37. The learned counsel for the appellants has taken great pains to show that the evidence of identity of the headless dead body was not worthy of reliance In this connection he has laid great emphasis on the fact that the clothes which the deceased was wearing when he had proceeded to the sugarcane field along with the accused, were not mentioned in the first information report He has also pointed out that Dr. V K Sinha (P W 15) had found the dead body in an advanced stage of decomposition and, therefore, it could not be possible for anyone to identify the dead body by its built We have given careful consideration to these submissions of the learned counsel In our opinion, they are not well founded The post-mortem examination of the headless dead body was performed by Dr Sinha on 14-6-1978 at 12 O'clock in the noon He estimated the probable time since death at about two and a half days Since it was peak of the summer season, decomposition had set in early The doctor found that blisters were present all over the body Maggots were also present The skin was also peeling off However, it is to be borne in mind that the witnesses who identified the body had seen it more than a day earlier or about one and a quarter days after the murder At that time the dead body must have been in a better condition and the built of the body could enable the relations and co-villagers to identify as to whose body it was. Hence, the claim of Yuvaraj Singh, Vijay Singh and Mohan Singh to have identified the headless body by its built cannot be said to be false or unworthy of acceptance

38 In the normal course the clothes of the deceased are not mentioned in the first information report Yuvaraj Singh, who lodged the first information report on the night of 12th June, 1978 could have no reason to think that the headless body of his father alone would be recovered later on, hence, it was quite natural for him not to give details of the clothes which his father was wearing while proceeding to the sugarcane field A mention of the clothes would have been, in our opinion, unnatural and would have been a strong pointer to the fact that the report was prepared after the recovery of the headless body The dead body was found wearing an underwear, a baniyan and a shirt A pajama was lying over the dead body Yuvaraj Singh and Vijay Singh both said that these were the clothes which the deceased was wearing Both these witnesses could not be shaken on this point We are, therefore, inclined to accept the testimony of these witnesses and Mohan Singh with regard to the identity of the headless body We are satisfied by the evidence that the headless body was that of Jodha Singh

39. The statement which Sompal accused is said to have made to the Investigating Officer in the presence of the public witnesses was mentioned by the Investigating Officer in the recovery memo Ex Ka. 10 It

amounted to a confession It appears that a part of this statement was considered to be inadmissible on the face of it and, therefore, was not repeated in evidence Only the remaining part was mentioned both by the Investigating Officer and Mohan Singh (P W 3) Mohan Singh put that statement in the following words

"पूछ ताछ पर बताया कि हमने जोधासिंह की लाश को इसाहीपुर के लालवा मोराव के खेत में ढूह पर पत्तियों के ढेर में दबाकर खुश किया है।"

The Investigating Officer made a similar statement We have above accepted the prosecution story that such a statement was made by Sompal appellant to the Investigating Officer in the presence of public witnesses Now, the point which requires consideration is whether this statement is admissible in evidence in view of the provisions of S 27, Evidence Act The words "fact discovered" used in S 27 of the Evidence Act have been held to mean not only the object produced but also to embrace the place from which the object was produced and the knowledge of the accused as to this The information relating distinctly to this fact understood in the aforesaid larger perspective, in admissible in evidence Only information as to past user or the past history of the object produced is not admissible in evidence as it does not relate to the discovery of the object produced The statement quoted above made by Sompal does not relate to the past user or the past history of the object produced It relates distinctly to the fact discovered, namely, the dead body recovered, the place from where it was recovered and the knowledge of the accused about its location Such type of statements have always been held admissible under S 27, Evidence Act In State of U P v Deoman Upadhyaya (AIR 1960 S C 1125) (1960 All L J 733) the statement "I will point out the gandasa which I had thrown into the tank", was held admissible We are, therefore, clearly of the view that the aforesaid statement made by Sompal appellant is admissible in evidence under S 27

40. In view of the discussion contained in the preceding paras we are of the view that circumstance no 11 also stands fully established

41. Circumstance no 12 is also an important one The prosecution has sought to prove this circumstance by the evidence of the Investigating Officer (P.W 16) and the public witness Ajay Vir Singh (P.W 5) The prosecution case is that two constables arrested Amar Singh accused and brought him to the Investigating Officer at about 10 A M on 13-6-1978 The Investigating Officer interrogated Amar Singh in the presence of witness and he (Amar Singh) gave out that the gandasa with which the head of Jodha Singh was severed had been concealed by him under a heap of sugarcane leaves in the sugarcane field of Mohan Jatav and offered to point out that gandasa Amar Singh took out the gandasa (Ex V) which was bloodstained from under a heap of sugarcane leaves, which was lying in the south eastern corner of the sugarcane field of Mohan Jatav This heap of leaves was eight or ten paces away from the place where the Investigating Officer had found blood over the sugarcane leaves and on the ground, and where a bloodstained brickbat was also lying Both Sri Matadin, the Investigating Officer, (P W 16) and Ajay Vir Singh have stated about the aforesaid statement made by Amar Singh and also about the recovery of gandasa on the pointing out of Amar Singh accused These witnesses were cross-examined on this point but could not be shaken Ajay Vir Singh admitted that he was a Jat by caste but denied that he was related to the deceased in any manner The gandasa was found under a small heap of sugarcane leaves inside the sugarcane crop standing in the field of Mohan Jatav It was for this reason that this gandasa would not have been available to the Investigating Officer even on a search Sompal Singh accused was arrested at about 8 A M and pointed out the headless dead body He did not point out this gandasa and it is likely that he did not know the exact location of concealing it The murderers, it seems, had divided the work of disposal of the headless body, the head and the gandasa The prosecution did not examine the constables who had arrested Amar Singh The failure to examine the constables cannot lead to an adverse inference in this case It is significant to note that the only suggestion made to the Investigating Officer was that Amar Singh was arrested from his house This was denied by the Investigating Officer, and there appears no good reason for not accepting this denial For these reasons we are unable to suspect the story of recovery of the gandasa (Ex V) on the pointing out of Amar Singh accused

42. The statement said to have been made by Amar Singh appellant to the Investigating Officer in consequence of which the bloodstained gandasa (Ex. V) was recovered, was noted by the Investigating Officer in the memorandum of recovery Ex. Ka. 2 This statement was confessional in nature and a part of it was clearly

inadmissible in evidence Ajay Vir Singh (P W 5) stated in his examination-in-chief —

"अमर सिंह बताया कि जिस गंडासे से जोधा सिंह का सर काट कर अलग किया गया था, वह मैंने मोहन जाटव की ईख के खेत में पत्तियों के नीचे छिपा दिया है। इसे बरामद कर सकता हूँ।"

According to the Investigating Officer also, Amar Singh had made the above statement and, thereafter pointed out the bloodstained gandasa from under a heap of sugarcane leaves We have accepted the prosecution case that Amar Singh appellant had made the aforesaid statement to the Investigating Officer in the presence of public witnesses Now, the question for consideration is whether this statement, or any part of it is admissible in evidence

43. We have already discussed the essential features of S 27, Evidence Act, in connection with the statement which was made by Sompal appellant to the Investigating Officer and the same need not be reiterated here Testing the present statement on those principles we find that the part

"जिस गंडासे से जोधासिंह का सर काट कर अलग किया गया था"

is not admissible in evidence The remaining portion of the statement, namely

"वह (गंडासा) मैंने मोहन जाटव की ईख के खेत में पत्तियों के नीचे छिपा दिया है।"

is clearly admissible in evidence, and for this we may refer to the case of Deoman Upadhaya (1960 All L J 733) (S C) (supra) The first part of the statement which we have held inadmissible relates to the past user or the past history of the object recovered and does not distinctly relate to the discovery of the fact.

44. The discussion in connection with circumstance no. 14 goes to show clearly that this gandasa was used for beheading Jodha Singh, deceased.

45. For the above reasons we hold that circumstance no 12 has also been fully established in a convincing manner but the part of statement made by Amar Singh appellant which has been held inadmissible, is to be excluded from consideration

46. Circumstance no. 13 relating to the recovery of the skull on the pointing out of Ram Kumar accused (now deceased) was not relied upon by the trial court as it was not possible to fix up the identity of the skull Hence we hold that circumstance no 13 has not been established in a convincing manner

47. Now, the position is that circumstances nos 1, 2, 3, 5 to 10 and 14 stand proved against all the appellants, and further, circumstance no 11 stands proved against Sompal appellant and circumstance no 12 stands proved against Amar Singh appellant

48. A question arises whether circumstances nos 11 and 12 can also be taken into consideration against the other appellants who are not directly connected with them. Sections 10 and 30, Evidence Act, deserve consideration in this connection

49. Section 30, Evidence Act, reads thus

"Consideration of proved confession affecting person making it and others jointly under trial for same offence — when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession Explanation — "Offence" as used in this section includes abatement of, or attempt to commit, the offence "

A perusal of this section shows that a confession made by one of the co-accused affecting himself and some other co-accused if proved, may be taken into consideration by the Court against such other co-accused One important ingredient of this section is that statement made by the accused must amount to confession To determine whether a statement is a confession or not, the test is to see whether it is sufficient by itself to support the conviction of the person making it, of the offence for which he is being jointly tried with other persons against whom the statement is tendered. A statement which is incriminatory in nature, but is not by itself sufficient to form the basis of conviction for an offence, cannot be regarded as a confession (See Nandini Satpathy v. P L Dani, AIR 1978 S C 1025) The admissible parts of the statements of Sompal and Amar Singh appellants do not amount to confession of the offences of criminal conspiracy and murder All the accused were also charged with an offence under S. 201, I. P C., for causing disappearance of the headless dead

body of the deceased and the gandasa with which the murder was committed The trial Judge found only Sompal and Amar Singh guilty of the offence under S 201, I P C He acquitted the remaining four accused of this offence Amar Singh's statement that he had hidden the gandasa under the sugarcane leaves does not affect any other accused and, therefore, will not attract S 30, Evidence Act Sompal's statement that they had concealed the dead body of Jodha Singh may appear to affect himself and the other co-accused The word used in Hindi was 'hamney' and we have translated it in indirect form as 'they' This statement would be admissible against other co-accused under S 30, Evidence Act, so far as the offence under S 201, I P C, is concerned, because all the ingredients of this section are made out However, it has no practical bearing because the other appellants were acquitted under S 201, I P C, for causing the disappearance of the dead body of Jodha Singh Here it may be pointed out that S. 30, Evidence Act, does not enlarge the scope of S 27, Evidence Act The limits of the evidentiary value of a confession admissible against a co-accused under S. 30, Evidence Act, have been clearly pointed out by the Supreme Court in a number of decisions Such a confession cannot be made the foundation of conviction of the co-accused It can be pressed into service only when the Court is inclined to accept other evidence against the co-accused, and feels the necessity of seeking for an assurance in support of its conclusion deducible from other evidence. In this connection Supreme Court's decision in Hari Charan Kurmi v. State of Bihar, (AIR 1964 S C 1184) may be referred to.

50. Section 10, Evidence Act, runs thus

"Things said or done by conspirator in reference to common design — Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by anyone of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving existence of the conspiracy as for the purpose of showing that any such person was a party to it"

51. The condition precedent to the application of the rule laid down in S 10 is that there should exist a reasonable ground to believe that two or more persons have conspired together to commit an offence Actual proof of conspiracy is not required, even some prima facie evidence leading to a reasonable belief that two or more persons had conspired together is sufficient It is also well established that conspiracy need not be proved by direct evidence. The same may be proved from the surrounding circumstances and conduct of the accused This principle will hold good for the purpose of establishment of the condition precedent laid down in S 10 In the instant case the circumstances which have been found established by us are enough to justify the conclusion that reasonable ground exists to believe that the accused had conspired together to commit an offence Under S 10 'anything said, done or written' by any one of the conspirators 'in reference to their common intention' may be proved and the same shall be taken as a relevant fact against other persons believed to be a party to the conspiracy The statements made by Sompal and Amar Singh to the Investigating Officer are, in our opinion, not covered by the expression "anything said" But the acts done by these appellants as appearing from their aforesaid statements, do come within the ambit of S 10, and therefore, can be used as a relevant fact against other conspirators namely the other appellants We are, therefore, of the view that the fact of concealment of the headless dead body of Jodha Singh under the sugarcane leaves (patai) by Sompal and the concealment of the bloodstained gandasa under another heap of sugarcane leaves by Amar Singh appellant, can also be taken into consideration as a relevant fact against the remaining appellants

52. Now we proceed to consider if the circumstances found proved in the instant case go to show that within all human probabilities, the various offences were committed by the present appellants and whether such circumstances are inconsistent with an inference of innocence of the appellants

53. The accused were charged with offences under Ss 120-B, 302 and 201, I P C The Trial Judge did not record conviction against the accused for an offence under S 120-B, I P. C He did not acquit the accused of this offence The Trial Judge seems to have treated S 120-B as a provision of constructive liability and used it to convict all the accused of the offence of murder

under S 302. I P C As said earlier, only two accused, Sompal and Amar Singh were convicted under S 201, I P C. The acquittal of the remaining four accused under S 201, I P C was not challenged by the State by preferring an appeal

54. The term 'criminal conspiracy' has been defined in S. 120-A, I. P C., the relevant part of which runs thus

"When two or more persons agree to do, or cause to be done —

(i) an illegal act, or

(ii) an act which is not illegal, by illegal means, such an agreement is designated a criminal conspiracy.

Provided

Explanation. "

55. Section 120-B provides for sentence for the offence of criminal conspiracy, which is the same as the sentence for the offence of abatement

56. The offence of criminal conspiracy consists in the very agreement between two or more persons to commit a criminal offence irrespective of the further consideration whether or not those offences have actually been committed The very fact of the conspiracy constitutes the offence, and it is immaterial whether anything has been done in pursuance of the unlawful agreement This was held by the Supreme Court in Bimbadhar v Orissa State, (AIR 1956 S C 469) and was followed in later decisions

57. An accused can be legally charged for an offence of criminal conspiracy and also for the commission of the actual offence If the charge for commission of the actual offence fails, the accused can still be convicted of the offence of criminal conspiracy This was so held in Bimbadhar's case (supra) In another case it was held that if the charge for general criminal conspiracy fails, even then the accused can be convicted for commission of actual offence, if charged for the same. Vide K Kunhahammad v State of Madras (AIR 1960 S C 661) In Mohd Hassan Umar v. Dalip Singh Ji (AIR 1970 S C 45) it was held that separate sentences for the commission of actual offence and for criminal conspiracy under S 120-B were not illegal. It was also held in that case that a criminal conspiracy is a separate offence punishable separately from the main offence

58. The above pronouncements go to show that a criminal conspiracy is a separate offence for which a separate sentence can legally be passed Nowhere it has been held that criminal conspiracy is merely a principle of constructive criminal liability, as is to be found under S 34 or S 149. I P C

59. There is no difference between the mode of proof of the offence of conspiracy and that of any other offence; it can be established by direct or circumstancial evidence (see Bhagwan v State of Maharashtra, AIR 1965 S C 682 and State (Delhi Administration) v. V C Shukla, AIR 1980 S C 1382). A conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the same The offence can be only proved largely from the inferences drawn from acts or illegal omissions committed by the conspirators in pursuance of a common design. This was held in Shiv Narain v State of Maharashtra (AIR 1980 S C 439). The above pronouncements make it clear that the inference of criminal conspiracy may be drawn from the circumstances and conduct of the accused

60. The Trial Judge held that all the accused had entered into a criminal conspiracy to commit the murder of Jodha Singh, but on this finding he did not hold the accused guilty of the offence under S 120-B, I. P C. It appears that he erroneously took the view that criminal conspiracy is a principle of constructive criminal liability and, therefore, made use of S 120-B, I P C., to hold the accused guilty of the offence of murder of Jodha Singh This approach was clearly wrong Though the Trial Judge did not record conviction of the accused for the offence of criminal conspiracy under S 120-B, I P C, we consider that the conviction on this charge can be recorded by this Court, provided we come to the conclusion that the circumstances proved go to show that the accused had entered into a criminal conspiracy to commit the murder of Jodha Singh The reason for taking this view is that the Trial Judge had recorded a clear and affirmative finding on the question of criminal conspiracy

61. Circumstances nos 1, 2, 3 to 12 and 14 taken together go to prove that all the accused had entered into a criminal conspiracy to murder Jodha Singh. These circumstances are not consistent with the inference of innocence of the accused, or any one of them. We, therefore, hold all the

appellants guilty of the offence of criminal conspiracy under S 120-B, I P C

62. All the accused were charged with the offence of murder under S 302, I P C, simpliciter Section 149, I P C, was not called into aid to charge the accused with the offence of murder Circumstances nos 1, 2, 3, 5 to 12 and 14 are, in our opinion, not sufficient to lead to the conclusion that all the accused had actually committed the murder of Jodha Singh by dealing fatal blows on his body, or by severing his head It may be that some of the accused actually committed the murder while others aided and helped them in doing so The circumstances relied upon do not help us in fixing the identity of those accused who actually committed the murder of Jodha Singh Hence, in our opinion, the accused could not be held guilty of the offence of murder under S 302, I P C simpliciter They could be held guilty of the offence of murder with the aid of S 149, I P C However, the accused were not charged in the alternative under S 302, I P C, read with S 149, I P C Now the question which arises for our consideration is whether the appellants can be held guilty of the offence of murder with the aid of S 149, I P C, when there was no specific charge to this effect

63. We have carefully perused the wordings of the charges framed by the Trial Judge against all the accused who were standing trial before him and having regard to the same, we are clearly of the view that S 149, I P C, can be called in aid in this case at the appellate stage, to hold the appellants guilty of the offence of murder We are also clearly of the view that the failure of the Trial Judge to frame a charge against the accused with the aid of S 149, I P C, had not caused any prejudice to the accused in their defence They (accused) had full notice of the ingredients of the charge of murder if it had been framed with the aid of S 149, I P C

64. The charges framed by the trial court are relevant and may be quoted.

"G L Tandon, IV Addl Distt — Sess Judge, Moradabad hereby charge you —

1 Bahoran, 2 Amar Singh, 3 Sompal Singh, 4 Ram Kumar, 5 Birbal and 6 Karan Singh as follows

Firstly, that you on the night between 11/12-6-78 in village Naveni Udaiya within the limits of Kur Fatehgarh district Moradabad agreed to do an illegal act i e to commit the murder of Jodha Singh of village Mandua within the limits of P S Kur Fatehgarh, district Moradabad and to cause the disappearance of the evidence of the murder of the said Jodha Singh and you thereby committed an offence punishable under S 120-B, I P C, and within the cognizance of this Court of Sessions

Secondly, that sometime on the night between 11/12-6-78 or at or about any time on 12-6-78 in pursuance of the aforesaid criminal conspiracy, you committed the murder of the aforesaid Jodha Singh by intentionally causing his death in village Naveni Udaiya within the limits of P S Kur Fatehgarh, district Moradabad and you thereby committed an offence punishable under S 302, I P C, and within the cognizance of this Court of Sessions"

65. From the above it is clear that common charges were framed against all the six accused who were standing their trial in the lower court In the first charge relating to criminal conspiracy under S 120-B, I P C, the words used were "you agreed to do an illegal act i e to commit the murder of Jodha Singh 'In the second charge relating to the offence of murder under S 302, I P C, the important words used were these "in pursuance of the aforesaid criminal conspiracy, you committed the murder of the aforesaid Jodha Singh by intentionally causing his death"

66. The first charge clearly indicated to all the six accused that they had agreed to commit the murder of Jodha Singh and this agreement was formed on the night between the 11th and the 12th of June, 1978 in village nument Udaiya The fact that there was an agreement between the six accused also implied that there was a meeting of minds of all the accused persons resulting in an ultimate decision regarding the commission of the murder of Jodha Singh The second charge indicated to all the six accused that they had that very night or on 12-6-1978 committed the murder of Jodha Singh, and this was done in pursuance of the aforesaid criminal conspiracy

67. "'Unlawful assembly' has been defined in S 141, I P C In view of this definition an assembly of five or more persons would be designated as unlawful assembly if the common object of the persons composing that assembly was to commit the offence of

murder. Ordinarily there is difference between 'object' and 'intention', but it has also been recognised that on the facts of a particular case there may be no difference between the object and the intention with which the offence was committed In such a case the facts to be proved and the evidence to be adduced would remain the same whether the charge was under S 149, I P C, or under S 34, I P C In such a case substitution of S 34 in place of S. 149 has been held permissible and it has been further held that the change would not result in prejudice to the accused. This has been held in Karnail Singh v State of Punjab (1954 All L J 209) (AIR 1954 S C 204) In the instant case the charge under S 120-B, I P C, has all the ingredients of the definition of unlawful assembly under S 141, I. P C Here there is no difference between the 'common intention' and the common object

68. Section 149, I P C, lays down the principle of constructive criminal liability. It has two parts, but here we are concerned with the first part only The first part provides that where any member of an unlawful assembly commits an offence in prosecution of the common object of that assembly, all the members of the assembly are guilty of that offence A charge under the first part of S. 149, I P C must, therefore, clearly indicate that the offence has been committed in prosecution of the common object of the assembly and the same has been committed by one or more members of the assembly These ingredients are to be found in the second charge relating to the offence of murder, though S 149, I P C., was not specifically mentioned in the second charge it was clearly mentioned that the accused had committed the murder of Jodha Singh in pursuance of the criminal conspiracy to commit the murder of Jodha Singh We have earlier observed that in the present case there is no difference between the common object and the common intention'. Thus all the ingredients of S. 149, I. P. C., were also implied in the second charge read in the light of the first charge

69. From the above discussion it follows that in the instant case S 149, I. P. C., can be invoked to hold the appellants guilty of the offence of murder of Jodha Singh, and thus will not be taken to cause any prejudice to the appellants. The appellants had full notice of the relevant ingredients because they were incorporated in the charges quoted above We think that S. 464, Cr. P. C., can also be invoked to cure the omission of framing a charge under S. 302, I. P C, read with S. 149, I. P C, by the lower court. One important requirement of this section is that the omission should not have occasioned a failure of justice We are satisfied that there has been no failure of justice in the instant case on account of the omission to frame a charge on the above lines

70. Certain observations of the Supreme Court in Suraj Pal v. State of U P (AIR 1955 S C 419) (1955 All L J 429) and relied upon in Tahsildar Singh v State (AIR 1958 All 255) need some consideration.

71. In Suraj Pal's case a number of accused were charged under Ss 147, 323/149, 307/149 and 302/149, I P C, but no direct and individual charge was framed against any accused for the specific offences under Ss 307 and 302, I. P C. On appeal the High Court acquitted the accused and convicted one accused, who was suspected of firing his pistol, for offences under Ss 302 and 307, I P C Their Lordships of the Supreme Court held that a charge under S. 149, I. P. C., puts the person on notice only of two alleged facts, namely.

1 That the offence was committed by one or other of the members of the unlawful assembly of which he is one; and

2 That the offence was committed in prosecution of the common object, or is such that was known to be likely to be so committed.

It was also held that S. 149, I. P. C., creates a distinct head of criminal liability which has come to be known as constructive liability. Their Lordships further observed, that the direct individual liability of a person can only be fixed upon him with reference to a specific charge in respect of the particular offence such a case is not covered by Ss. 326 and 237, Cr. P. C. (corresponding to S. 221(1) and (2), Cr. P C. of 1973). The framing of a specific and distinct charge in respect of every distinct head of criminal liability constituting the offence is the foundation for conviction and sentence therefor The Supreme Court, therefore, held that the conviction and sentence of the particular accused could not be maintained as there were no direct and individual charges for offences under Ss 307, and 302, I P C, against him.

72. The charges framed against that particular accused namely Suraj Pal by the lower court were quoted by the Supreme

Court in para 4 of its judgment These charges have been given at page 422. A perusal of these charges shows that it was nowhere mentioned in the charges that the murder of Suraj Din was committed by the particular accused namely Suraj Pal This aspect was emphasised by their Lordships of the Supreme Court, in para 1 of column 1 at page 423 (of AIR) (at p 432, 32 of All L J) Their Lordships observed

"They appear to indicate a definite, non-committal attitude on the part of the public prosecutor of the court which has the ultimate responsibility for the framing of the charge (vide S. 226 Cr P C) as to who is the active author of the pistol fire referred to under these two heads of charge When the charge was so pointedly vague, no accused was bound to direct his attention in his defence to the question as to whether he or somebody else was the person who fired the pistol which brought about the gun-shot wounds "

73. The above, in our opinion, brings out the main distinguishing feature between Surajpal's case (1955 All L J 429) (S C) and the present case, so far as application of S 149, I P C., to the facts of the present case, is concerned

74. In Tahsildar Singh's case (AIR 1958 All 255) the facts were just the opposite Tahsildar was charged under S 302, I P C , simpliciter for the murder of one Dudhnath. The trial court convicted Tahsildar Singh In the High Court the learned counsel for the State attempted to support the conviction with the aid of S 149, I P C The learned Judges of the Division Bench held that they were not permitted by law to do so, and for this they placed reliance on the propositions laid down in Surajpal's case (Supra) A perusal of the judgment shows that the Division Bench refused to apply S 149, I P C , because it was the prosecution case that Tahsildar Singh was all alone when he had fired at Dudhnath We do not know precisely as to what were the wordings of the charge of murder under S 302, I P C , against Tahsildar Singh The charge has not been extracted in the judgment Further, the discussion seems to proceed on the ground that on facts Tahsildar Singh could not be a member of the unlawful assembly at the time when Dudhnath was shot at Hence, the observation in Tahsildar Singh's case does not go counter to what we have said earlier This case is also distinguishable

75. For the above reasons, we alter the conviction of the appellants from S 302, I P C read with S. 120-B, I P C to S 302, I P C read with S 149, I P C

76. Only Sompal and Amar Singh appellants were convicted for an offence under S 201, I P C This charge is made out against Sompal accused by his own statement under S 27, Evidence Act, and by other circumstances So far as Amar Singh is concerned, he had merely concealed the weapon of attack This cannot be said to amount to causing evidence of the commission of the offence of murder, to disappear Hence, in our view, the conviction of this appellant (Amar Singh) for the offence under S 201, I P C is not justified and he deserves acquittal on this count

77. Next we come to the question of sentence for the offence of criminal conspiracy under S 120-B, I P C The punishment provided is the same as for the offence of abetment Section 109, I P C., prescribes sentence for the offence of abetment where the act abetted is committed and this sentence in the absence of any express provision, is to be the same which is provided for the offence itself In the instant case the offence of murder of Jodha Singh was committed in pursuance of the criminal conspiracy and, therefore, the punishment provided for the offence of murder under S 302, I P C , can be awarded for the offence of criminal conspiracy Having regard to all the facts and circumstances we think that the ends of justice will be sufficiently met if each of the appellants is sentenced to undergo imprisonment for life for the offence of criminal conspiracy under S 120-B, I P C

78. The trial court had sentenced each of the accused to imprisonment for life for the offence of murder of Jodha Singh under S 302, I P C , read with S 120-B, I P C , Having regard to all the facts and circumstances of this case we think that the sentence of imprisonment for life should be awarded to the appellants for the altered offence under S 302, I P C read with S 149, I P. C

79. The sentence of rigorous imprisonment for two years for the offence under S 201, I P C does not call for any interference

80. In the result, the appeal succeeds in a small part. We convict Bahoran, Amar Singh, Sompal Singh, Birbal and Karan Singh

appellants for the offences of criminal conspiracy under S 120-B, I P C, and murder under S 302, I P C, read with S 149, I P C, and sentence each of them to undergo imprisonment for life on each of the two counts Amar Singh appellant's conviction and sentence for the offence under S 201, I P C, are hereby set aside Sompal's conviction under S 201, I P C, and the sentence of rigorous imprisonment for two years on this count are upheld All the sentences of each of the appellants shall run concurrently Sompal appellant is in jail and shall serve out the sentence according to law The remaining four appellants are on bail and shall surrender to their bail bonds to serve out the sentence according to law

Appeal partly allowed

1981 ALL. L. J. 1008

M P MEHROTRA, J

Avtar Singh and another, Petitioners v Prescribed Authority and others, Respondents

Civil Misc Writ Petn No 530 of 1980, D/-7-8-1981

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 5 — Ceiling area — Determination — Trespass on holding of R before U. P. Act I of 1951 came into force in the area in question, i.e. 1st July 1969 — Clause (I) and not Cl. (III) would apply — No suit filed against trespasser within three years of resting — Trespasser becomes owner — Land in question cannot be included in the holding of tenure-holder — (U. P. Zamindari Abolition and Land Reforms Rules (1952), Appendix III, Serial No. 30 Cl. I and Cl. III.)

Where P trespassed on the holding of R when U P Act I of 1951 was not in force, in the area, only U P Tenancy Act would be in force, and, consequently, R could not be treated to be Bhumidar or Sirdar as there were no Bhumidars under the Tenancy Act and therefore, in such a case Cl (I) and not Cl (III) of serial No 30 would apply and the trespasser would be deemed to have perfected his title to land in his possession when no suit was filed within three years after the date of resting. Therefore, R would not be tenure-holder of such land and the same could not be included in his holding. 1973 All L J 612 Rel on (Para 5)

Cases Referred : Chronological Paras

1973 All L J 612

Rajesh Tandon, for Petitioners

ORDER:— This petition arises out of the proceedings under the U. P Imposition of Ceiling on Land Holdings Act

2. The facts, in brief, are these

3. The respondent 4 was treated as tenure-holder and the notice under S 10(2) was issued to him in respect of some land which was shown as included in the holding of the said tenure-holder (respondent 4 Bale Singh Buksha) The petitioners put forward a claim that they were the tenure-holders as they had perfected their title to the land in their occupation under the Statute by prescription and, therefore, such land was not liable to be included in the holding of respondent 4 Bale Singh This objection has not been accepted by the Prescribed Authority and by the appellate court and, therefore, the petitioners have come up in the instant writ petition and in support thereof, I have heard Sri Rajesh Tandon and in opposition, the learned Standing Counsel has made his submissions

4. A finding of fact has been recorded that the petitioners came in possession in 1376 F and their claim, that they had been in possession for a much longer period since prior to 1376 F, has not been accepted by the authorities below. In such a finding of fact, based on appraisal of evidence, no interference is called for in this writ petition However, the learned counsel for the petitioners contended that even on the said finding, in law, the petitioners had perfected their title before 8-6-1973 and in this connection, it was contended that admittedly the U P. Zamindari Abolition and Land Reforms Act, 1950, came into force in this area on 1st July, 1969, i e with effect from 1377 F Therefore, the petitioners had been in possession for a period of one year when the said U. P Act No I of 1951 came into force The learned counsel contended that in such a situation, Cl (I) of serial No 30 of Appendix III to the U. P Zamindari Abolition and Land Reforms Rules, 1952, was applicable This clause on the relevant date had down a period of three years for filing of the suit and the period had to be computed from the date of vesting Therefore, computing from the date of vesting in this area i e from 1st July, 1969, the

period of three years expired on 1st July, 1972 Therefore, according to the learned counsel for the petitioners, the petitioners' rights stood matured on 1st July, 1972 in terms of S 210, U P Act No I of 1951 The learned counsel for the petitioners has placed reliance on a Division Bench pronouncement reported in Hanuman Rai v. Deputy Director of Consolidation, (1973 All L J 612) The Division Bench laid down as follows — (at p 613)

"For the appellant it was urged that under S 209 a suit could be filed by a bhumidhar, sirdar or asami where a person takes or retains possession of land forming a part of the holding of bhumidhar, sirdar or asami A holding could not in law be of a bhumidhar, sirdar or asami before the date of vesting So a suit under S 209 was not maintainable in relation to persons who were in possession of such land from before the date of vesting We are unable to agree Section 209 applies to a person taking as well as to a person retaining possession of land A person who has taken possession before the date of vesting and continues in possession is a person who is retaining possession of land after the date of vesting With effect from the date of vesting the land forms part of the holding of the bhumidhar, sirdar and asami and hence the suit for ejectment of such a person can be filed on the basis that he was retaining possession of land forming part of such holding Entry No 30 of Appendix III specifically provides a period of limitation of two years from the date of vesting for a suit for the ejectment of a person in possession of the land on the date of vesting It cannot hence be said that a suit for the ejectment of the respondents was not maintainable under S 209 "

5. From the side of the State it was contended that in the instant case, Cl. (I) was not applicable but it was Cl. (III) which was applicable and that, therefore, the petitioners had not perfected their title till 8-6-1973 In my view, this contention is not correct Clause (III) will be applicable only to those cases of trespass which occurred after the date of vesting and in those cases, where the tresspass occurred before the date of vesting, Clause (I), which specifically deals with such a situation, will be applicable Admittedly, when the petitioners trespassed on the land in dispute, the same did not form part of the tenure-holder's holding as a Bhumidhar The trespass occurred when the U P Act No I of 1951 was not in force but U P Tenancy Act was in force There were no Bhumidhars when the latter Act was in force The Bhumidhars and Sirdars came into existence only after the promulgation of U P Act No I of 1951 Therefore, it cannot be contended that when the petitioners in 1968 trespassed on the holding of respondent 4, the latter could be treated to be Bhumidhar or Sirdar In this view of the matter, Cl (III), in my view, will not be applicable and Cl (I) will apply The authorities below were wrong in thinking that cl (III) of serial No 30 of Appendix III to the U P Zamindari Abolition & Land Reforms Rules was applicable in the case of the petitioners In my view, the petitioners had perfected their title to the land in dispute by prescription and, therefore, respondent 4 was not tenure-holder of such land which was wrongly included in his holding

6. Accordingly, this petition is allowed and the order of the Prescribed Authority dated 30th June, 1979, and the judgment of the appellate court dated 15th Novemaber, 1979 (Annexure 7) are hereby quashed and it is directed that the plot No 312 measuring 3 Bighas situated in village Santoshpur, Tahsil Bazpur, District Naintal and plot No 8 measuring 27 Bighas situated in Village Sentoshpur, Tahsil Bazpur, District Naintal be treated as the holding of the petitioners and the same should not be included in the holding of respondent 4 and should not be declared as the surplus land of the said tenure-holder In the circumstances, there will be no order as to costs

Petition allowed.

1981 ALL. L. J. 1009

N D OJHA, J

Smt Maya Devi, Petitioner v District Judge, Allahabad and others, Respondents

Civil Misc Writ No 6387 of 1981, D/- 20-7-1981

(A) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 14 — Eviction — Finding recorded by Rent Control and Eviction Officer that respondent was tenant of accommodation in dispute and had possession over accommodation from before 15-7-1972 as tenant with consent of earlier landlord — Accommodation could

HY/HY/D614/81/SAD

not be deemed to be vacant in favour of subsequent purchaser of accommodation — Respondent given benefit of S. 14 — Finding apperently a finding of fact based on appraisal of evidence — It cannot be challenged in writ petition under Art. 226 of Constitution. (Constitution of India, Art. 226). (Para 2)

(B) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 14 — Eviction of tenant by petitioner-landlord; subsequent purchaser of accommodation — Notice given by earlier landlord containing admission that respondent was tenant of accommodation — Notice given by earlier landlord through an advocate — It would be deemed to be given by earlier landlord himself. (Para 3)

(C) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Ss. 14, 12 (1) (b), 12 (4), 16 — Application of landlord for release of accommodation in view of what is contained in S. 12 (4) — Tenant cannot be refused benefit of S. 14 — Landlord's application under S. 16 is not maintainable.

S. 12 (1) (b) has been held to be retrospective Section 12 (4) provides that any building or part thereof which a landlord or tenant has ceased to occupy within the meaning of sub-s (1), (2), (3), (3-A), (3-B), shall for the purposes of that Chapter be deemed to be vacant Sections 12, 14, 16 are all in Chap III In the instant case, the petitioner-landlord a subsequent purchaser of the accommodation made an application under S 16 for release of accommodation which was in possession of respondent 3 who was the brother of the tenant respondent 4, living with him and continued in possession after the tenant-respondent 4, left the accommodation apparently in view of what is contained in S 12 (4) The argument that even though the petitioner was entitled to make an application under S 16 in view of aforesaid provision, respondent 3 could not be given benefit of S 14, is, on the face of it, self-contradictory and self-defeating argument If the effect of possession not being formally surrendered by tenant-respondent 4 to the landlord was that the said respondent continued to be a tenant, so as to render S 14 inapplicable, the application made by the petitioner-landlord when there was already a sitting tenant for allotment under S. 16 is misconceived and not maintainable If the accommodation in question could not be treated as vacant, i.e., having been vacated by the tenant-respondent 4 for the purpose of S 14, it could not be treated as vacant for purposes of S 16 either 1980 All W C 385 (F B) Foll (Para 4)

Cases Referred. Chronological Paras

1980 All W C 385 (F B) 4

Sankatha Rai, for Petitioner

ORDER.— One Jagannath Singh was the owner of a house situate in the city of Allahabad, a portion of which (hereinafter referred to as the accommodation in question or the said accommodation) was allotted to Janak Raj Singh, respondent 4 The petitioner purchased the said house from Jagannath Singh on 23rd December, 1974 Thereafter she made an application for the release of the accommodation in question in her favour under S 16, U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U P Act No XIII of 1972), inter alia, on the ground that the tenant Janak Raj Singh had been transferred from Allahabad and had permitted his brother Sheo Pujan Singh, respondent 3, to occupy the said accommodation According to the petitioner, in these circumstances, the tenant would be deemed to have ceased to occupy the said accommodation and consequently it was available for release in her favour The application was contested by respondent 3 Sheo Pujan Singh, inter alia, on the grounds that he had been living in the accommodation in question with his brother Janak Raj Singh even in 1963 when he was transferred from Allahabad, that thereafter Jagannath Singh the then owner of the said accommodation had accepted him as its tenant and since on 15th July, 1972, the date of commencement of U P Act No XIII of 1972, he was in occupation of the said accommodation as tenant with the consent of the landlord, he was entitled to the benefit of S. 14, U P Act No XIII of 1972 The plea raised by respondent 3 in his defence was accepted by the Rent Control and Eviction Officer, respondent 2 and the release application was dismissed A revision filed against that order by the petitioner has been dismissed by the District Judge, respondent 1 Aggrieved she has instituted the present writ petition with a prayer to quash these orders

2. The finding recorded by the Rent Control and Eviction Officer and accepted by the District Judge on the basis of the evidence on record including a notice given by Jagannath Singh, the earlier landlord

through an Advocate, a copy whereof has been filed as part of Annexure 'III' to the writ petition containing an admission that respondent 3 was the tenant of the accommodation in question, is that respondent 3 had been in possession over the accommodation in question from before 15th Junly, 1972 as tenant with the consent of the earlier landlord Jagannath Singh and consequently the said accommodation could not be deemed to be vacant for release in favour of the petitioner Respondent 3 was thus given the benefit of S 14, U P Act No XIII of 1972 The finding referred to above is apparently a finding of fact based on appraisal of evidence and cannot be challenged in a writ petition under Art 226 of the Constitution

3. What was, however, urged by counsel for the petitioner is that since the notice relied on by respondents 1 and 2 had not been given by Jagannath Singh himself but was given by an Advocate on his behalf any admission in the said notice was not binding on the petitioner who was a subsequent purchaser I find no substance in this submission The notice given by Jagannath Singh through an Advocate would be deemed to be given by Jagannath Singh himself and for that reason an admission contained in that notice will be an admission not of the Advocate but of Jagannath Singh

4. It was then urged that S 14, U P Act No XIII of 1972 was not attracted to the facts of the instant case inasmuch as respondent 4, who was the allottee of the accommodation in question had never formally surrendered the possession of the said accommodation to the then landlord and as such the then landlord could not induct respondent 3 as a tenant in the said accommodation I find no substance in this submission either In view of the facts pleaded by her it is apparent that the case of the petitioner was that the tenant respondent 4 would be deemed to have ceased to occupy the accommodation in question, inter alia, in view of S 12 (1) (b), U P Act No XIII of 1972 Section 12 (1) (b) has been held to be retrospective by a Full Bench of this Court in Smt Keshar Bai v District Judge (1980 All W C 385) Section 12 (4) provides that any building or part thereof which a landlord or tenant has ceased to occupy within the meaning of sub-s. (1), or sub-s (2), or sub-s (3), sub-s (3-A) or sub-s (3-B), shall, for the purposes of this Chapter be deemed to be vacant Sections 12, 14 and 16, U P Act No XIII of 1972, are all in Chap III The petitioner made an application under S 16 for release apparently in view of what is contained in S 12 (4) of U P Act No XIII of 1972 The argument that even though the petitioner was entitled to make an application under S 16 in view of the aforesaid provision, respondent 3 could not be given the benefit of S 14, is, on the face of it, self-contradictory Further, it is a self defeating argument If the effect of possession not being formally surrendered by respondent 4 to the landlord was that the said respondent continued to be a tenant, so as to render S 14 inapplicable, the application made by the petitioner, when there was already a sitting tenant, for allotment under S 16 of U P Act No XIII of 1972 was misconceived and not maintainable If the accommodation in question could not be treated as vacant, that is having been vacated by respondent 4 for purposes of S 14, it could not be treated as vacant for purposes of S 16 either

5. In the result, I find no merit in this writ petition It is accordingly dismissed

Petition dismissed

1981 ALL. L. J. 1011

M P MEHROTRA, J

Krishna Kumar etc , Petitioners v State of U P and others. Respondents

Civil Misc Writ Petn Nos 5851 and 4498 of 1980, D/- 6-8-1981

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 5 (b) Proviso (b) — Prescribed Authority ignoring certain transfers effected after 24-1-1971 and not extending benefit of proviso (b) to S. 5 (6) — Finding confirmed by Appellate Authority on basis of discrepancies between evidence of witness appearing in respect of sale deed and recitals in sale deed as to giving of possession — Validity — Interference in writ jurisdiction. (Constitution of India, Art. 226).

Where in an appeal against the order of the Prescribed Authority ignoring certain tranfers the Appellate Court while confirming the order considered many aspects to show that there were many gaps in the position taken by the tenure-holder and by his transferees and pointed out that the

agreement of sale was executed before the sale deeds were executed but the original agreement for sale was not placed on record and there was no reference to the alleged agreement for sale in the sale deeds and the witness who appeared in respect of the sale deed made one statement about the date when possession was obtained whereas there was a different recital as to that aspect in the sale deed itself, the finding recorded by lower court could not be interfered with in view of S 5 (6) and its proviso in writ petition under Art 226 1980 All L J 1105 (S C), Disting

(Paras 3 and 6)

Cases Referred : Chronological	Paras
1980 All L J 1105 , AIR 1981 S C 636	3
1978 All L J 864 1978 Rev Dec 285	4

Ashok Khare, for Petitioner, Standing Counsel, for Respondents

ORDER :— These two petitions are connected and they are directed against the common order passed by the Prescribed Authority and thereafter by the appellate Court. They arise out of the proceedings under the U P Imposition of Ceiling on Land Holdings Act, 1960

2. The facts, in brief, are these —

One Krishna Kumar, who is the petitioner in Civil Misc Writ Petn No 5851 of 1980 was treated as the tenure-holder and the notice under S 10 (2) of the Act was issued to him Objections were filed by the said tenure-holder and also by the transferees, who had purchased lands from him These objections were decided by the Prescribed Authority by his order dated 4-6-1979, a certified copy whereof is annexure 1 to the writ petition of Shri Krishna Kumar and whose true copy is annexure 1 to the other connected writ petition Thereafter separate appeals were filed by the said tenure-holder and by his transferees and all these appeals were treated as connected and were disposed of by one common judgment, whose true copy is annexure No 2 to the two writ petitions. The certified copy of the appellate judgment is also on the record Now the petitioners in the two petitions have come up to this court in these petitions and in support thereof I have heard Shri K M Sinha, learned counsel for the petitioners in Civil Misc. writ petition No. 4498 of 1980 and Shri Ashok Khare, learned counsel for the petitioners in Civil Misc Writ Petition No 5851 of 1980 In opposition the learned Standing Counsel has also made his submissions

3. Learned Counsel for the petitioners emphasised that the appellate Court should have dealt with the objections filed by separate objectors in a separate and systematic manner and that this was not done and the appellate Court has almost created a jumble It may be that this criticism may have some point in it but merely on the ground that the order should have been more neat and lucid, dealing separately with each objection, it would not be proper to set aside the same within the limited ambit of a petition under Art 226 of the Constitution What has to be seen is whether ends of justice will be satisfied only by setting aside such an order on the ground that there has been miscarriage of justice by the manner in which the controversies were decided by the authorities below The only point which has been pressed before me is that the sale deeds in question which were executed by the tenure-holder Krishna Kumar after 24-1-1971 were wrongly ignored by the Prescribed Authority and thereafter by the appellate Court and the benefit of cl (b) of the proviso to sub-sec (6) of S 5 was wrongly denied to the petitioners. In other words, it is claimed that the transfer deeds even though executed after 24th January, 1971 should have been held to have been executed in good faith and for adequate consideration and should have been accepted Learned Counsel for the petitioners have placed reliance on a recent Supreme Court decision in Brijendra Singh v State of U P , (AIR 1981 S C 636) (1980 All L J 1105) I have gone through the facts of the said case but in my view, the same is distinguishable in view of the facts involved in the said case In paragraph 20 of the said decision it was laid down as follows —

"In the instant case, the two sales in question have not only been found to be genuine and for adequate consideration but it has been further accepted that the sales were made by the tenure-holder to meet an ordinary need of every house holder i e for raising funds for constructing a residential house in New Delhi The sales have been held by the Appellate Authority to be not in 'good faith' merely on the ground that the construction of a residential house in New Delhi by the tenure-holder could not in the opinion of the Authority, be said to be an 'impending (impelling) necessity. This approach and finding is manifestly erroneous "

4. It seems to me that in the instant case the appellate Court was under no legal misconception It was observed by the appellate Court as follows —

"No doubt the law does not require that the circumstances which constrain an owner of agricultural land to sell the land would be recited in the sale dead itself Of course, the presence or absence of such recital in the sale deed may be relevant to determine whether the sale was bona fide or not within the meaning of the Act. However, the absence of such a recital is not decisive of the matter This view has been held in 1978 Rev Dec 285 (1978 All L J 864) Lal Krishna Kumar Pal v Civil Judge The sale deeds also do not contain any recital that the aforesaid sale deeds were executed in pursuance of the agreement for sale "

5. Learned Counsel for the petitioners drew my attention to the following extract occurring in the judgment of the appellate Court —

"It may also be mentioned here that the sale deeds do not appear to have been executed in good faith as there is not evidence on record to show as to what was the compelling circumstances and necessity under which the sale had to be executed "

6. In my view this sentence should not be read in isolation from the rest of the judgment pronounced by the appellate Court. It should be seen that many aspects were considered by the appellate Court to show that there were many gaps in the position taken by the tenure-holder and by his transferees An agreement of sale is said to have been executed before the sale deeds were executed The Court has pointed out that the alleged original agreement for sale was not placed on record It has further been pointed out that there is no reference to the alleged agreement for sale in the impugned sale deeds So far as the sale deed executed in favour of the petitioners of Civil Misc Writ Petn No 4498 of 1980 is concerned, it has been pointed out that the witnesses who appeared in the witness-box in respect of the said sale deed, made one statement about the date when possession was obtained whereas there is a different recital in the sale deed itself It seems to me that taking into consideration the language used in S 5 (6) and in its proviso, it is not possible to interfere with the finding recorded by the authorities below Therefore, both these petitions are dismissed, but there will be no order as to costs However, I should like to make it clear that hereafter it will be open to the tenure-holder to give his fresh choice in regard to the land which is sought to be declared as surplus under S 12A of the Act and such choice, as far as possible be accepted as laid down in the said provision, of law provided the tenure-holder has not lost his rights in such land in the proceedings under S 14 of the Act

Order accordingly

1981 ALL. L. J. 1013

M P MEHROTRA, J

Ramendra Pal Singh and others, Petitioners v. The State of U P and others, Respondents

Civil Misc Writ No 5852 of 1980, D/- 6-8-1981

(A) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 5 — Ceiling area — Determination — Plots jointly owned by co-tenure holders — Transfer of certain plots — Benefit to certain extent in respect of the plots in question given to a co-tenure-holder by appellate authority while deciding his ceiling area — Such benefit should be extended to other co-owners also. (Para 4)

(B) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 5 (5) proviso (b) —Prescribed Authority ignoring certain transfers effected after 24-1-1971 and not extending benefit of proviso (b) to S. 5 (6) — Finding confirmed by Appellate Authority on basis of discrepancies between evidence of witnesses appearing in respect of sale deed and recitals in sale deed as to giving of possession and on basis of not bringing of agreement of sale deed on record — Finding being in consonance with S. 5 (6) proviso (b) thereto will not be interfered with in exercise of writ jurisdiction. 1981 All L J 1011, Rel. on.

(Para 3)

Cases Referred : Chronological Paras

1981 All L J 1011 3

ORDER :— This petition arises out of the proceedings under the U P Imposition of Ceiling on Land Holdings Act

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IY/IY/D895/81/SMA

2. The facts, in brief, are these

The petitioner No 2 Prabhat Kumar was treated as the tenure-holder and the notice under S 10 (2) of the act was issued to him He had effected certain transfer deeds and the petitioner No 1 Ramendra Pal Singh is such a transferee from the petitioner No 2 Prabhat Kumar Objections were filed before the Prescribed Authority by the said tenure-holder Prabhat Kumar and by the said transferee Ramendra Pal Singh and by the other transferees also The Prescribed Authority by his order dated 4-6-1979 decided the said objections A true copy of the said order is annexure 1 to the petition Thereafter an appeal was filed and the same was dismissed by the appellate Court by its judgment dated 8-4-1980 A certified copy of the said judgment is on the record and its true copy, is annexure 2 to the petition Now the petitioners have come up in the instant petition and in support thereof, I have heard Sri Ashok Khare, learned counsel for the petitioners In opposition the learned Standing counsel has made his submissions.

3. Learned counsel for the petitioners contended that the various sale deeds executed by the tenure-holder including that in favour of petitioner No 1 were wrongly ignored by the Prescribed Authority and thereafter by the appellate Court. I have gone through the judgment of the appellate Court and through the order of the Prescribed Authority and in my view it is not possible to interfere in this petition in the findings recorded by the said authorities The contention raised in this petition in respect of the transfer deeds is identical with those which were advanced in the two connected writ petitions, being No 5851 of 1980 and 4498 of 1980, (reported in 1981 All L J 1011) and for the reasons which I have given in detail in my judgment of date disposing of the said two connected writ petitions I am of the view that so far as the controversy about the transfer deeds is concerned, this petition also lacks merit and the contention in respect of the transfer deeds should be rejected

4. Shri Ashok Khare, learned counsel for the petitioner, next contended that in respect of plots Nos. 28, 32 and 77 the position was that these three plots were jointly owned by three brothers the petitioner No 2 Prabhat Kumar, Shri Krishna Kumar, who is the petitioner in writ petition No. 5851 of 1980 and Sri Harish Chandra These three brothers are sons of one Sitaram This averment is contained in paragraph 16 of this petition and there is no counter affidavit on behalf of the State denying the correctness of the said allegation, in this view of the matter, the aforesaid allegation can be accepted as correct It was pointed out that the appellate Court while deciding the appeal of Krishna Kumar gave benefit to him in respect of certain parts of the said three plots, namely, plots Nos 28, 32 and 77 It is not clear from the order passed by the appellate Court in the case of Krishna Kumar as to whether benefit was given to the extent of 1/3rd or to any other extent However, it seems to me that the appellate Court lost sight of the said aspect of the matter while deciding the case of Prabhat Kumar and it seems to me that if some benefit has been given to one co-tenure-holder in respect of same land which is commonly owned by the other co-tenure-holder also (and where no demarcation has taken place) then such benefit should be extended to all the co-owners

5. Accordingly, I quash the judgment of the appellate Court in so far as the benefit in respect of plots Nos 28, 32 and 77 is concerned The appellate Court is directed to decide whether the petitioner No 2 in this case, namely, Sri Prabhat Kumar is also entitled to the benefit in respect of the said three plots, if so, to what extent, in the light of the appellate Court's judgment in the case of his brother Krishna Kumar. The same benefit should be extended to Prabhat Kumar also as has been extended to Krishna Kumar in respect of the said three plots which are claimed to be commonly owned by the three brothers as has been stated above The ceiling area and the surplus land should be re-calculated thereafter The tenure-holder will also be allowed to exercise his fresh choice under S 12 of the Act

6. In the circumstances, there will be no order as to costs

Order accordingly

1981 ALL. L. J. 1014

H N SETH AND R M SAHAI, JJ

M/s Ashok Kumar Dinesh Chandra, Ballia, Petitioner v Krishi Utpadan Mandi Samiti, Ballia and another, Respondents

Writ Petn Nos 2109, 2110 and 5020 of 1977 and 487 of 1974, D/- 21-5-1981

FY/IY/C980/81/HR/RSK

(A) U. P. Krishi Utpadan Mandi Adhiniyam (25 of 1964), S. 19 — Market Committee fund must be utilised only for purposes enumerated in S. 19 and cannot be utilised for constructions outside market yard.

The Krishi Utpadan Mandi Samiti cannot treat the collection of fee as tax, it cannot go on collecting fee irrespective of necessity and spending it at will. Expenditure of the Market committee fund established u/s 19 of the Act has to be for purposes enumerated in it. This power cannot be extended for spending the fund on constructions outside the market yard. Sub-cl (vi) providing for expenditure, 'on cost of land or buildings acquired for the purposes of this Act,' has to be read alongwith cls (vii) and (ix) of sub-sec (2) of S 16 which empowers the Committee to provide amenities and constructions in the Market or sub-market yard. If a committee utilises the fee levided and collected under S 17 (iii) for purposes for which fee cannot be realised, it can be prevented from doing so and a direction can be issued to it to utilise for permissible purpose only. It can be prohibited also if the court is satisfied that the amount already accumulated is beyond the element of quid pro quo in relation to future realisation as well. However, the demand for market fee cannot be quashed merely because the collections were for purposes permissible and impermissible both. That does not make the levy bad. (Para 14)

(B) U. P. Krishi Utpadan Mandi Adhiniyam (25 of 1964), S. 17 (iii) (b) — Market fee can be levied or collected even in absence of machinery for levying and collecting such fee. 1980 All L J 490 (S C), Rel. on. (Para 17)

(C) U. P. Krishi Utpadan Mandi Adhiniyam (25 of 1964), S. 17 (iii) (b) — U. P. Krishi Utpadan Mandi Niyamavali (1965), R. 76 — Applicability of S. 17 (iii) (b) — Market fee u/s. 17 (iii) (b) is chargeable on sales by a trader to another trader and levy cannot be struck down on ground that sale did not take place by auction as per R. 76. 1972 All L J 591 (D B), Rel. on. (Para 17)

(D) U. P. Krishi Utpadan Mandi Adhiniyam (25 of 1964), S. 17 (iii) (b) — Market fee — Paddy purchased from within market area and on which fee had been paid mixed with paddy purchased from outside — Market fee is chargeable on quantum of rice produced from imported paddy.

The petitioners purchased paddy from within the market area and also from places outside. It was contended that as the paddy which was imported was mixed with the paddy on which fee had already been paid, the ratio of rice thus produced could not be found out, and, therefore, the Mandi Samiti could not levy any fee.

Held, market fee was chargeable on the quantum of rice produced from paddy purchased from places outside the market area. The petitioners were expected to maintain accounts from which they could conveniently point out the quantity of imported paddy which had been mixed with the quantity of other paddy which had already suffered the fee. From this it could be found out how much rice was produced in the light of procurement principle from paddy. (Para 19)

(E) U. P. Krishi Utpadan Mandi Adhiniyam (25 of 1964), S. 17 (iii) (b) — Levy of market fee — Opportunity of hearing as contemplated by the Act, not given — Levy order is not maintainable. (Para 20)

Cases Referred :	Chronological	Paras
AIR 1980 S C 1008		3, 6, 7, 8, 11, 12, 13
1980 All L J 490	AIR 1980 S C 1124	2, 3, 6, 15, 17, 18
1979 All L J 126		2
AIR 1978 S C 1181		6
1973 Tax L R 2372 (All)		2, 12
1972 All L J 591		17
AIR 1961 S C 459		11, 12

S. P. Gupta, for Petitioner. B. D. Mandhyan, for Respondents.

R. M. SAHAI, J. :— By these four petitions, two by wholesalers and Commission Agents of Rice and two by Rice Millers, the levy and demand of market fee, under U. P. Krishi Utpadan Mandi Adhiniyam (hereinafter referred to as the Act), has been challenged, both on non-applicability of S. 17 (1) (b) of the Act and absence of any special benefit or privilege to petitioners for the fee paid by them. Apart from these, certain minor aspects also arise which shall be considered in course of the judgment.

2. Since the enforcement of the Act, a series of attempts have been made by a spate of petitions challenging the levy being in violation of quid pro quo rule, the sine qua non for imposition of fee but it has always been repelled by this Court (see Atma Ram

Ram Lal v State, 1979 All L J 126, Special Appeal No 280 of 1972 (reported in 1973 Tax L R 2372), Mangah Prasad Kamta Prasad v Krishi Utpadan Mandi Samiti decisions mentioned at page 132 of Atma Ram's decision) Final battle, however, was fought in the Supreme Court in appeals arising out of a bunch of petitions decided alongwith Atma Ram's case and the Hon'ble Court put final seal to the constitutional validity of the imposition Ram Chandra Kailash Kumar v State of U P AIR 1980 S C 1124 (1980 All L J 490)

3. It held (at p 499 of All L J) —

"Yet charging of 1% fee as is being charged throughout the State of Uttar Pradesh by all the Market Committees is not illegal and does not go beyond the quid pro quo theory discussed in Puri's case (AIR 1980 S C 1008) "

What survives for consideration, therefore, is the validity of demand of the fee from petitioners on principles enunciated by the Supreme Court in Kewal Krishna Puri v State of Punjab, AIR 1980 S C 1008 as the Hon'ble Court while passing the order in Ram Chandra's (supra) observed, (at pp 507, 508)

"We do hope that services are being rendered and will continue to be rendered by the various Market Committees in the light of the judgment in Kewal Krishna Puri's case If in regard to any particular Market Committee it is found that services are not being rendered or in future lapses are made then it will be open to the payers of fees to reagitate the matter in the High Court in the light of that jugment "

In Puri's case although seven principles have been laid down but the basic philosophy round which they revolve is,

"But generally and broadly speaking it must be shown that with some amount of certainty, reasonableness or preponderance of probability that quite a substantial portion of the amount of fee realised is spent for the special benefit of its payers "

It is in this background and enunciation of law that the allegations made in the counter-affidavit, supplementary affidavits etc filed by Samitis in reply to the amendment aplications raising this plea in each of the petitions has to be examined. Before summarising these allegations it may be pointed out that the burden to establish that fees are charged for services rendered is on the Samiti In para 9 of counter-affidavit filed in amendment application in Civil Misc Writ Petn No 487 of 1974 it is alleged, 'Mandi Samiti has rendered various services to the petitioners and other traders, producers and sellers and others engaged in the transactions of specified agricultural produce in the market area of Dhampur from the very inception The Mandi Samiti has made arrangement for light, water, sweeping and other facilities in the market yard It has provided tents, urinals and has also constructed link roads and culverts These have been more or less repeated except for very minor changes in para 9 of Civil Misc Writ No 5020 of 1977, para 22 of Civil Misc Writ No 2109 and 2110 of 1977 They constitute the services which are being rendered at present

4. Then the second set of allegations in same paragraph is, that Samitis have either submitted proposals for acquiring land for constructions of market yard or it is in process of acquisition and after land is acquired, the cost of which runs in lakhs, the Samitis propose to construct market complexes consisting of godowns, post-office, bank, police station, warehouse shelter, rest house etc That is, the Samitis intend to render these services in future

5. Lastly in the supplementary affidavits in Civil Misc Writ No 487 of 1974 and 5020 of 1977 it is alleged that services as provided in S 16 of the Act are being rendered In this regard it is peculiar that no specific service has been alleged but all the duties which have to be performed by Samiti have been alleged to be being performed. The allegations are faithful reproduction of various functions to be discharged by the Samiti

6. Before considering each of them individually and their implication it may be mentioned that allegations are not only identical but general in nature, and absolutely vague No effort has been made to substantiate the allegations by filing extract of accounts maintained by Samiti In case where levy is challenged for lack of rendering service, the burden is on the other side to rebut it by fact and figure, not by empty words Despite the law having been clarified by the Supreme Court in Puri's and Ram Chandra's cases (AIR 1980 S C 1008 and 1980 All L J 490 (S C)) that substantial amount of fee should be shown to have been spent on payers of fee the affidavits and supplementary affidavits are blissfully silent They have

pitched their faith more on law than on facts In the declaration of law that fee can be charged for service to be rendered in future they found a shelter forgetting that it has to be related to the payer The following observation, in the Chief Commissioner Delhi v Delhi Cloth and General Mills Ltd., AIR 1978 S C 1181 (at p. 1182)

"there must be an element of quid pro quo that is to say, the authority levying the fee must render some service for the fee levied however remote the service may be,"

was explained in Puri's case (AIR 1980 S C 1008) and it was observed (at para 21)

"We would like to point out that the first condition is rather couched in too broad and general language Rendering some service, however remote the service may be, cannot strictly speaking satisfy the element of quid pro quo required to be established in case of the impost of fee"

7. They may now be scrutinised one by one The present service which is being rendered according to Counter-affidavit is sweeping of floor, lighting, water, providing for urinals and tents etc Even ignoring the rejoinder affidavit that most of these services are being performed by Public Works Department of Municipal Boards, can these services be considered sufficient for charging fee from Rice-Millers? In Puri's case (AIR 1980 S C 1008) the Supreme Court rejected such general service

8. Then as regards construction of link roads and culverts there is no whisper whether this construction is in market yard or market area In Puri's case (AIR 1980 S C 1008) this problem also arose Cl (viii) of S 27 of the Punjab Act enjoined upon the committee to construct and repair approach roads, culverts, bridges and other such purposes' It was held by the Hon'ble Court (at p 1027)

"But as we have pointed out above, if one were to give a very wide meaning to this phrase of construction and repair of approach roads, culverts and bridges to say that such construction can be permitted anywhere in the market area for the facility of the agriculturists which ultimately will benefit the traders also, then the whole concept of correlation of fee and its character of having an element of quid pro quo will dwindle down and become an empty formality "

9. The allegations, therefore, are not sufficient to clothe the Samiti with power to charge fee unless it is established that they have constructed roads in the market yard

10. So far as future rendering of service is concerned it again cannot be an excuse for charging fee It has to withstand the same test The main plank of defence is that money is required for acquiring land It was not denied by the learned Counsel for Mandi Samiti that the land which has been or is being acquired for this purpose is outside the Market yard What is urged is that this was one of the purposes on which fund of Samiti could be spent as is clear from S 19 (vi) of the Act It may be pointed out that S 16 empowers the Committee to enforce the provisions of the Act, rules and bye-laws in the Market area and provides facility for sale and purchase of agricultural produce Sub-sec (2) specifies the function it can perform in market yard The construction contemplated in S 19 (vii) is in the Market yard or sub-market yards The charging of fee should therefore, be correlated to proposed construction of shops etc in Market yard. Even assuming that the Samiti may opt to construct another Market yard in Market area and may charge fee for the same but it cannot be done unless it is declared as Market yard We are not impressed by the submission that fee may be charged, Land may be acquired and the declaration u/s 7 may take place subsequently In that case it would be charging fee for a purpose not enjoined by the Act It is further doubtful whether the Mandi Samiti can utilise the fund collected under power conferred on them to develop huge commercial complexes The fee is not tax It cannot be charged to augment general revenue It has to be correlated with its payer Some benefit must be conferred on him The charging of fee is not perennial Once the purpose and objective for which it is imposed is achieved it has to be discontinued Then it is alleged that Mandi Samitis are constructing huge buildings and selling them to big traders who in some cases are purchasing them also The Mandi Samitis are not to work as business houses They have to regulate the business only

11. In Puri's case (AIR 1980 S C 1008) the Supreme Court rejected Haryana Marketing Board's contention that rendering of services could be correlated to those on whom the ultimate burden falls It was held (at p 1015)

"In our opinion this argument is neither logical nor sound The impost of fee and the

liability to pay it is on a particular individual or a class of individuals They are under the obligation to submit accounts, returns or the like to the authorities concerned in cases where quantification of the amount of fees depends upon the same They have to undergo the botherations and harassments, sometimes justifiably and sometimes even unjustifiably, in the process of discharging their liability to pay the fee The authorities levying the fee deal with them and realise the fee from them By operation of economic laws in certain kinds of impositions of fee the burden may be passed on to different other persons one after the other "

It is further held (at p 1015)

"It is axiomatic that the special service rendered must be to the payer of the fee The element of quid pro quo must be established between the payer of the fee and the authority charging it. It may not be the exact equivalent of the fee by a mathematical precision, Yet, by and large, or predominantly, the authorities collecting the fee must show that the service which they are rendering in lieu of fee is for some special benefit of the payer of the fee "

The Hon'ble Court considered its earlier decision in Hingir Rampur Coal Co , Ltd v State of Orissa, AIR 1961 S C 459 and explained the observation made at page 464 to the effect,

"If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the case is distinguishable from a tax and is described as a fee,"

by saying that, "the above passage does not mean that the service rendered is unconnected with or not meant for the payer of the fee " It is, therefore, not open to opposite party to argue that if services are rendered to a specific area or a specific class of persons or trade the imposition shall be justified even if special benefit to the individual namely, the person who pays the fee is not established To this extent the earlier view has been diluted.

12. Still the question is, can the demand be quashed because the opposite party is not rendering any service or special benefit to petitioners at present ? In Hingir Rampur Coal Co case (AIR 1961 S C 459) (supra) it was held by the Hon'ble Court, (at p 464)

"In regard to fees there is and must always be correlation between the fee collected and the service intended to be rendered."

This was applied by this Court in Special Appeal No 280 of 1972 and connected Appeals, Mangali Prasad Kamta Prasad v Krishi Utpadan Samiti, decided on 23-11-1972 (reported in 1973 Tax L R 2372 at p 2379) and it was held

"the fee can be levied and collected for services intended to be rendered, the public authority may commence rendering service after the fee is recovered and not before "

Therefore, on future rendering of service the fee can be charged but as has been held in Puri's case (AJR 1980 S C 1008 at p 1023)

"That the services rendered to the licensees must be in relation to the transaction of purchase or sale of the agricultural produce That while rendering services in the market area for the purpose of facilitating the transactions of purchase and sale with a view to achieve the objects of the marketing legislation it is not necessary to confer the whole of the benefit on the licensees but some special benefits must be conferred on them which have a direct, close and reasonable correlation between the licensees and the transactions "

It will, therefore, have to be seen in each case whether the intended service to be rendered in future shall have any correlation with payer

13. Before taking up the next point we consider it necessary to point out that S 16 of the Act gives in detail the duties and functions which a committee is under obligation to perform Levy of fee for similar duties has been upheld in Puri's case (AIR 1980 S C 1008) We may not, therefore, be understood as laying down that those Samitis which are performing their functions in accordance with law are precluded from charging the fee in exercise of power under S 17 of the Act

14. But one thing is certain that the Samiti cannot treat the collection of fee as tax, it cannot go on collecting irrespective of necessity and spending it at will Expenditure of the Market committee fund, established u/s 19 of the Act has to be for purposes enumerated in it We have already pointed

out that this power cannot be extended for spending the fund on constructions outside market yard Sub-cl (vi) providing for expenditure, 'on cost of land or buildings acquired for the purposes of this Act,' has to be read along with cls (vii) and (ix) of sub-sec (2) of S 16 which empowers the Committee to provide amenities and constructions in the Market or sub-market yard If a committee utilises the fee levied and collected under S 17 (iii) for purposes for which fee cannot be realised, it can be prevented from doing so and a direction can be issued to it to utilise for permissible purpose only It can be prohibited also if the court is satisfied that the amount already accumulated is beyond the element of quid pro quo in relation to future realisation as well We may, however, hasten to add that the demand cannot be quashed merely because the collections were for purposes permissible and impermissible both That does not make the levy bad

15. Coming to the question of non-applicability of Section 17 of the Act to petitioners it is necessary to quote sub-cl (b) of S 17(iii) which runs as under —

"(b) market fee, which shall be payable on transaction of sale of specified agricultural produce in the market area at such rates, being not less than one per centum and not more than one and half per centum of the price of the agricultural produce so sold, as the State Government may specify by notification, and such fee shall be realised in the following manner —

1) if the produce is sold through a commission agent, the commission agent may realise the market fee from the purchaser and shall be liable to pay the same to the Committee,

2) if the produce is purchased directly by a trader from a producer the trader shall be liable to pay the market fee to the Committee,

3) if the produce is purchased by a trader from another trader, the trader selling the produce may realise it from the purchaser and shall be liable to pay the market fee to the committee, and

4) in any other case of sale of such produce, the purchaser shall be liable to pay the market fee to the Committee

In Ram Chandra's case (1980 All L J 490 (S C)) (supra) it has been held, (at p. 500)

"All the four clauses of cl (b) are mutually exclusive If the produce is purchased from a producer directly the trader shall be liable to pay the market fee to the Committee in accordance with sub-cl (2) But if the trader sells the same produce or any product of the same produce to another trader neither the seller-trader nor the purchaser-trader can be made to pay the market fee under sub-cl (3) So far the position was not disputed by the Market Committee, rather it was conceded, and in our opinion, rightly "

Petitioners in Writ Petition Nos 2109 and 2110 are wholesalers It is admitted that their case could be covered under cl. (3) only

16. The taxable event under the clause is sale by a trader to another trader Trader has been defined in sub-cl. (y) of S 2 to mean "a person who in the ordinary course of business is engaged in buying or selling agricultural produce as a principal or as a duly authorised agent of one or more principals and includes a person, engaged in processing of agricultural produce The liability to pay the fee could therefore, arise only if the sale was made by petitioners to another trader The petitioners claim to be importers of rice whereas according to opposite parties the purchases were made in the Market yard itself According to learned counsel for Mandi Samiti as sale of less than a quintal by wholesaler is prohibited, and normally a consumer would not purchase this much, a presumption arises that sale was made to trader We are afraid there is no warrant for this submission Neither the Act nor rules provide for any such presumption Nor is there any merit in the submission that the word purchaser should be read as including consumer as such because it refers to purchases by a trader used in earlier part The purchase or sale to consumer is not covered in this clause also because all such transactions shall be covered in residuary cl (4) Therefore, no demand can be made by a trader unless it is found that it had purchased the produce from another trader

17. It was also argued by the learned counsel for petitioners that in absence of any machinery for levying and collecting the levy the provisions of the Act should not be implemented The controversy, however, stands concluded in view of the decision by Supreme Court in Ram Chandra's case (1980 All L J 490 at p 499) (S C)

"But it is not correct to say that in absence of such a machinery no market fee can be

levied or collected If a dispute arises then in the first instance the Market committee itself or any Sub-Committee appointed by it can give its finding which will be subject to challenge in any court of law when steps are taken for enforcement of the provisions for realisation of the Market fee "

It was then urged that only those transactions of sale give rise to liability of market fee under S 17(iii) (b) of the Act which take place according to R 76 framed under the Act This contention was repelled by a division bench of this Court in Special Appeal No 418 of 1971 decided on 9-12-1971 (Reported in 1972 All L J 591) We are in respectful agreement with it The chargeability of fee depends on sale by a trader to trader If that is established then the levy cannot be struck down because sale did not take place by auction

18. Having disposed of the submissions which were general in nature we now take up individual petitions In Civil Misc Writ Petition Nos. 487 of 1974 and 5020 of 1977 filed by Rice Millers it was urged that their mills are situated outside the market yard Therefore, there is no question of rendering any service The learned counsel pointed out in case of Chandra Rice Mill the State went to the length of declaring the premises of petitioner itself as Market yard Such declaration according to him was illegal and violative of S 7 of the Act The learned counsel urged that mere declaration of market yard was not sufficient as the Mandi Samities are not capable of rendering any service in present or in future to the Mills The question whether any service is being rendered or not apart from being legal question, is a question of fact It has not been decided or adjudicated upon by the Mandi Samities as yet In Ram Chandra's case (1980 All L J 490) (S C) it was held by the Supreme Court 'that even though no machinery was provided yet the Mandi Samities are competent to adjudicate all such disputes which may then be decided by the High Court' It is, therefore, expedient to direct the Mandi Samities that it may consider whether any service is being rendered to the Mills which have been declared to be the Market yard

19. It was also urged that petitioners purchased paddy from within the market area and also from places outside As the paddy which was imported was mixed with the paddy on which fee has already been paid, the ratio of rice thus produced could not be found out and, therefore, the Mandi Samitis could not levy any fee There appears to be no substance in this submission as the petitioners are expected to maintain accounts from which they can conveniently point out the quantity paddy which has been mixed with the quantity of other paddy which has already suffered the fee From this it can be found out how much rice was produced in the light of procurement principle from paddy

20. As regards the petitions of wholesalers when these petitioners had come earlier for hearing we had directed the Mandi Samitis to adjudicate whether any service was being rendered and whether the petitioners were carrying on business so as to attract the levy under S 17(b) The Mandi Samitis have decided it and the order has been filed along with the supplementary affidavit The petitioners do not appear to have participated Their grievance is that they were not afforded any opportunity by the Mandi Samiti On the other hand according to Mandi Samiti the petitioners did not co-operate in spite of the orders passed by this Court We have gone through the supplementary affidavits, counter-affidavit and rejoinder-affidavit filed to it. We have also gone through the orders passed by the prescribed authority We are constrained to say that the prescribed Authority took it for granted that the petitioners are liable to pay the fee It has not afforded opportunity as contemplated in the Act The letter which was sent by it to the petitioners to produce the documents was vague It did not specify the registers which it required for examination During hearing the petitioners produced the documents which were being demanded by the prescribed Authority and it was demonstrated that these documents were already with them In these circumstances, we are of the opinion that order passed by the prescribed Authority cannot be maintained

21. In the written notes submitted by learned counsel for parties, which was accepted on their request, the petitioners challenged the levy being hit by Arts 14 and 301 of the Constitution This was, however, not raised at the time of hearing Therefore, we do not take any notice of it Apart from it the constitutional validity of the impost having been upheld by Supreme Court it is not open to the petitioners to challenge it on other grounds in this Court.

22. Before parting with these petitions we think it necessary to highlight that under S 26-A of the Act, State Agricultural Mandi Board has been established to supervise and control the working of the Committee Under sub-cl. (x) of S 16 a Committee is required to prepare annual budget of estimated collections and expenditure It has to be scrutinised by the Board u/s 26-b While exercising such power the Board can ascertain whether realisations are being made in accordance with law and expenditure is on permissible heads From the counter-affidavits filed on behalf of Samitis the state of affairs does not appear as it should be. May be because, as pointed out by the learned counsel for petitioners, that, despite the enforcement of Act since 1964 there are no elected bodies But that can be no justification for not actng in accordance with law If it is not being done we trust that the samitis shall in future prepare their annual budget showing not only income and expenditure but also the collections u/s 17 and their expected utilization to enable the Board to discharge its duty under S 26 The Board shall examine the collections actual or estimated in the light of the two Supreme Court decisions It would be then possible for this Court in case of challenge to decide whether levy satisfies the test of quid pro quo

23. One thing we may also point out, that as far back as 27-3-1980 the Supreme Court while repelling the contention that in absence of machinery for collecting, the levy was invalid, observed (at p 499)

"But it is high time that Market Committee should be constituted in a regular manner on a permanent basis in accordance with the provisions contained in Chapter III of the Act"

More than a year has passed but probably a year is short for the State machinery to set the rules in order Such observations by courts are meant to be implemented and not for filling pages of law reports During the course of hearing we had apprised Mr Advocate General of this We hope that the State Government will not wait till a direction is issued by this Court

24. In the result all the petitions succeed and are allowed The orders dt 24th/25th Sept , 1977 passed by prescribed authority in Civil Misc Writ Nos 2109 and 2110 of 1977 are quashed A direction is further issued to opposite parties in all the petitions not to enforce the impugned demand without adjudication of petitioners' claim that no fee can be charged from them as no service is rendered In petitions Nos 2109 and 2110 it shall further be decided whether fee can be charged from them u/s 17(iii) (b) When deciding its claim the authorities shall bear in mind the law as laid down by the Supreme Court and explained by this Court in these petitions Petitioners shall be entitled to costs

Petitions allowed.

1981 ALL. L. J. 1021

R R RASTOGI, J

Smt Tikoli Kunwar, Petitioner v State of U P and others, Respondents

Civil Misc Writ Nos 6137 and 6299 of 1980, D/- 22-5-1981

(A) Civil P. C. (5 of 1908), O. 18, R. 18 — Inspection by Court — Memorandum of inspection — Party to suit cannot file objection to memorandum of inspection.

O 18, R 18 enables the Court to inspect any property or thing and the object is to enable it to understand the questions that are being raised and appreciate the evidence True, the judgment cannot be passed solely on the basis of such personal local inspection The memorandum of inspection forms a part of the record of the suit and there is no question of any party filing any objection to such memorandum The power of the Court to inspect is not to be confused or equated with the report of a Commissioner While making a spot inspection under O 18, R 18, CPC the Court does not become a witness to the proceedings AIR 1971 Assam and Naga 127 Rel on 1980 All L J 723 Distng

(Paras 6, 9)

(B) Evidence Act (1 of 1872), S. 114 — Khasra entries — Entries are presumed to be correct, tho' party aggrieved may rebut such presumption — Forum of ceiling authorities is not proper forum for rebutting presumption. (U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 10(2).)

(Para 11)

Cases Referred : Chronological	Paras
1980 All L J 723 : 1980 All Civ J 390	7
AIR 1971 Assam & Naga. 127	8

S K Singh, for Petitioner, Standing Counsel, for Respondents

ORDER :— These two writ petitions may be taken up together because same questions are involved and the counsel for the petitioners addressed the same arguments in both of them

2. In Writ Petition No 6137 of 1980, the petitioner is Smt Tikoli Kunwar Proceedings under the U P Imposition of Ceiling on Land Holdings Act (hereafter 'the Act') were started against her by the issue of a notice u/s 10(2) along with the statement It was proposed to declare 15 Bighas 14 biswas 8 biswansis land of her holding as surplus Her holding was situated in two villages, namely, Changeli and Chathiya In village Changeli she was tenure-holder of plots Nos 7 and 10 Ram Swarup, who is the petitioner before this Court in Writ Petition No 6299 of 1980, is another tenure-holder of these plots Smt Tikoli Kunwar contested the notice and one of the objections taken by her was that plots nos 7 and 10 aforesaid and the entire land of her holding in village Chathiya were unirrigated and had been wrongly shown as irrigated in the statement The Prescribed Authority did not accept this contention and by its order dt 31-12-1974, confirmed the notice In appeal the surplus area was modified to some extent but the finding in regard to the character of the aforesaid land was upheld Thereafter Smt Tikoli Kunwar came up to this Court by way of a writ petition, being Civil Misc Writ No. 8241 of 1976 That petition was decided by this Court on 26-9-1978 The claim of the petitioner that the aforesaid land was unirrigated had not been decided in the manner required by S 4-A of the Act and hence the case was remanded to the appellate court for decision of this question afresh

3. After remand, the appellate court has, on an examination of the relevant Khasras for 1378 to 1380 fasli years, taken the view that for both the plots Nos. 7 and 10 aforesaid irrigation facility was available by a tubewell and in some of the land of both the plots two crops had been grown The petitioner's contention in regard to the other plots has also been similarly examined and ultimately it has been held that irrigated area of plots Nos. 7 and 10, 220 and 295 comes to 26 Bighas 8 biswas and 5 biswansis and the remaining area of 16 Bighas 14 biswas and 1 biswansi is unirrigated and relief has been accordingly given and surplus land was

4. In the other case Ram Swarup also contested the notice which had been served on him u/s 10 (2) of the Act and claimed that plots Nos 7 and 10 aforesaid were unirrigated That contention was not accepted by the Prescribed Authority and surplus land was declared Ram Swarup's appeal having failed, he came up to this Court by way of writ petition, being Civil Misc Writ Petition No 785 of 1976 That petition was decided by this Court on 7-4-1978 The petitioner's contention was accepted that the question had not been decided as required by law and further that in the circumstances of the case it was accepted that the Prescribed Authority should have made a local inspection Accordingly the case was remanded to the Prescribed Authority with the direction to make a local inspection and then decide this objection of the petitioner regarding plots Nos 7 and 10. After remand the Prescribed Authority made a local inspection and found that in plot No 7 only 5 Bighas 14 biswas and 10 biswansis and in plot Nos 10, 8 Bighas 5 biswas land is unirrigated while the remaining is irrigated It appears that the petitioner filed certain objections to the inspection report of the Prescribed Authority The Prescribed Authority, however, on the basis of the inspection report gave some relief to the tenure-holder Ram Swarup and determined 4 21 hectares in terms of irrigated land as surplus The inspection report of the Prescribed Authority in Ram Swarup's case was not available to the appellate court while deciding the appeal of Smt Tikoli Kunwar It would have been better if these cases were taken up together and the appeals were heard by the same Court, but there is nothing on the record to suggest that the parties desired that these cases should be consolidated and unless that was done, the evidence available on the record of one case could not have been read in the other case

5. As for the case of Ram Swarup, tenure-holder, of course, the case was remanded by this Court to the Prescribed Authority In compliance with the directions given by this Court, the Prescribed Authority made a local inspection and gave its report Suprisingly enough, Ram Swarup, petitioner filed an objection to that report In my opinion such an objection was not maintainable It is another thing that if in the report of a Presiding Officer of a Court something had been pointed out on the spot and by some over-sight it had not found mention in the

report, the attention can be drawn to it, but that is absolutely different from raising an objection to the observations of the Court

6. In this behalf, it would be useful to refer to the relevant provision As for the power of the Court to inspect, provision has been made in O 18 R 18 of the C P C It reads

"The Court may, at any stage of a suit, inspect any property or thing concerning which any question may arise and where the court inspects any property or thing, it shall, as soon as may be practicable, make a memorandum of any relevant facts observed at such inspection and such memorandum shall form part of the record of the suit"

O 18 provides for hearing of the suit and examination of witnesses R 18, as noted above, enables the Court to inspect any property or thing and the object is to enable it to understand the questions that are being raised and appreciate the evidence It is correct that the judgment cannot be passed solely on the basis of such personal local inspection The memorandum of inspection forms a part of the record of the suit and there is certainly no question of any party filing any objection to such memorandum The power of the Court to inspect is not to be confused or equated with the report of a Commissioner O 26 of the C P C provides for Commissions Commissions may be issued to examine witnesses, for local investigation and to examine accounts For local investigation it is under R 9 of this Order that if the Court deems a local investigation to be requisite or proper to elucidate any matter in dispute or for ascertaining the market value of any property or the amount of any mesne profits or damages, the court may issue a commission to such person as it thinks fit R 10 provides for the procedure which is to be followed by the Commissioner and sub-rule (2) says that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record, but the Court or with the permission of the Court, any of the parties to the suit may examine the commissioner personally in open Court touching any of the matters referred to him or mentioned in his report Sub-rule (3) empowers the Court to direct such further enquiry to be made as it shall think fit if for any reasons it is dissatisfied with the proceedings of the Commissioner In the case of a local inspection by the court itself, no such occasion can arise And the question also is that if an objection is permitted to be filed against the memorandum of local inspection of the Court, then who is to decide it? Certainly, it cannot be expected of that court itself to decide it If it is taken that the appellate court is to decide it, then it can do so only if it itself visits the spot Against the appellate court's memorandum on his petition as well an objection may be filed and thus there can be no end to this process I do not think that such a situation can be permitted to arise.

7. Learned counsel for the petitioners drew my attention to certain decisions in support of his contention In Ram Dev v Deputy Director of Consolidation (1980 All Civ J 390) (1980 All L J 723), the view taken was that where a local inspection was made after hearing of arguments in the case, the petitioner was entitled to a fresh hearing on the material obtained after such inspection The learned counsel wanted to infer from this proposition that if after local inspection fresh hearing is permissible, it can only be for the purposes of challenging the material obtained after inspection I do not find any warrant for this inference from this decision. Right of hearing is entirely different from a right to file an objection Certainly, if after the close of arguments in a case a Court makes a local inspection, the party should be given a fresh opportunity of hearing on the material obtained by the Court after inspection That will be with a view to enlighten the Court on the evidence given in the case in the light of the material so obtained and certainly not to raise objections to the observations made by the Court after local inspection This decision, therefore, does not help the petitioner

8. The next case is a decision of the Assam High Court in Manindra Kumar Ray v Paresh Chandra Ray (AIR 1971 Assam and Naga 127), but in my opinion instead of supporting the petitioners, it lends support to the observation made by me above. In that case a Munsif, purporting to exercise power under O 18 R 18 of the C P. C', got measurement of the land done and made a survey report In the opinion of the Munsif since the measurement was done in the presence of the plaintiff and his lawyer, he could not raise any objection to the measurement It was observed by their Lordships that under O 18 R 18 it was not possible for the Munsif to make a local inspection in the manner done in the suit Under that Rule the Court at any stage of a suit may inspect any property or thing

concerning which a question may arise It is not permissible for a court to conduct an enquiry in order to furnish evidence in the suit for proper decision of the issues raised in the suit. It was held that under R 18 aforesaid the court in its discretion uses this power in a proper case and when the court inspects the property it makes a memorandum of inspection for the purposes of the record It was observed "There can be no cross-examination of the Court with regard to such a report and the court does not become a witness of the proceedings by making this inspection On the other hand, a Commissioner under O 26 R 9 has to offer himself as a witness, if required to satisfy the Court regarding the correctness or accuracy of his report or opinion about the manner in which he has conducted the proceedings" It was further held that by the impugned order the Munsif, although purported to exercise his power under O 18 R 18 of the C P C, in fact made a report and at the same time denied opportunity to the plaintiff to question the same or to furnish other appropriate evidence In this context the view taken was —

"After having performed the function of the Commissioner under O 16 R. 9, as it appears to be, the learned Munsif disqualified himself from further continuing adjudication of the suit"

9. In the present case such a situation did not obtain The Prescribed Authority made the local inspection under O 18 R 18 of the C P C and made a memorandum of inspection for the purposes of the record Strangely enough a copy of that memorandum has not been filed by the petitioners though they have taken particular care to file a copy of the objection In my opinion there could have been no occasion for filing any such objection because while making a spot inspection under O 18 R 18 of the C P C the Court does not become a witness to the proceedings

10. Therefore, in so far as Smt Tikoli Kunwar's case is concerned, the report of the Prescribed Authority's local inspection was not before the appellate court and in so far as Ram Swarup's case is concerned an objection to the report could not have been maintained and apart from that the appellate court has decided the matter mainly on the basis of relevant Khasras and in doing so has not come to a finding which is in any way contrary to the report of local inspection of the Prescribed Authority

11. Another contention made on behalf of the petitioners was that the relevant entries of the Kharas for the aforesaid three years are incorrect and the appellate court erred in relying on the same There is no merit in this contention either because Khasra entries are presumed to be correct. It is, of course, a rebuttable presumption and if any party feels aggrieved against any particular entry, it has remedy for that, but the forum of the ceiling authorities is not a proper forum for that purpose In the proceeding under the Act, therefore, the ceiling authorities could not have gone into the question as to whether or not the disputed entries were correct or not

12. It would thus appear that there is absolutely no merit in these writ petitions and they are liable to be dismissed Both the writ petitions are hence dismissed The stay orders dt 17-7-1980 passed in these two writ petitions are vacated There will be no order as to costs

Petitions dismissed

1981 ALL. L. J. 1024

= AIR 1981 Supreme Court 1739

(From Allahabad)

P N BHAGWATI AND BAHARUL ISLAM, JJ

Civil Appeal No 697 of 1981, D/- 6-2-1981

Mohammad Mustakhan, Appellant v U P Sunni Central Board of Waqf and others, Respondents

(A) U. P. Muslim Waqf Act (16 of 1980), S. 14 (2) — Dissolution of managing committee of Wakf — Order as to — Controller is competent to pass such order. **(Para 1)**

(B) U. P. Muslim Waqf Act (16 of 1980), S. 14 (2) — Order of dissolution of managing committee of waqf without stating therein reasons — Error of law apparent on face of record — Order quashed and case remanded. Decision of Allahabad High Court, Reversed. **(Para 1)**

JUDGMENT :— Special leave granted. This appeal by special leave arises out of a proceeding taken by the appellant under S 63 (3) read with S 71 of the U P Muslim

HY/HY/D676/81/CWM

Waqf Act 16 of 1980 challenging an order dated 7th May, 1973 passed by the Controller dissolving the management committee of the Waqf There were three contentions raised on behalf of the appellant before us in support of the challenge against the validity of the order of dissolution One was that the Controller had no power to dissolve the management committee because that was a function which could be performed by the Waqf Board alone and the Controller had no power to make such an order This contention does not appear to be sound since we find that under S 14, sub-sec (2) of the Act, the State Government has, in the circumstances specified in that section, power to appoint a Controller of the Waqf Board and the Controller so appointed is entitled to perform and discharge the functions and duties of the Waqf Board The learned counsel appearing on behalf of the respondent has produced before us a copy of a Notification dated 22nd March, 197(*) issued by the State Government appointing R Mussam Chisti, a Sunni Muslim, as Controller of the Waqf Board. Therefore, there can be no doubt that in the present case the Controller had power to make an order dissolving the Committee of Management But the order of dissolution suffers from an error of law apparent on the face of record inasmuch as it does not give any reasons for the dissolution of the Committee of Management and the only ground which has been given in the order of dissolution is that the "existing Committee is defective" This ground does not make any sense at all and it is obvious that the Controller has made the order of dissolution without applying his mind to the relevant considerations which should weigh with him in making such an order Moreover there are no reasons given by the Controller for dissolving the Committee of Management It is undoubtedly true that a report was made by the Inspector and on receipt of the report, a show cause notice was issued to the Committee of Management and a representation was filed by the Committee of Management showing cause against the proposed order of dissolution, but the order of dissolution does not show as to what were the reasons which weighed with the Controller in dissolving the Committee of Management We should have expected the order of dissolution to discuss the facts and circumstances set out in the report of the Inspector in the light of the cause shown by the Committee of Management and then set out the reasons as to why the order of dissolution should be made

2. We, therefore, allow the appeal, set aside the orders passed by the Dist Court as well as the High Court and quash the order of dissolution by the Controller and direct that the Controller or the Board, as the case may be, may, if it thinks fit, decide, after following the principles of natural justice, whether the Committee of Management should be dissolved and if the Controller or the Board decides to dissolve the Committee, then it shall give proper reasons for doing so in the order of dissolution There will be no order as to costs

Appeal allowed

1981 ALL. L. J. 1025

= AIR 1981 Supreme Court 1722

(From Allahabad)*

D A DESAI AND A P SEN, JJ

Civil Appeal No 1248 of 1981 (Appeal arising out of S L P (Civil No 2936 of 1981) and Civil Appeal No 1249 of 1981 (Appeal arising out of S L P (Civil No 1746 of 1981)), D/- 6-4-1981

State of U P., Appellant v Shiv Charan Sharma and others, Respondents

Ashok Kumar and another, Appellants v. Union of India and others, Respondents

Constitution of India, Arts. 226, 14 — Sale of right to extract minor mineral — Proper mode — State should sell the right by public auction and not on application of party — Public auction with open participation and a reserved price guarantees public interest being fully subserved. (Administrative law).

(Paras 3, 4)

Cases Referred : Chronological Paras

AIR 1981 S C 344 (1981) 1 SCC 568 1980 Lab I C 1367 3

DESAI, J. :— Special leave to appeal is granted in both the matters

2. We have heard learned Attorney General for the State of U P Mr R K. Garg, for the petitioner/appellant in appeal arising out of S L P (Civil) No 1746 of 1981 and Mr O P Rana for Shiv Charan Sharma,

*C M W P No 7109 of 1980, D/- 24-11-1980 (All)

respondent in appeal arising out of S L P (Civil) No 2936 of 1981 Both these appeals arise out of a grant of lease for excavating sand and minor mineral from the leased area by the State of U P The grant was in favour of Ashok Kumar and Asha Ram, appellants in appeal arising out of S L P (Civil) No 1746 of 1981

3. At the instance of Shiv Charan Sharma, one who failed to procure the lease, a revision application was preferred to the Central Government but it was dismissed Hence he moved the High Court of Judicature at Allahabad in Civil Misc Writ Petition No 7109 of 1980 A Division Bench of the High Court by its judgment dated 24-11-1980 allowed the writ petition and quashed and set aside the orders dated 16-2-1980 and 25-7-1980, the first by the State of U P and second in revision by Union of India and directed the State to grant lease after following the prescribed procedure in force at the relevant time which would be applicable to the facts of this case In short, the dispute was whether the grant was to be made on an application of a party or by auction between contending offerers It would have been necessary for us to examine the relevant rule and the notification issued under the relevant rule However, before we undertook to examine the same, we directed on the earlier date by way of abundant caution to assure us about the bona fide of the rival contenders that in any event, the State does not lose what it has already obtained, that Shiv Charan Sharma does deposit Rs 1,50,000/- and Ashok Kumar and Asha Ram do deposit Rs 2,00,000/- and the deposit will be treated as minimum offer by them for a licence for a period of one year Apart from the fact whether there should be a grant on application or by auction, public interest demands that those who seek the privilege of extracting mineral under lease from the State, in this case Shiv Charan Sharma on one hand and Ashok Kumar and Asha Ram on the other, they be asked to bid against each other and we must record our happiness that all parties are agreed that that would be the just and legal procedure In proceeding in this manner We are not embarking upon any hitherto unknown or adventurous course We are merely translating into action the sentiment expressed in the majority opinion of the Constitution Bench in Fertilizer Corporation Kamgar Union (Regd), Sindri v Union of India, (1981) 1 SCC 568 at p 579 (AIR 1981 S C 344 at p. 350). The pertinent observation may be extracted

"We want to make it clear that we do not doubt the bona fides of the authorities, but as far as possible, sales of public property, when the intention is to get the best price, ought to take place publicly The vendors are not necessarily bound to accept the highest or any other offer, but the public at least gets the satisfaction that the government has put all its cards on the table "

4. Public auction with open participation and a reserved price guarantees public interest being fully subserved That is what High Court by the judgment under appeal directed

5. Accordingly, we set aside the judgment of the High Court as well as the order of the U P State dated 16-2-1980 and the order of the Union of India dated 25-7-1980 and direct that the Collector, Meerut should hold an auction permitting Shiv Charan Sharma on the one hand and Ashok Kumar and Asha Ram on the other, to bid against each other for the grant of a lease for a period of three years reserving the minimum bid of Rs 1,50,000/- for one year and the highest bid shall be accepted without further enquiry subject to other conditions that may have to be fulfilled under the relevant rules. The minimum bid at auction should commence from Rs 1,50,000/- per year If the Collector feels any difficulty for any relevant consideration including the conduct, he must seek further directions of this Court through learned Attorney General of India The auction should be held on 16-4-1981 in the office of the Collector at 11 00 a m No further notice will be given to the parties This order is a notice to them to attend and participate in the auction

6. The appeals are disposed of accordingly with no order as to costs

Order accordingly

1981 ALL. L. J. 1026

= AIR 1981 Supreme Court 1724

(From Allahabad)*

R S PATHAK AND A D. KOSHAL, JJ

Civil Appeal No 1440 of 1979, D/- 23-7-1981

Syed Asadullah Kazmi, Appellant v. The Addl. District Judge, Allahabad and others, Respondents.

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*Civil Misc Writ No. 3736 of 1978, D/- 15-11-1978 (All)

U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Sections 21, 24 — Order for eviction of tenant from part of premises becoming final by order of Supreme Court — Death of landlord before obtaining possession — Proceedings cannot be re-opened on that ground as the order has already become final — In such circumstances subsequent events could not be taken into consideration. ((i) Civil P. C. (1908) Order 41, R. 33, (ii) Words & Phrases — Subsequent events). C. M. W. 3736 of 1978, D/- 15-11-1978 (All). Affirmed.

(Paras 4, 5)

Mr R K Garg, Sr Advocate, Mr Manoj Swarup and Miss Lalita Kohli, Advocates with him, for Appellant, Mr Yogeshwar Prasad, Sr Advocate (Mrs Rani Chhabra Advocate with him) for Respondents

PATHAK, J. :— This appeal by special leave is directed against a judgment of the Allahabad High Court dismissing a tenant's writ petition arising out of proceedings consequential upon an order of ejectment

2. The bungalow, 16-D, Beli Road, Allahabad, was owned by Raj Kumar Sinha, father of the third respondent, Kailash Shankar Sinha In February, 1965, the bungalow was allotted to the appellant, Syed Asadullah Kazmi, and he was accordingly treated as the tenant of the premises At the time, Raj Kumar Sinha, with his family, including the third respondent, occupied another house at 14-D, Beli Road, Allahabad In October 1973, the third respondent applied for the release of the bungalow 16-D, Beli Road, Allahabad, now described as 26, B K Banerjee Road, Allahabad The attempt failed A fresh application was made in April 1975 It was allowed by the Prescribed Authority on 24th May, 1976, after overruling an objection filed by the appellant The appellant appealed and the appellate authority by its order dated 25th March, 1977 modified the order of the Prescribed Authority inasmuch as a portion only of the building was released in favour of the third respondent and the appellant was permitted to continue in the remaining portion, and the Prescribed Authority was directed to divide the bungalow accordingly The appellant filed a writ petition in the High Court against the order of the Appellate Authority, but the writ petition was dismissed. Against its dismissal he applied in this Court for special leave to appeal and on 3rd January 1978, that petition was also dismissed

3. To give effect to the direction of the Appellate Authority, the Prescribed Authority meanwhile initiated proceedings for demarcation of the premises and a partition scheme was prepared During the preparation of the partition scheme, Raj Kishore Sinha, the third respondent's father, died On 22nd September, 1978, the appellant filed an application before the Prescribed Authority bringing the fact of this death to its notice and praying that the partition scheme should not be prepared The Prescribed Authority rejected the application An appeal by the appellant was dismissed by the Appellate Authority on the ground that the order dated 25th March, 1977, directing a division of the premises had become final and the controversy could not be re-opened The appellant then filed a writ petition before the High Court, and the High Court has maintained the view taken by the Appellate Authority and dismissed the writ petition by its judgment dated 25th November, 1978.

4. We are of opinion, that the High Court is right Plainly, the order dated 25th March, 1977 of the Appellate Authority releasing a portion of the premises in favour of the third respondent and leaving the remaining portion in the tenancy of the appellant acquired finality when the proceedings taken against it by the appellant failed The order having become final, the Prescribed Authority was bound to give effect to it In doing so, the Prescribed Authority was not acting outside its jurisdiction or contrary to law The application moved by the appellant before the Prescribed Authority requesting it to take into account the death of Raj Kumar Sinha was misconceived, because it did not lie with the Prescribed Authority to reopen proceedings which had been taken to the highest Court and had become final It is true that subsequent events must be taken into account by a statutory authority or Court when considering proceedings arising out of a landlord's petition for ejectment of a tenant on the ground of the landlord's personal need But in the present case, the order for release of a portion of the accommodation acquired finality before the death of Raj Kumar Sinha and the controversy concluded by it could not be reopened

5. The appellant has vehemently urged that being the highest Court of the land it is

open to us to reopen the proceeding for release initiated by the third respondent We do not think we can The present appeal is limited to the question which arose before the Prescribed Authority on the application of the appellant after the proceedings for release had acquired finality and we must be confined to the consideration of that question alone We cannot reopen that which has become final after this Court dismissed the special leave petition of the appellant We may point out that we have been referred to Section 24 of the U P Urban Buildings Act, 1972 in support of the contention that the Prescribed Authority retains control over ejectment proceedings, but we are not impressed by that contention

6. The appeal fails and is dismissed with costs

Appeal dismissed

1981 ALL. L. J. 1028

= AIR 1981 Supreme Court 1726

(From Allahabad)*

R S PATHAK, E S VENKATARAMIAH AND V BALAKRISHNA ERADI, JJ

Civil Appeal No 965 of 1980, D/- 20-8-1981

Mangal Sen, Appellant v Kanchhid Mal, Respondent

(A) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 20 (2) (a) — Landlord's notice to tenant for surrender of possession — Tenant standing surety for landlord for payment of certain arrears of sales tax — No payment made by tenant to sales tax authorities — Landlord, not agreeable to adjustment of proposed payment — Held, subsequent conduct of landlord did not amount to waiver of notice. (ii) Evidence Act (1872), S. 115 (ii) Transfer of Property Act (1882), S. 106).

(Para 8)

(B) Civil P. C. (5 of 1908), O. 6, R. 2 — Suit for eviction of tenant — Landlord's notice for surrender of possession — Waiver of — Plea not taken by tenant in written statement — Trial Court need not go into question of waiver. (Evidence Act (1872), S. 115).

(Para 8)

(C) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Ss. 20 (2) (a) and (4), 30 — Benefit of S. 20 (4) for relieving tenant against his liability for eviction under S. 20 (2) (a) — Payment on first date of hearing — It must be an unconditional tender of the amount for payment to landlord.

(Para 10)

Mr Manoj Swarup and Miss Lalita Kohli, Advocates, for Appellant, Mr R N Sharma, Sr Advocate (Mr N N Sharma, Advocate with him), for Respondent

V. BALAKRISHNA ERADI, J. :— This appeal by special leave is against a judgment rendered by the First Additional District Judge, Bulandshahr, allowing a Revision Petition filed before him by the respondent herein

2. The respondent is the owner of a shop building in Jahangirabad town which he had let out to the appellant on a month to month tenancy basis A suit for ejectment was filed by the respondent in the Court of Small Causes (Civil Judge), Bulandshahr, praying for eviction of the appellant from the shop under Section 20 (2) (a) of the U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (for short, the Act) on the ground that the tenant was in arrears of rent for not less than four months commencing from April 9, 1972 and had failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand (October 19, 1972) It was alleged in the plaint that the agreed rent of the shop was Rs 100 per month and that the tenant had kept the rent in arrears from April 9, 1972 onwards despite notice having been served on him on October 19, 1972 demanding payment of arrears of rent and determining the tenancy.

3. The appellant (defendant) pleaded in defence that the rent was only Rs 90 per month, that he had not committed any default in payment of the same and hence the suit for ejectment was not maintainable According to the defendant, after service of the notice of demand for payment of arrears of rent, the respondent had approached him with a request to stand surety for him for the payment of arrears of sales tax due by him for the realisation of which the Amin had come with a warrant for the arrest of the respondent and since the appellant had acceded to the

*Civil Revn No 661 of 1977 D - 28-11-1979 (All)

said request and stood surety for the respondent, there could be no further question of any arrears of rent being outstanding as due by him to the respondent

4. The trial Court held that the rent of the shop was Rs 90 per month, that it had been kept in arrears by the tenant from April 9, 1972 onwards and a default had been committed by the tenant in payment of arrears of rent for more than four months after the notice of demand Notwithstanding the aforesaid finding that there had been such default committed by the tenant, the trial Court took the view that the conduct of the plaintiff-respondent in inducing the defendant to stand surety for him for the payment of sales tax arrears due by him constituted a waiver of the demand made in the notice for surrender of possession on the ground of arrears of rent made On this reasoning, the trial Court denied the plaintiff the relief of ejectment and decreed the suit only for recovery of arrears of rent

5. The respondent-plaintiff carried the matter in revision before the District Court, Bulandshahr The learned District Judge found that the plea of waiver had not been put forward by the defendant either in the written statement or in any other manner at any stage before the trial Court and that the issue covering the question of waiver had been framed by the trial Court of its own accord The District Judge further found on the merits that no conduct amounting to waiver on the part of the plaintiff had been established by the evidence because even according to the case of the defendant himself, excepting for standing surety for the plaintiff, he had not actually made any payment on behalf of the plaintiff towards the sales tax dues since the plaintiff had specifically refused to make any endorsement in the Rent Deed adjusting the proposed payment of sales tax against the arrears of rent due by the defendant Inasmuch as the trial Court had found that the default in payment of the arrears of rent for a period exceeding four months had been committed by the defendant and it had denied a relief of ejectment only on the reasoning that there had been a waiver of the demand for eviction on the part of the plaintiff, the District Judge allowed the Revision Petition and granted the plaintiff a decree for ejectment under Section 20(2) (a) of the Act

6. Thereafter, the appellant-defendant took up the matter in further revision before the High Court under Section 115, Code of Civil Procedure The High Court by its judgment dated November 28, 1979 confirmed the findings of the District Judge and dismissed the Revision Petition

7. The defendant thereupon approached this Court for the grant of special leave to appeal against the said judgment of the High Court It would appear that, at the time of the preliminary hearing of the Special Leave Petition, the appellant realised that the Revision Petition filed by him before the High Court was not maintainable in law Hence, this position was conceded by the appellant before a Bench which heard the Special Leave Petition and a request was made by the appellant for the grant of special leave to him to appeal against the judgment of the District Court That request was granted by order of this Court dated April 23, 1980 This Civil Appeal is thus directed against the judgment of the District Judge

8. After hearing counsel on both sides, we are satisfied that the District Court was perfectly right in its view that there had not been any conduct on the part of the plaintiff which would constitute a waiver by him of the demand for surrender of possession made as per the notice dated October 9, 1972 which was served on the tenant on October 19, 1972 As rightly observed by the District Court, the defendant had not put forward any plea of waiver in the written statement filed by him before the trial Court and in the absence of any specific pleading in that behalf, the trial Court was not really called upon to go into the question of waiver Further, it being the specific case put forward by the defendant himself that no amount whatever had been paid by the appellant-defendant to the sales tax authorities on behalf of the plaintiff and that the respondent-plaintiff was not agreeable to make any endorsement on the Rent Deed adjusting the proposed payment of sales tax against the arrears of rent, we fail to see how it can be said that there had been any waiver by the plaintiff-respondent of the demand for surrender of possession already made by him as per the notice dated October 9, 1972 The finding rendered by the trial Court that the effect of the notice had been effaced by the subsequent conduct on the part of the landlord which amounted to a waiver was manifestly illegal and perverse and it was rightly set aside by the District Judge

9. Before us, an additional point was sought to be raised by the appellant which

had not been put forward by him either before the trial Court or before the District Judge at the revisional stage It was urged that on the date of first hearing of the suit, the defendant had deposited into the trial Court an amount of Rs 1,980 and hence he is entitled to the benefit of sub-sec (4) of S 20 of the Act which empowers the Court to pass an order relieving the tenant against his liability for eviction on the ground mentioned in cl. (a) of sub-sec (2) of the said section It is necessary in this context to reproduce cl (a) of sub-sec (2) and sub-sec (4) of Section 20 of the Act They are in the following terms

"20 (2)

(a) that the tenant is in arrears of rent for not less than four months, and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand

(4) In any suit for eviction on the ground mentioned in clause (a) of sub-section (2), if at the first hearing of the suit, the tenant unconditionally pays or tenders to the landlord the entire amount of rent and damages for use and occupation of the building due from him (such damages for use and occupation being calculated at the same rate as rent) together with interest thereon at the rate of nine per cent per annum and the landlord's costs of the suit in respect thereof, after deducting therefrom any amount already deposited by the tenant under sub-section (1) of Section 30, the Court may, in lieu of passing a decree for eviction on that ground, pass an order relieving the tenant against his liability for eviction on that ground:

Provided that nothing in this sub-section shall apply in relation to a tenant who or any member of whose family has built or has otherwise acquired in a vacant state, or has got vacated after acquisition, any residential building in the same city, municipality, notified area or town area "

10. The provisions of sub-section (4) will get attracted only if the tenant has, at the first hearing of the suit, unconditionally paid or tendered to the landlord the entire amount of rent and damages for use and occupation of the building due from him together with interest thereon at the rate of nine per cent per annum and the landlord's costs of the suit in respect thereof, after deducting therefrom any amount already deposited by him under sub-section (1) of Sec 30. There is absolutely no material available on the record to show that the alleged deposit of Rs 1,980 was made by the tenant on the first date of hearing itself and, what is more important, that the said deposit was made by way of unconditional tender for payment to the landlord The deposit in question is said to have been made by the appellant on January 25, 1974 It was only subsequent thereto that the appellant filed his written statement in the suit It is noteworthy that one of the principal contentions raised by the appellant-defendant in the written statement was that since he had stood surety for the landlord for arrears of sales tax, there was no default by him in the payment of rent In the face of the said plea taken in the written statement, disputing the existence of any arrears of rent and denying that there had been a default, it is clear that the deposit, even if it was made on the date of the first hearing, was not an unconditional tender of the amount for payment to the landlord Further, there is also nothing on record to show that what was deposited was the correct amount calculated in accordance with the provisions of Section 20(4) In these circumstances, we hold that the appellant has failed to establish that he has complied with the conditions specified in sub-section (4) of Section 20 and hence he is not entitled to be relieved against his liability for eviction on the ground set out in clause (a) of sub-section (2) of the said section

11. This appeal is, therefore, devoid of merits and is accordingly dismissed We direct the parties to bear their respective costs

Appeal dismissed

1981 ALL. L. J. 1030

M P MEHROTRA, J

State, Petitioner v. Addl. District Judge and another, Respondents

Civil Misc Writ Petn Nos. 683 of 1979 and 5985 of 1980, D/- 19-8-1981

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 5(6) — Ceiling area — Computation of — On death of tenure-holder his two widows becoming co-tenure-holders — Compromise decree dt. 25-7-72 between them and a stranger declaring the stranger entitled to 5/6th share in land left by deceased and each of co-widows entitled to 1/12th share — It being "transfer"

BY JY F162 81 DX 1

made after 24-1-1971, is to be ignored — Covered by Explns. to S. 5(6) — Proviso thereto not applicable. 1979 All. W. C. 41 Followed. (Para 4)

Cases Referred: Chronological Paras

1979 All W C 41 4

T P Asthana, for the State

ORDER:— These petitions are connected and they can be disposed of by one common judgment The facts, in brief, are these

2. One Bhal Chandra died in 1956 and he left two widows Smt Kapoor Wati and Smt Subha Wati They become co-tenure holders to the extent of ½ share each in the agricultural lands left by the deceased Bhal Chandra In the ceiling proceedings separate notices were sent to each of the said two co-widows and each of them filed objections Ceiling case No 136 of 1974 was in respect of Smt Subha Wati and ceiling case No 137 of 1974 was in respect of the other widow, namely Smt Kapoor Wati It seems that the prescribed Authority decided both the cases on 12-8-75 Thereafter both the ladies filed appeals and they were decided by the appellate court Smt Subha Wati filed writ petition No 3708 of 1977 against the judgment of the appellate court but the said petition was dismissed by this Court in limine on 22-2-78 The appeal filed by Smt Kapoor Wati was allowed by the appellate court on 20-10-78 and a true copy of the said order is annexure 7 to Civil Misc Writ Petition No 683 of 1979 Against the said judgment of the appellate court dated 20-10-78 the State has come up in the said Civil Misc Writ Petition No 683 of 1979

3. One Gulab Chandra had also filed his objections and they were decided by the Prescribed Authority and thereafter he filed an appeal which was allowed by the appellate court on 9-4-80 A true copy of the appellate court's judgment is annexure 9 to the other writ petition No 5985 of 1980 The State has come up in the said writ petition No 5985 of 1980 against the said appellate judgment dated 9-4-80

4. The point involved in both the writ petitions is one and the same, namely that the appellate court was wrong in accepting the compromise decree dated 25-7-72, which was passed in the consolidation proceedings By the said compromise decree 5/6th share in the lands left by Bhal Chandra was declared to be that of Gulab Chandra and each of the two co-widows was declared entitled to 1/12th share in the said lands This compromise decree was wrongly accepted by the appellate court, according to the learned Standing Counsel In my view, this contention is correct It should be seen that Sec 5 (6) of the Act clearly lays down that in determining the ceiling area applicable to a tenure-holder, any transfer of land made after the 24th day of January, 1971, which but for the transfer would have been declared surplus land under land under this Act, shall be ignored and not taken into account Thereafter there is a proviso and after the proviso there is Explanation I which gives an extended meaning to the expression 'transfer' for the purpose of Sec 5 (6) of the Act. Cl (a) of the said Explanation clearly lays down that transfer will include a declaration of a person as a co-tenure-holder, made after the 24th day of January, 1971 in a suit or proceeding irrespective of whether such suit or proceeding was pending on or was instituted after the 24th day of January, 1971 It should be seen that the proviso to Sec 5 (6) will not apply to such transfers as are covered by Explanation I Cl (a) of the proviso is obviously not attracted because there is no question of a transfer in favour of a person referred to in Sec 5 (2) That is not the position here So far as cl (b) is concerned, the Division Bench in Fateh Mohammad v District Judge, (1979 All W C 41) has clearly laid down that benefit of cl (b) is extended to such transfers which are made in good faith and for adequate monetary consideration That is not the position here Therefore, in my view, the Prescribed Authority was bound to ignore the said compromise decree dated 25-7-72, which was passed in the consolidation proceedings

5. Accordingly, both the petitions are allowed and the appellate judgment dated 20-10-78 (annexure 7 in Civil Misc Writ Petition No 683 of 1979) and the appellate judgment dated 9-4-80 (annexure 9 in Civil Misc Writ Petition No 5985 of 1980) are hereby quashed In the circumstances, there will be no order as to costs

Petitions allowed

1981 ALL. L. J. 1032 (1)

M P MEHROTRA, J

Budh Prakash, Petitioner v The Fourth Addl. District Judge, and others, Respondents

Civil Misc Writ Petn No 8921 of 1980. D/- 19-8-1981

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 3 (17) — Tenure-holder — Father of minor sons is tenure-holder — Minor sons also cannot be tenure-holders under S. 3 (17). (Para 4)

R P Goel, for Petitioner, Standing Counsel, for Respondents

ORDER :— This petition arises out of the proceedings under the U P Imposition of Ceiling on Land Holdings Act

2. The facts, in brief, are these The petitioner was treated as the tenure-holder and the notice under S 10 (2) of the Act was issued to him He filed objections and they were decided by the Prescribed Authority Thereafter, an appeal was filed and the same was heard and decided by the appellate court by its judgment dated 31-10-1974 Thereafter, a writ petition was filed in this court and the same was allowed by a learned judge of this court by his order dated 19th April, 1978, a true copy of which is Annexure 7 to the petition The case was remanded to the appellate court to be decided in accordance with the directions given in the said order Thereafter, the appellate court reheard the matter and decided the appeal vide its judgment dated 20th August, 1980, a certified copy of which is on the record as Annexure 1 to the petition

3. Feeling aggrieved, the petitioner now has come up in the instant petition and in support thereof, I have heard Sri R P Goyal, learned counsel for the petitioner and in opposition, the learned Standing Counsel has made his submissions

4. The learned counsel for the petitioner sought to contend that the minor sons of the petitioner were tenure-holders in their own rights, independently of the petitioner as they had inherited their lands from their maternal grand-father in some such manner as had no relation with the lands of their father, namely, the petitioner., In my view this contention cannot be accepted. S. 3 (17) of the Act defines 'tenure-holder' in such a manner that if a minor son's father is himself a tenure-holder, then the minor son cannot be the tenure-holder under the Ceiling Law In this view of the matter, the contention raised by the learned counsel is unsustainable Further, it should be seen that this point stood already decided by the aforesaid judgment dated 19th April, 1978 passed by this Court in the aforesaid writ petition Accordingly, it was not open to the petitioner to raise this contention at any subsequent stage

5. The petition fails and is dismissed but there will be no orders as to costs

Petition dismissed.

1981 ALL. L. J. 1032 (2)

P N GOEL, J

Kafeel Ahmad, Applicant v Nagar Palika and others, Respondents

Criminal Misc Appl No 5337 of 1980, D/- 12-8-1981

(A) U. P. Municipalities Act (2 of 1916), Ss. 307, 185 — Application for impleadment — Power of Magistrate — Criminal case — Magistrate would not be competent to implead. (Criminal P. C. (1974), Ss. 319, 223).

Where 'B' in a criminal case which was filed by the Nagar Palika before the Magistrate against 'A' that he had made openings in its wall, moved an application for being impleaded in the case because he alleged interest in the land adjoining to 'A' and wanted to show that the case was a result of collusion between 'A' and the officials of the Nagar Palika, 'B' could not be said to have interest in the case when the Magistrate was only required to determine whether 'A' had committed the illegal act and was not required to determine as to whether 'A' was the tenant of the adjoining land and further the Nagar Palika did not assert that 'B' had also committed illegal act by making openings in its wall The case was purely of a personal nature against 'A' (Paras 21, 22)

Further, there was no provision in the Criminal P C or the Act enabling the Magistrate to implead 'B' in the case Hence there would be absolutely no justification to implead 'B' in the case. (Para 23)

(B) Criminal P. C. (2 of 1974), S. 482 — Abuse of process of court — Magistrate impleading stranger as party in Criminal case, though not competent — Amounts to abuse of process of court — Order liable to be quashed as impleading stranger would cause harassment to accused. (Paras 26, 27)

(C) Criminal P. C. (2 of 1974), S. 397 (2) — Interlocutory order — Criminal case — Magistrate impleading stranger — Order is not interlocutory. (Para 29)

Cases Referred :	Chronological Paras
1980 All L J 1090	20
AIR 1976 S C 578	19
1968 All W R (H C) 447	13
AIR 1968 Cal 216 1968 Cri L J 600	13
1967 All W R (H C) 702	9

Pradeep Kumar, for Applicant, Ravindra Asthana, for Respondents

ORDER :— By means of this application under S 482 Cr P C Kafeel Ahmad applicant invokes the inherent powers of this Court to quash the order dated 30-6-1980 passed by the Sessions Judge Etawah as well as the order dated 17-1-1980 passed by the City Magistrate Etawah, opposite party No 3

2. Facts relevant for the disposal of this application may be stated at some length

3. There is a wall called Chesh Bagh wall belonging to the Nagar Palika in the town of Etawah On both sides of this wall ther is land of Nagar Palika Land on one side of this wall has been let out by the Nagar Palika to some persons On 24-10-1979 the Nagar Palika gave a notice to Kafeel Ahmad (Annexure I) saying that he had opened two doors in the Chesh Bagh wall of the Nagar Palika illegally and that he had thereby committed breach of the conditions of the lease deed Kafeel Ahmad was called upon to close the doors within 7 days Kafeel Ahmad did not make compliance of the notice Therefore, the Nagar Palika filed a criminal complaint against him under S 307 of the U P Municipalities Act, 1916 The criminal case was pending before the City Magistrate Etawah, on 17-1-1980 Mohammad Shakoor, opposite party No 2 moved an application before the City Magistrate for being impleaded in the criminal case (Annexure II) In this application Mohammad Shakoor alleged

(1) Kafeel Ahmad in collusion with the officials of the Nagar Palika had got filed fictitious case, (2) In the criminal case Kafeel Ahmad has been alleged to be proprietor of New Bharat Timber Mart This fact is totally wrong In fact Mohammad Shakoor is the owner of the said timber mart Kafeel Ahmad has no connection with it In this respect there have been decision of the various courts (3) The shop of Mohammad Hanif, brother of Kafeel Ahmad is just to the north of the shop of Mohammad Shakoor Mohammad Hanif and Kafeel Ahmad desire to take illegal possession over his land And, (4) Mohd Shakoor got a plan of his shop sanctioned by the Nagar Palika and in the said plan the doors in question were shown On 17-1-1980 the City Magistrate allowed the application of Mohammad Shakoor and passed order "Let him be impleaded as party " Against this order Kafeel Ahmad filed a revision before the Sessions Judge Etawah The Sessions Judge dismissed the revision simply on the ground that the order passed by the magistrate was an interlocutory one, vide copy of order dated 30-6-1980 (Annexure IV)

4. Kafeel Ahmad then moved this application

5. One Mohammad Sharafat Ullah Khan has filed counter affidavit on behalf of Mohammad Shakoor In this affidavit he deposed that Kafeel Ahmad and firm M/s New Bharat Timber Mart of which Mohd Shakoor is sole Proprietor were the tenants of Nagar Palika, that Kafeel Ahmad filed suit No 458 of 1974 against Nagar Palika and others, that the parties compromised the case and the case was decided in terms of the compromise on 19-8-1976 One of the terms of the compromise was that the tenancy would continue to remain in the names of Kafeel Ahmad, the firm and partners of the firm Nav Bharat Timber Mart He further deposed in respect of the grounds taken by Mohammad Shakoor in his application for impleadment He also deposed that the question of tenancy was involved in various civil and criminal cases

6. Kafeel Ahmed filed a rejoinder affidavit denying the allegations made in the counter-affidavit

7. The learned counsel for Mohammad Shakoor has filed a certified copy of the compromise which took place in civil suit No 458 of 1974 The relevant terms of this compromise are that Kafeel Ahmad, M/s. Nav Bharat Timber Mart and its partners would remain the tenants of the suit

premises and would pay rent at Rs 100/- per month with effect from 24-9-1974 and that enhanced rent for the period 25-9-1974 to 31-5-1976 had been paid, and that previously the rent was Rs 25/- per month

8. Learned counsel for the parties have been heard

9. The main contention of the petitioner's counsel (i.e Kafeel Ahmad's counsel) is that the magistrate was not competent to implead Mohammad Shakoor in the criminal case because there was no provision in the Criminal Procedure Code enabling him to do so. The learned counsel placed reliance on the case of Mahipal Singh v Mahtab Singh, 1967 All W R (H C) 702 In this case Mahtab Singh, Principal of J K J High School filed a complaint against Turshanpal Singh, the Manager of the school under Ss 406 and 408 I P C Various items of money were involved One item was of Rs 2,500/- One of the pleas taken by Turshan Pal Singh was that he had paid a sum of Rs 2,500/- to Mahipal Singh Then Mahtab Singh moved an application that, in view of the aforesaid plea, the offence of the sum of Rs 2,500/- was either committed by Turshan Pal Singh or by Mahipal Singh and, therefore, Mahipal Singh be impleaded The magistrate allowed the application The revision before the Sessions Judge failed Then Mahipal Singh moved this court On a consideration of the provisions of S 351 of the old Code of Criminal Procedure, this Court allowed the revision

10. S 351 provides that any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned This section empowers a Criminal Court to suo motu implead a person as an accused if it is found from the evidence that he has committed an offence Under this section it is necessary for a Magistrate to record evidence and to come to the conclusion that the person present in court has committed an offence. If these two conditions do not exist, the magistrate has no right to implead that person as an accused.

11. S. 351 corresponds to S. 319 of the new Code. S. 319 extends the general provisions contained in S 223 of the new Code S 223 corresponds to S 239 of the old Code S 223 lays down as to which person may be charged and tried together Cl (a) of this section provides that persons accused of the same offence committed in the course of the same transaction can be charged and tried together

12. The contention of the petitioner's counsel is that the case of Mohammad Shakoor did not fall either under S 319 or under S 223 Cr P C and therefore the magistrate was not competent to implead him in the case

13. On the other side the learned counsel for Mohd Shakoor referred to two cases (1) Govind Ram v Lahori, 1968 All W R (H C) 447 and (2) Chandi Kumar Sarkar v Probhat Kumar Biswas, AIR 1968 Cal 216 Both these cases relate to proceedings under S 145 Cr P C It will be noticed that sub-s (3) of S 145 Cr P C lays down that a copy of the preliminary order shall be served in the manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute The intention of affixing a copy of the preliminary order near the place of dispute is that persons interested in the property should come up and prefer their claims before the Magistrate It means that the proceedings under S 145 Cr P C. are not confined to only those persons who are mentioned in the preliminary order In view of this, the cases cited by the learned counsel for the opposite party do not help the opposite party

14. The learned counsel for the opposite party next contended that Mohmmad Shakoor had an interest in the land which lay by the side of the Nagar Palika wall and that, therefore, he could be impleaded in the case He referred to Ss. 185, 186, 307, 318 and 319 of the U. P Municipalities Act

15. S 185 lays down that whoever begins, continues or complete the erection or re-erection of, or any material alteration in a building or part of a building or the construction or enlargement of a wall, without giving the notice to the Nagar Palika, shall be punished and upon conviction he would be liable for fine which may extend to one thousand rupees, S 186 confers powers on the Nagar Palikas itself. It lays down that the board may at any time by written notice direct the owner or occupier of any land to

stop erection or alteration of a building or part of a building and may direct the alteration to be demolished

16. Breach of the notice under S 186 is punishable under S 307 This section lays down that if a notice has been given under the provisions of this Act to a person requiring him to execute the work or refrain from doing anything within a time specified in the notice, and if such person fails to comply with such a notice, the board may cause such work to be executed. Such person shall be liable, on conviction before a Magistrate, to a fine which may extend to one thousand rupees

17. S 318 provides for an appeal (from order of the board) by any person aggrieved It will be noticed that S 318 does not provide an appeal against the order of a Magistrate passed under S 307 S 319 provides reference to High Court if on the hearing of an appeal under S 318 any question as to the legality of the prohibition, direction, notice or order arises

18. In the present case the wall in which two openings/doors are alleged to have been made by Kafeel Ahmad belongs to the Nagar Palika. In view of this it is apparent that S 185 of the Municipalities Act has no application Consequently, Ss 186, 307, 318 and 319 are not applicable Therefore, the opposite party cannot take any advantage from these sections

19. The learned counsel for the opposite party referred to the case of Jasbhai Motibhai Desai v Roshan Kumar, AIR 1976 S C 578 to show that the opposite party could be aggrieved in the instant case In the case of Jasbhai Motibhai Desai, respondents 1 and 2 moved the District Magistrate for the grant of a certificate that there was no objection to the construction of a cinema hall at a piece of land The District Magistrate observed certain formalities and inspected the site He refused to grant the certificate The respondents then approached the State Government and the State Government directed the District Magistrate to grant "No objection certificate" Thereafter the appellant Jasbhai Motibhai Desai moved a writ petition The appellant had a cinema hall at some distance The writ petition was dismissed by the High Court on the ground that he was not prejudiced or adversely affected by the grant of the certificate Jasbhai Motibhai Desai then preferred an appeal in the Supreme Court. The Supreme Court also held that the appellant was not prejudiced and could not be termed as "aggrieved person" The relevant observation in this case reads as follows —

"38 To distinguish such applicants from 'strangers', among them, some broad tests may be deduced from the conspectus made above These tests are not absolute and ultimate Their efficacy varies according to the circumstances of the case, including the statutory context in which the matter falls to be considered These are Whether the applicant is a person whose legal right has been infringed? Has he suffered a legal wrong or injury, in the sense, that his interest, recognised by law, has been prejudicially and directly affected by the act or omission of the authority, complained of? Is he a person who has suffered a legal grievance, a person "against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something? Has he a special and substantial grievance of his own beyond some grievance or inconvenience suffered by him in common with the rest of the public? Was he entitled to object and be heard by the authority before it took the impugned action? If so, was he prejudicially affected in the exercise of that right by the act of usurpation of jurisdiction on the part of the authority? Is the statute, in the context of which the scope of the words "person aggrieved" is being considered, a social welfare measure designed to lay down ethical or professional standards of conduct for the community? Or is it a statute dealing with private rights of particular individuals?"

20. The learned counsel for the applicant referred to the case of Balbhadra Pandey v D M Azamgarh, 1980 All L J 1090 In this case the Municipal Board granted sanction for the construction of a house to Balbhadra Pandey His neighbour Kedar Nath Agarwal filed an appeal against the order sanctioning the construction The question was whether he was aggrieved by the sanction It was held that there was no injury to his civil rights and that, therefore, he was not competent to file an appeal

21. Turning to the facts of the present case, it will be noticed that the case of the Nagar Palika against Kafeel Ahmad was that he had made openings/doors in the wall of the Nagar Palika The magistrate was only required to determine whether Kafeel Ahmad had committed this illegal act The magistrate was not required to determine as to whether Kafeel Ahmad was the tenant of

the adjoining land or not The opposite party wanted to be impleaded because he alleged interest in the adjoining land and he wanted to show that the criminal case was a result of collusion between Kafeel Ahmad and the officials of the Nagar Palika

22. Taking into consideration the allegations of the complaint of Nagar Palika against Kafeel Ahmed both these questions could not be appropriately decided by the magistrate Therefore, in this case the opposite party cannot be said to have any interest in the criminal case The Nagar Palika does not assert that the opposite party had also committed illegal act by making openings in its wall The case is purely of a personal nature against the petitioner

23. In view of the above, there was absolutely no justification to implead the opposite party in the criminal case There was not provision in the Code or in the Municipalities Act enabling the Magistrate to implead the opposite party in this criminal case

24. It will be noticed that the Nagar Palika moved no application under S 482 Cr P C against the order passed by the magistrate The Nagar Palika also did not put in appearance in this Court Ordinarily in cases like the present one this Court would have interfered at the instance of Nagar Palika, the complainant in the case

25. A question arises whether this Court should interfere under S 482 Cr P C at the instance of an accused in the case Sec 482, Cr P C empowers this Cout to exercise inherent powers in 3 cases — (i) if it is necessary to give effect to any order under the Code, (ii) to prevent abuse of the process of any court, and (iii) otherwise to secure the ends of justice

26. In the present case it has been found above that the magistrate was not justified/competent to implead the opposite party in the criminal case His order impleading the opposite party in the criminal case is the abuse of his power

27. It will further be noticed that if the opposite party is impleaded in the criminal case he would raise the question of title to the adjoining land and the fact that the criminal case is an outcome of collusion between the petitioner and the officials of the Nagar Palika. It has been said above that these two points cannot be gone into by the magistrate in the present case The scope of the present case is limited one Therefore, the presence of the opposite party in this criminal case would not only prolong the disposal of the criminal case but it would also cause unnecessary harassment to the petitioner

28. In view of the above, the present case is fully covered by the 2nd and 3rd conditions mentioned in S 482 Cr P C.

29. The learned Sessions Judge dismissed the revision simply on the ground that the order of the magistrate was an interlocutory one This view of the Sessions Judge is not correct He should have understood the entire import of the order passed by the magistrate The order in fact went to the root i e it opened an irrelevant and unnecessary question between the co-accused as to which of them was the rightful occupant of the adjoining land

30. The proper remedy open for the opposite party in the present case was to have approached the officers of the Nagar Palika In case, they did not give any relief to him and if the Nagar Palika closed the doors which the opposite party considers to have been opened by him with the permission of the Nagar Palika, he should have filed a suit against the Nagar Palika for injunction

31. Taking into consideration all what has been discussed above, the application is allowed and the order of the Magistrate dated 17-1-1980 impleading Mohammad Shakoor as a party in the criminal case is quashed and the order of the Sessions Judge dt. 30-6-80 dismissing the revision is also set aside

Application allowed

1981 ALL. L. J. 1036

V K. MEHROTRA, J

Bachchaji Sinha, Appellant v Chandra Bhushan, Respondent

Second Appeal No 2100 of 1974, D/- 11-8-1981 *

Civil P. C. (5 of 1908), O. 15 R. 5 (Introduced in U. P. by the U. P. Act 37 of

*Against decree and judgment of Maharaj Din, Addl Civil J Allahabad, D/- 26-8-1974

1972 and as stood prior to U. P. Act 57 of 1976) — Striking off defence — Tenant claiming that he has spent amount on behalf of landlord for house repairs and nothing left due to landlord — Defence cannot be struck off. (U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 20 (4)).

The defence of a defendant can be struck off only in case he had failed to deposit by the first hearing of the suit the amount of rent or compensation admitted by him to be due and upon his failure to deposit, throughout the continuance of the suit all such amount every month which according to him, had to be deposited by him towards monthly rent or compensation Further, in case the defendant claimed that the amounts actually paid by him to the landlord or spent on his behalf had left nothing due to the landlord from him at all to be deposited at or before the first hearing of the suit, his defence could not be struck off. Case law discussed

(Paras 10, 12, 14)

Cases Referred :	Chronological	Paras
1980 All L J 690		8
AIR 1980 All 136		9
1979 All L J 495		13
1979 All L J 857		11
AIR 1976 All 261	1976 All L J 494	7, 11

Sachtanand Sahai, for Appellant, R N Upadhya, for Respondent

JUDGMENT :— This is a defendant's second appeal The suit was decreed for his ejectment from house No 46 (old) (new No 71) Talab Nawal Rai, Allahabad by the trial court which also passed a decree for recovery of some amount from him as arrears of rent, damages etc That decree was affirmed by the lower appellate court

2. The facts, bereft of unnecessary details, giving rise to this appeal are these, plaintiff Chandra Bhushan is the owner and landlord of the house of which the appellant is a tenant for several years past The plaintiff's case was that the defendant was in arrears of rent which was due from him at the rate of Rs. 15/- per month for a long time and that he did not pay the amount in arrears in spite of a demand made to him by the plaintiff The plaintiff claims to have terminated the defendant's tenancy by a notice under S 106 of the Transfer of Property Act Since in spite of that notice, the defendant did not vacate the house, apart from his failure to pay the amount of arrears due from him, the necessity arose for the suit out of which arises the present second appeal.

3. The case of the defendant was that he was not in arrears of any amount by way of damages for he had incurred huge expenditure on behalf of the plaintiff when compelled to do so by the Nagar Mahapalika, Allahabad, that the rate of rent was only Rs 5/- per month and that the plaintiff's allegation that he was in arrears of any amount due to the plaintiff was incorrect. The defendant also pleaded that nothing was due to the plaintiff from him

4. The suit was registered on July 27, 1968 The defendant filed a written statement which was verified by him on Nov 7, 1968 The suit followed a chequered course which it is not necessary to notice in detail for purposes of this appeal However, it eventually came to be received in the court of the First Addl Munsif, Allahabad for disposal under the orders of the District Judge towards the end of the year 1971 The District Judge was approached again for transferring the case to another court but that application was rejected on Oct. 28, 1972 Eventually the trial court directed on Feb 12, 1973 that notices be issued to the defendant's counsel for March 16, 1973 On that date, as is clear from the order sheet maintained by the court in English, both the parties were present and July 4, 1973 was fixed for final hearing in the suit On that date, namely, July 4, 1973 an application (paper no 59-C) was moved on behalf of the plaintiff for striking out the defence of the appellant in accordance with the provisions of U P. Act 37 of 1972 When the case was called, the defendant was not present nor was he represented by anyone in court The application was directed to be put up on July 6, 1973 for its disposal. When the case was taken up on July 6, 1973 the defendant was again absent and was not represented as well. The plaintiff was present with his counsel who argued that the defendant had failed to comply with the provisions of R 5 of O XV C P C as amended by U P Act 37 of 1972 and that his defence should be struck off. The trial court observed in its order of that date, inter alia, as follows —

"... There is nothing on record to show that defendant had deposited up to date rent and damages and cost of the suit

The application 59-C is allowed and defence of the defendant is struck off Fix 16-7-73 for argument and judgment"

It heard the argument on July 16, 1973 and fixed July 18 for delivery of judgment On that date an application (paper No 60-C) made by the defendant for setting aside the order striking off his defence was disposed of This application also contained a prayer that the defendant be allowed to deposit the rent. The trial court by a detailed order contained in the order sheet maintained in English, dismissed this application Since judgment was not ready that day, it directed the case to come up for delivery of judgment on the next day It pronounced the judgment on July 19, 1973 and decreed the suit for the reliefs sought by the plaintiff, including the relief of defendant's ejectment The suit thus stood decreed after the trial court had decided to proceed ex parte after striking out the appellant's defence The decree was assailed by the defendant in appeal The lower appellate court negatived the contention that the defendant's defence had been erroneously struck off It felt that in the circumstances, the trial court was justified in striking off the defence and to decide the suit on merits in the defendant's absence It affirmed the decree passed by the trial court Hence, the present second appeal.

5. The main submission of Sri S N Sahai, appearing for the defendant-appellant in this Court has been that the trial court misdirected itself in law in striking out the defence of the appellant in the case on account whereof the defendant was prejudiced and did not have a fair trial. The precise submission is that the court had no jurisdiction to strike out the defence of the appellant for under R 5 of O. XV, C P C as at stood at the time of the disposal of the suit, it could only strike out the defence in case the defendant had failed to deposit the amount admitted by him to be due by the date of the first hearing of the suit and not otherwise. It has been urged that in paragraph 16 of the written statement it had been specifically averred by the defendant that nothing was due from him to the plaintiff and that he was not liable to ejectment This submission was reiterated in the application (paper No. 60-C) of the defendant dated July 17, 1973 wherein it was mentioned in paragraph 2 that one of the pleas in defence was that nothing was due to the plaintiff from the defendant and rather more had been paid. A grievance was also made in this application that no copy of the application (59-C) made by the plaintiff for striking out the defence was ever served on the defendant or his counsel and that the order on that application was passed behind the back of the defendant. It was also pointed out that till the date of the order of the trial court striking out the defence of the appellant, the defendant had not admitted that any amount was due from him to the plaintiff The learned counsel for the appellant also drew the attention of the court to the statement of the defendant recorded under O. X, R 2, C P C on Dec 2, 1969 wherein he had only stated that he had received the notice sent by the plaintiff and had not made any admission of any amount being due from him to the plaintiff

6. R 5 as added in O XV C P C by S 7 of the Uttar Pradesh Civil Laws Amendment Act, 1972 (U P Act No. 37 of 1972) with effect from Sept. 20, 1972 was in the following terms

"5 Striking off defence on non-deposit of admitted rent etc In any suit by a lessor for the eviction of a lessee from any immovable property after the determination of his lease, and for the recovery from him of rent in respect of the period of occupation thereof during the continuance of the lease, or of compensation for the use or occupation thereof, whether instituted before or after the commencement of the Uttar Pradesh Civil Laws Amendment Act, 1972 the defendant shall, at or before the first hearing of the suit (or in the case of a suit instituted before the commencement of the said Act, the first hearing after such commencement) deposit the entire amount of rent or compensation for use and occupation admitted by him to be due, and thereafter throughout the continuance of the suit, deposit regularly the amount of monthly rent, or compensation, for use and occupation, due at the rate admitted by him, and in the event of any default in this regard, the court may, unless after considering any representation made by him in that behalf it allows him further time on security being furnished for the amount, refuse to entertain any defence or, as the case may be, strike off his defence "

This rule was repealed and re-enacted by the U P Civil Laws (Reforms and Amendment) Act (No. 57 of 1976) and the re-enacted provision which came into force on Jan. 1, 1976 took the following shape —

"5. Striking off defence on failure to deposit admitted rent etc. (1) In any suit by a lessor

for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly deposit monthly amount due within a week from the date of its accrual, and in the event of any default in making the deposit of the entire amount admitted by him to be due or the monthly amount due as aforesaid, the court may subject to the provisions of sub-rule (2) strike off his defence

Explanation 1 — The expression 'first hearing' means the date for filing written statement of or hearing mentioned in the summons or where more than one of such dates are mentioned, the last of the dates mentioned

Explanation 2 — The expression 'entire amount admitted by him to be due' means the entire gross amount whether as rent or compensation for use and occupation, calculated at the admitted rate of rent for the admitted period of arrears after making no other deduction except the taxes, if any, paid to a local authority in respect of the building on lessor's account and the amount, if any deposited in any court under S 30 of the U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972

Explanation 3 — The expression 'monthly amount due' means the amount due every month whether as rent or compensation for use and occupation at the admitted rate of rent after making no other deductions except the taxes if any, paid to a local authority in respect of the building on lessor's account

(2) Before making an order for striking off defence, the court may consider any representation made by the defendant in that behalf provided such representation is made within ten days of the first hearing or of the expiry of the week referred to in sub-section (1) as the case may be.

(3) The amount deposited under this rule may at any time be withdrawn by the plaintiff

Provided that such withdrawal shall not have the effect of prejudicing any claim by the plaintiff disputing the correctness of the amount deposited

Provided further that if the amount deposited includes any sums claimed by the depositor to be deductible on any account, the court may require the plaintiff to furnish security for such sum before he is allowed to withdraw the same "

Dealing with R 5 of Order XV as added by U P Act No 37 of 1972 a Division Bench (G C Mathur and K N Seth, JJ) observed in Ladly Prasad v Ram Shah Billa (1976 All L J 494) : (AIR 1976 All 261) (in paragraphs 4 to 6 of the report) as under

" . Order XV relates to disposal of suit at the first hearing This stage is arrived after the defendant has filed his written statement, the parties have been examined under Order X if considered necessary to clarify the points in controversy, documents, on which parties rely have been produced and admission and denial obtained and necessary issues framed as provided under Order XIV After the framing of the issues the case is ready for hearing This is the stage when Rule 5 of Order XV comes into play This is anterior to the stage when the parties examine their witnesses At the stage of R 5 of Order XV the court is not required to record finding on disputed questions of fact which can be done only after the parties have led evidence in support of their conflicting claims

. . . .

6 Under R. 5 the defendant is required to deposit the entire amount of rent or damages for use and occupation which is admitted by him to be due If the whole or a part of the amount claimed by the plaintiff is admitted by the defendant in his written statement or during the examination under Order X, the law requires that he shall deposit the amount admitted to be due and thereafter throughout the continuence of the suit continue to deposit regularly the amount of monthly rent or compensation for use and occupation due at the rate admitted by him If, however, the defendant does not admit that any amount is due to the plaintiff as rent or damages for use and occupation, he need not make any deposit. At this stage the court is not required to decide the question, whether any amount is really due and whether the lease has been validly terminated The court cannot under this rule order or compel the defendant to deposit the amount claimed by the plaintiff and on the failure of the defendant to make the deposit as claimed by the plaintiff refuse to entertain any defence or strike off his defence It is only when the defendant commits default in depositing the amount admitted by him to be due or in continuing to deposit regularly the amount of monthly rent or compensation for use and occupation due

at the rate admitted by him that the court would be competent to refuse to entertain any defence or to strike off his defence "

In Brij Gopal v Ratan Chand (1980 All L J 690) another Division Bench (Yashodanandan and H N Seth, JJ) inter alia, observed as under in paragraph 6 of the report)

"The case before us is governed by Rule 5 as introduced by S 7 of the U P Civil Laws Amendment Act, 1972 and not by R 5 as substituted by the U P Civil Laws Amendment Act 1976 The rule as introduced by the 1972 Act requires that in a suit for ejectment and recovery of arrears of rent filed against the tenant, the tenant has to deposit the entire amount of rent admitted to be due at or before the first hearing of the suit. He also has to go on regularly depositing throughout the continuance of the suit the amount of monthly rent falling due at the rate admitted by him If the tenant commits a default either in depositing all the arrears of rent at or before the first hearing of the suit, the court is called upon to strike off his defence The rule contemplates making of representation by a tenant who has committed default in not paying the arrears of rent admitted to be due by him at or before the first hearing of the suit takes place Till the first hearing of the suit takes place the tenant can save himself of the consequences of being in default by his own action by depositing the arrears of rent and no question of making a representation by him arises The representation by the tenant, for extending the time for depositing the arrears of rent, can be made only after the first hearing of the suit takes place In case the tenant does not, after committing the default, make a representation, the court can make an order striking off his defence immediately after commission of such default. The fact, however, remains that there will always be a hiatus between the default committed by the tenant and the making of an order under Order 15 R 5 C P C striking off the defence."

9. In Surendra Nath Dubey v Smt. Shakuntala Devi (AIR 1980 All. 136) a Division Bench (Satish Chandra, C. J. and H. N. Seth, J) dealing with Rule 5 as it stood upon its introduction by U P Act 37 of 1972 observed (in paragraph 9 of the report) as under:—

"A perusal of the written statement filed by the defendant in this case shows that his case was that all his liability to pay rent or damages for use and occupation of the premises in question, up to the period ending Aug 1976 stood discharged before 16th Sept., 1976 and that no rent or amount for use and occupation of the premises was due against him on the date when the first hearing in the suit took place

At this stage we are not concerned with the question as to whether the defendant was legally entitled to adjust against the rent payable by him the amount which he claims to have spent in getting the electricity connection restored with the permission of the prescribed Authority

As the defendant did not admit that any rent or other amount for use and occupation of the premises was due, no question of his depositing any further amount or compensation for use and occupation of the premises on that account, at the first hearing or before 16th of Sept, 1976 arose The defence of the defendant, therefore, could not be struck off under O XV R 5 of the C P C on the ground that the defendant did not deposit in court the amount towards rent or compensation for use and occupation of the premises in dispute which was admittedly due from him at the first hearing or before 16th of Sept 1976, (the date on which the first hearing took place) As the defendant in this case did not admit that any amount by way of rent or compensation for use and occupation of the premises was due from him at the time when the first hearing took place on 16th of Sept 1976, no question of his making a representation seeking further time to make such deposit, arose "

10. It is clear that the view which has commended itself to this court is that in cases, like the present governed by R. 5 of O. XV C P C as originally introduced by U P Act 37 of 1972, the defence of a defendant could only be struck off in case he had failed to deposit by the first hearing of the suit the amount of rent or compensation admitted by him to be due and upon his failure to deposit, throughout the continuance of the suit all such amount every month which according to him, had to be deposited by him towards monthly rent or compensation Further, in case the defendant claimed that the amounts actually paid by him to the landlord or spent on his behalf had left nothing due to the landlord from him at all to be deposited at or before the first hearing of the suit, his defence could not be struck off.

11. In Nathulal Khandelwal v Dharmendra Kumar (1979 All L J 857), Satish Chandra, C J observed (in paragraph 8 of the report) that prior to its amendment in the year 1976 the requirement of R 5 of O XV was that the rent must be admitted to be due to the defendant Referring to the decision in Lady Prasad's case (AIR 1976 All 261) (supra) the learned Chief Justice observed thus (at p 858) —

"This authority dealt with O XV R 5 as it was prior to the amendment in 1976 At that time the requirement was that the rent must be admitted to be due In that context the court ruled that the defendant did not admit that any amount was due as rent It was not open to the court to go into the question and decide it "

12. In the instant case the stand of the defendant in the written statement was that having regard to the payment made by him to the landlord as also the huge expenditure incurred by him on his behalf, nothing was due from him as arrears In the statement under O X C P C as well, he did not admit any amount being due from him. This stand was unchanged even on July 4, 1973 which was fixed as the date of final hearing in the suit At best this date for purposes of R 5 of O XV, as it then stood, could be treated to be the first hearing of the suit by the trial court which had received the case on transfer and had, after issuance of notice to the defendant's counsel for Mar 16, 1973, been fixed for final hearing in presence of both the parties The liability of the defendant, in terms of R 5 was to have deposited the amount admitted by him to be payable to the plaintiff by this date and thereafter to have continued to pay regularly the amount of monthly rent or compensation for use and occupation due at the rate admitted by the defendant The submission that the defendant should be held to have committed default for purposes of R 5 of O XV C P C as he failed to deposit an amount of Rs 5/- admitted by him to be the monthly rent between the date of the filing of the suit and July 4, 1973 is difficult to accept in view of the phraseology of Rule 5 as it then stood, as interpreted by the Division Bench in Lady Prasad's case (supra)

13. It has been observed by me in Raghubir Singh v Krishna Kant Agnihotri (1979 All L J 495) that striking out of the defence of a defendant in a suit is a measure of penalty and should be resorted to only in exceptional circumstances. The effect of the striking out of defence of the defendant clearly is to deny him a fair trial. Prejudice to a defendant is implicit in the striking out of his defence and miscarriage of justice is the inevitable resultant in such case

14. In the present case, the suit was decreed inter alia, for the defendant's ejectment from the house in question after his defence had been struck off on July 6, 1973 The trial court misdirected itself in law in striking off the defence of the present appellant which it did upon a mistaken impression that the defendant had to deposit up to date rent and damages and cost of the suit. It over-looked that the defendant was required under R. 5 of O XV C P C as it then stood, to deposit only that amount which was admitted to him to be due from him and no more The appellant had not admitted any amount to be due from him to the plaintiff In these circumstances, his defence was not liable to be struck off and he was entitled to contest the plaintiff's claim on the merits of his defence He could not do so due to the order passed by the trial court The decree against him can, in these circumstances, not be upheld even though it was affirmed by the lower appellate court which also shared with the trial court a mistaken view of law by holding that the defendant was required to deposit the arrears of rent under O XV R 5 C P C

15. In conclusion, the appeal succeeds and is allowed The decree of the court below is set aside and the suit is sent back to the trial court for trial afresh in accordance with law The parties are directed to appear before it on Sept 21, 1981 The trial court will ensure that the suit is decided by it within four months of that date The plaintiff shall, however, be entitled to his costs of this appeal from the defendant-appellant The record shall be sent back to the court below forthwith

Appeal allowed

1981 ALL. L. J. 1041

M. N SHUKLA AND B. C JAUHARI, JJ.

Babban Singh, Petitioner v State of U P and others, Respondents

Civil Misc Writ Petn No 9512 of 1981, D/- 5-8-1981

(A) **Constitution of India, Arts. 226, 16 — Writ jurisdiction — Competitive**

IY/IY/E37/81/VCD

examination held by service commission — Petition by candidate challenging that norms prescribed for examination were illegal — Interference by High Court when permissible.

In ordinary cases the High Court would not interfere with the results of the competitive examinations by suggesting or substituting its own norms and standards, nor would the Court assume the role of an appellate authority to re-assess the merits of the examinees. The area of interference by the Court in such matters is strictly limited. It is only where some constitutional or other cardinal legal right of a candidate is infringed or where apparent irrationality or illegality is ingrained in the system which adversely affects the candidature of the examinees that the Court can interfere and issue suitable directions (Paras 1, 3)

(B) Constitution of India, Arts. 14, 16 — Competitive examination — Viva voce or oral test — Not inherently arbitrary.

It cannot be said that every viva voce or oral test in competitive examinations is inherently arbitrary and is invariably abused in the present case merely because 200 marks in the examination were allocated to interview, whereas 700 marks were assigned to the written test, it could not lead to the conclusion that the overall selection was arbitrary. AIR 1964 S C 1823 Rel on, AIR 1981 S C 487, Disting (Paras 2, 3)

(C) Constitution of India, Arts. 16, 226 — Competitive examination — Mere fact that father of some of the examinees is a member of Commission for selecting other candidates — Cannot vitiate the selection of candidates who happen to be his sons.

(Para 6)

Cases Referred : Chronological	Paras
AIR 1981 S C 487	3
AIR 1964 S C 1823	2

R. N Singh, for Petitioner

M. N. SHUKLA, J. :— This writ petition has been filed on behalf of a candidate who was not selected in the combined U. P State Services Examination, 1979. Disgruntled candidates are often prone to approach the scheme of such competitive examinations in a spirit of carping criticism. It is remarkable that when appearing at such examinations they are not alive to any of what they later deplore as the abominable features of the system. If their efforts are crowned with success, then they are quite satisfied and the entire system appears to be above reproach. On the other hand, if success eludes them and they are found deficient in merit, then all sorts of imaginary short-comings in the scheme of such examinations and the manner and mode of conducting them suddenly dawn upon them. This is vividly illustrated by the nature of criticism hurled by the present petitioner at the combined State Services Examination of 1979. The learned counsel for the petitioner with great vehemence pressed upon us virtually to review the entire scheme and structure of the combined examination held by the U. P. Public Service Commission and held that the norms prescribed for the examination were illegal, inconsistent and not indicative of the real merit of the examinees. It was urged that the whole system needed to be radically altered and that too through the instrumentality of this Court. It cannot be too strongly emphasised that it is beyond the jurisdiction of courts to devise the scheme and form for holding such examinations or lay down the norms and standards which the Public Service Commission or other bodies must observe in conducting such examinations. The fixation of place, the allocation of marks to various subjects, enumeration of the factors which ought to be taken into consideration in the matter of selection are best left to the bodies or authorities entrusted with the duty of holding such examinations. Therefore, the area of interference by the courts in such matters is strictly limited. It is only where some constitutional or other cardinal legal right of a candidate is infringed or where apparent irrationality or illegality is ingrained in the system which adversely affects the candidature of the examinees that the Courts can interfere and issue suitable directions.

2. In the instant case the petitioner's arguments were mostly of a rambling nature and in our opinion instead of drawing attention to any legal infirmity in the system there was nothing more than a sweeping indictment of the entire mode of examination. It is difficult to endorse the criticism that the system is absolutely rotten and fraught with all the potentialities and arbitrariness of an unjust selection. We are unable to accept the wide proposition that every viva voce or oral test is inherently arbitrary and is invariably abused. With respect we may advert in this connection to the observations of the Supreme Court which

are to the effect that the system is not intrinsically bad and that its efficacy and utility really depend upon the personnel who are called upon to execute the scheme and put it into practice Therefore, to advance arguments which are not buttressed by facts but are merely speculative and flow from the realm of imagination that there may be a very remote possibility of such system being abused, is to indulge in sophistry of which the Court can take no notice The Supreme Court in the case of R Chitralekha v State of Mysore (AIR 1964 S C 1823) observed (at p 1831) —

"In the field of education, there are divergent views as regards the mode of testing the capacity and calibre of students in the matter of admissions to colleges Orthodox educationists stand by the marks obtained by a student in the annual examination The modern trend of opinion insists upon other additional tests such as interview, performance in extra-curricular activities, personality test, psychiatric tests etc Obviously we are not in a position to judge which method is preferable or which test is the correct one If there can be manipulation or dishonesty in allotting marks at interviews, there can equally be manipulation in the matter of awarding marks in the written examinations In the ultimate analysis, whatever method is adopted, its success depends on the moral standards of the members constituting the selection committee and their sense of objectivity and devotion to duty This criticism is more a reflection on the examiners than on the system itself The scheme of selection, however, perfect it may be on paper, may be abused in practice That it is capable of abuse is not a ground for quashing it So long as the order lays down relevant objective criteria and entrusts the business of selection to qualified persons, this Court cannot obviously have any say in the matter" (emphasis added)

3. The learned counsel for the petitioner referred us to the decision of the Supreme Court in Ajay Hasia v Khalid Mujib, AIR 1981 S C 487 and submitted on its basis that the system of allotting high percentage of marks in interview was deprecated by that court We have carefully gone through the facts of that case and it appears to us that what actually weighed with their Lordships was that a chart has been placed before them in which it was found as a matter of fact that the marks obtained in the written test by the examinees were in inverse proportion to the marks obtained by them in the viva voce test If such an abnormal situation or freaks comes to the notice of this court it would certainly not throw out the petition under Art 226 but in ordinary cases the High Court would not interfere with the results of the competitive examinations by suggesting or substituting its own norms and standards, nor would the Court assume the role of an appellate authority to re-assess the merits of the examinees In the present case merely because 200 marks in the U P P S C examination were allocated to interview, whereas 700 marks were assigned to the written test, it does not lead to the conclusion that the overall selection was arbitrary In the case of Ajay Hasia (supra) the Supreme Court held that allocation of 33 1/3% of the total marks to the oral interview was not proper In the instant case only 22 22% marks were assigned to viva voce Hence, Ajay Hasia's case does not support the petitioner's contention

4. It is noteworthy that even in Ajay Hasia's case the Supreme Court took a very realistic view of the matter and observed that "in the absence of any better test for measuring personal characteristics and traits, the oral interview test must at the present stage, be regarded as not irrational or irrelevant" The Court merely sounded a note of warning that the "oral interview test as presently held should not be relied upon as an exclusive test" In the case in hand the result of the oral test was not regarded as the sole criterion for the selection of candidates On the other hand, the criterion was the aggregate of the marks obtained both in the written test and viva voce test

5. The learned counsel for the petitioner also submitted that R 50 relating to Personality Test was patently nebulous and such woolly phrases occurring therein as "intelligent, personality, character, physique and general suitability for the service" were devoid of objective content It was suggested that the relevant factors should have been more particularised In other words the point was raised that the criteria embodied in the Personality Test as framed in R 50 were in the nature of "airy nothings" and they could serve no purpose unless they were given "a local habitation and a name" This criticism is purely academic and untrammelled by considerations of reality In order to make a law effective and all embracing the element of vagueness cannot be totally eschewed, some important terms and key words have to

be made advisedly broad and in a sense vague so that they may be able to cover the infinitude of nuances which may arise in different sets of facts which no amount of human ingenuity can exhaustively catalogue It has always to be left ultimately to experts and seasoned examiners appointed for making the selection to perceive that substratum of excellence or merit or spectrum of qualities which would satisfy the broad factors or ingredients enumerated under the general heading of Personality Test The discerning faculty of such experts alone can discover the presence or absence of these virtues in a candidate This necessarily involves a streak of subjectiveness What actually constitutes such essential merit or eligibility in a particular candidate is a matter which defies analysis and makes a completely objective statement of the minutiae of such qualities impossible In matters of Personality Test there is always in the last analysis an indefinable "something" which the trained eye can never miss but which mere paper definition, however artistic, can never invest an examiner with true insight

6. Before parting with the case we may also notice the last argument pressed upon us on behalf of the petitioner It was stated in Paragraph 26 of the writ petition that it had come to the knowledge of the petitioner that two sons of Sri Ram Hit Ram, member of the U P Public Service Commission were also selected in the same combined U P State Service Examination of the year 1978 and his another son had been declared successful in the examination of the year 1979 It was, however, unequivocally conceded by the learned counsel for the petitioner that Sri Ram Hit Ram, the aforesaid member of the Public Service Commission was not included in any of the panels which interviewed his sons We hold that the mere fact that the father of some of the examinees also belongs to the fraternity of members of the Commission for selecting other candidates cannot vitiate the selection of the candidates who happen to be his sons To attribute partiality or bias to members of such an independent and august body as the Public Service Commission merely because a relation of one such member was also a candidate at the examination, though he was interviewed not by that member but by a different examiner is to betray petulant prejudice. On the other hand, the presumption is that a candidate must have succeeded by dint of his own merit If such facile allegations of partisanship are taken at their face value it would disrupt the entire pattern of competitive examinations in this State which has stood the test of time Thus, there is not a single point canvassed on behalf of the petitioner which has any substance On the other hand, the entire writ petition gives the unsavoury impression that merly because the petitioner's bid at the examination proved abortive, he is anxious to tear the whole system into shreds

7. In the end the learned counsel for the petitioner endeavoured to reinforce his submission by means of an analogy and contended that the maximum marks assigned to viva voce test in another Provincial service of the same standard and prospects, namely, the U P Provincial Judicial Service were only 100 Hence, according to him allocation of 200 marks to viva voce test in the case of combined competitive examination for U P executive and other allied services was arbitrary and discriminatory The creation of different services and holding examinations for the purpose of recruitment to those services and prescribing standards of examination and subjects for purposes of selection is entirely the function of the Government It is wholly beyond the province of the judiciary to attempt to undertake the discharge of these functions and prescribe subjects and standards of merit by determining the number of marks to be allocated to each subject or mode of examination The basic structure as well as the hierarchy of services has got to be created by the Government and the jurisdiction of the courts is attracted only when the working of such pattern results in the infringement of the specific legal or constitutional rights of those who offer themselves as candidates for appointment to such posts The learned counsel went on to argue that the technique of viva voce was extremely unsatisfactory because some candidates were interviewed for a long time, whereas others were disposed of very quickly and the nature of questions put to them by the examiners in the interview was vitally different from each other This again is a matter of details in the actual working and application of the general norms and judicial supervision or control over such things is neither feasible nor proper The suggestion that the law courts should attempt to control the practical working of such competitive examination in such minute details is wholly fatuous If the general norms prescribed are on the whole sound and relevant, their detailed application must of

necessity be left to the authorities concerned with the practical functioning of such examining bodies Even the definition of norms can do nothing beyond indicating the bare essence or crucial content of the guide-line or the requirement of the examination They cannot be reduced to a rigid formula or rule of thumb which may without the intrusion of any subjective element, be mechanically followed Hence, to cavil at the general guide-lines in the Rules relating to the Personality Test is merely in the nature of an academic animadversion, it does not stem from a practical analysis of the scheme of selection which may merit attention nor does it point to any serious or tangible short-comings which may be mitigated by adopting a different mode of examination

8. We find this writ petition under Art 226 devoid of merits and dismiss it in limine

9. After we had dictated the judgment the learned counsel for the petitioner asked for grant of a certificate that the case was a fit one for filing an appeal before the Supreme Court We have already quoted the two Supreme Court decisions covering the points In these circumstances no question of law of general importance meriting consideration by the Hon'ble Supreme Court is involved in this case The certificate asked for is refused

Petition dismissed

1981 ALL. L. J. 1045

R R RASTOGI, J

Ramesh Chand Gupta, Applicant v M/s Automobiles Financing Corporation and others, Respondents

Civil Revn No 636 of 1980, D/- 3-8-1981 *

Civil P. C. (5 of 1908), O. 38 Rr. 5, 6 and 9, O. 39 Rr. 1 and 2 — Attachment before judgment — Application for its withdrawal — Court must examine whether either of the situations contemplated by O. 38 R. 9 exist — Earlier order in plaintiff's favour becoming final — Not a ground to refuse withdrawal of attachment.

*Against judgment and order of Jagat Prakash, 2nd Civil J., Kanpur D/- 23-5-1980

IY/IY/D908/81/SMA/DVT

The plaintiff was a firm carrying on business of advancing loans and financing purchases of buses It advanced loan to defendants for purchasing bus on basis of hire purchase agreement There was criminal litigation between the defendants and a third party and the bus was seized by police The plaintiff firm filed an application under O 38 R 5 read with O 39 Rr 1 and 2 for attachment of the bus Ex parte interim order directing the police not to release the bus was granted but the police had already given possession to the defendants The Court subsequently issued ex parte warrant of attachment and accordingly plaintiff firm obtained possession of the bus The defendants filed application for recalling earlier order granting possession to the plaintiff firm

Held, as the Court had passed interim order directing issue of warrant of attachment defendants' application could not be dismissed on ground that the earlier order in favour of the plaintiff had become final When the application for withdrawal of attachment before judgment was filed it could not be dismissed by the Court without first determining whether sufficient security was furnished by the defendants or in the alternative whether the suit stood dismissed In either event it was the duty of the Court to order withdrawal of attachment The plaintiff firm could not also claim possession on basis of the terms of hire purchase agreement as it had filed application under O 38 R 5

(Paras 4 and 5)

Cases Referred : Chronological Paras

AIR 1973 All 67 1972 All L J 892 3

R A Sharma, for Applicant. P Gaur. for Respondents

ORDER :— This is defendant's application in revision under S 115 of the Code of Civil Procedure directed against the order passed by the II Civil Judge, Kanpur dismissing the application of the defendant applicant for release of the disputed vehicle on his furnishing security to the satisfaction of the court The brief facts are these The plaintiff opposite party No 1 M/s Automobiles Financing Corporation, a partnership firm, carries on business in advancing loans and financing purchase of buses etc Under hire purchase agreement dated 29th of January, 1977 the plaintiff advanced a loan to the defendant-applicant and defendants opposite parties 2 and 3 for

purchase of a bus The loan was payable in instalments It appears that some disputes arose between the parties and there was also an attempt on the part of the defendants to transfer the vehicle to a third person There was criminal litigation between the defendants and that person and the vehicle was seized by the police In the mean time the plaintiff opposite party No 1 filed an application under S 20 of the Arbitration Act on 20-7-1978 On that very date an application 5-C was given which contained three alternative prayers viz , the disputed vehicle be seized and possession thereof be delivered to the plaintiff firm, or the disputed vehicle be attached before judgment or the defendant be restrained from taking possession of the said bus from police station district Agra This application purported to be under S 20 of the Arbitration Act read with O 3 of R 5 and O 39 Rr 1 and 2 of the Code of Civil Procedure On this application that very day the court below passed an ex parte interim order directing the Officer-in-charge of police Station Chatta, district Agra not to release the disputed vehicle in favour of the defendants A commission was issued to a Vakil Commissioner to serve that order on the police officer as also on the defendants The Commissioner gave his report and it appears that in the mean time the police had already given delivery of the disputed vehicle to the defendants The case was then taken up on 14th of Oct , 1978 Nobody appeared from the side of the defendants on that date and the court below made an order for issue of warrant of attachment of the disputed bus That warrant was also given to a Commissioner for service The Commissioner seized the vehicle from the possession of the defendant on 10-1-1979 and gave it in the possession of the plaintiff

2. Thereafter an application was given by the defendants for recalling the order dated 14-10-1978 That application was rejected on 10-8-1979 and then on 1-5-1980 the defendants gave another application for releasing the bus in favour of defendant No 1, who is the applicant before this Court on his furnishing adequate security This application was 72-C-2. The plaintiff opposed this application. The court below has rejected the application mainly on the ground that the order passed on the application of the defendants for recalling the order dated 14-10-1978 had become final and also that the order dated 14-10-1978 was itself a final order in this behalf. In the opinion of the court below if the defendant-applicant was aggrieved with those orders he should have approached the higher Court for proper relief Aggrieved, defendant No 1 has come up to this Court with a prayer to revise this order

3. It has been submitted before me on behalf of the defendant-applicant that it was under O 38 R 5 of the C P C that the plaintiff had given its application for attachment of the disputed vehicle and the order of attachment was passed under sub-r (1) of R 6 Now, the defendant applicant made an application under R 9 of O 38 which reads —

"Where an order is made for attachment before judgment the court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment or when the suit is dismissed."

Under this Rule the attachment made under the preceding R 6 is to be withdrawn when two situations arise, (1) when the defendant furnishes security as required along with the security for costs of the attachment and secondly when the suit is dismissed According to the learned counsel the Court has no option but to release the attachment when either of these situations obtains in the case He has invited my attention to a Full Bench decision of this Court rendered in Abdul Hamid v Karim Bux (AIR 1973 All 67) After examining various cases cited at the bar his Lordship Trivedi, J speaking for the majority has observed (at p 68) —

"Examining the cases propounding the different views it appears that most of the High Courts are of the opinion that an attachment before judgment ceases after the dismissal of the suit even if no express order is passed According to the majority view an attachment would terminate no sooner the suit is dismissed by the trial court The view of this Court throughout has been that an attachment before judgment ceases on the dismissal of the suit"

Further, it has been held (at p 69) —

"The language of O 38 R 9 no doubt is capable of both the interpretations, but the well recognised rule of interpretation is that where the language is capable of two interpretations and where the Section of the Act has received a judicial construction and said construction has long been acted on without any alteration in the statute, the interpretation so recognised and acted on is to be accepted on the principle of stare decisis

because it is the general maxim that even a point of law has been settled by decision it forms a precedent which is not afterwards to be departed from "

As noted above R 9 of O 38 contemplates two situations when attachment before judgment shall be withdrawn and those situations are when the defendant furnishes the required security together with the security for the costs of the attachment and the other when the suit is dismissed In view of the aforesaid Full Bench decision, in the event of either of the situations occurring in a case the court has to withdraw the attachment made under O 38 R 5 of the Civil P C Unfortunately the court below has not proceeded to examine the case on the basis of this provision and has thus refused to exercise jurisdiction vested in it The matter, therefore, needs consideration on merits afresh

4. It was, however, submitted on behalf of the plaintiff-opposite party that under the terms of the hire purchase agreement itself the plaintiff has a right to obtain possession of the vehicle in the event of the conditions of that agreement not being fulfilled by the hirer I do not think that this aspect can be examined by this court The plaintiff did not seek attachment of the vehicle in exercise of any such right The application was given for attachment of the vehicle under O 38 R 5 of the Civil P C read with O 39 Rr 1 and 2

5. The view taken by the court below that the order dated 14th Oct . 1978 was final is not correct because on that date only an interim order was passed directing issue of warrant of attachment of the vehicle On the previous date, that is, 20th July, 1978 the interim order consisted of a direction to the police officer concerned not to hand over possession of the vehicle to the defendant hirer The fact that the defendant's application for recalling the order dated 14th Oct , 1978 was rejected on 10th Aug . 1979 would also not make that order final because the attachment was made on 10th Jan., 1979 The defendant-applicant had filed objection to that attachment No order was passed confirming the attachment after 10th Jan , 1979

6. From what has been discussed above, the matter needs fresh decision according to law The revision application is hence allowed and the impugned order passed by the court below on 15-7-1980 is set aside The court below is directed to decide the application of the defendant applicant (72-C-2) and the plaintiff's objection (74-C-2) thereto on merits after hearing the parties There will be no order as to costs

Revision allowed

1981 ALL. L. J. 1047

R M SAHAI, J

Km Asha Devi and others, Petitioners v State and others, Respondents

Writ Petn No 5000 of 1979. D/- 13-7-1981

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 172; 174 and 175 — Succession — Co-widows — Death of one of the co-widows leaving an heir entitled to succeed under the provisions of Act — S. 174 applies to such a case and not S. 172 or 175 — Property devolves on personal heir of deceased co-widow and not on surviving co-widow. (Paras 5, 6)

M P Singh, for Petitioners, M D Singh Standing Counsel and S Srivastava, for Respondents

ORDER :— In proceedings under S 10(2) of U P Imposition of Ceiling on Land Holdings Act initiated in 1976 against Smt Adhari, O P No 4 (hereinafter referred to as Opposite party since deceased) and Smt Sundari, mother of petitioners 1 and 2, the two widows of one Badri Singh who died sometime in 1969-70, the notice was discharged on 30th Jan , 1975 as after excluding certain land transferred prior to 1971 and giving benefit on certain other counts each was held not to possess any surplus land No sooner had these proceedings come to an end and order was affirmed in appeal, Sundari died giving rise to fresh notice under S 10(2) read with S 29 of the Act to Opposite party for re-determination of surplus area as the share of Sundari, her co-widow, having devolved on her she was now possessed of land which far exceeded the ceiling area To contest it, two objections were filed, one by Opposite party and the other by petitioners, unmarried daughters of Sundari, mainly basing their claim on will executed by Badri Singh stipulating devolution of land on unmarried daughters in the event of death of any of the widows It did not cut any ice, rather, the appellate authority held the will to be

fictitious, a finding which could not be and has not been seriously challenged

2. Even ignoring the Will the proposed statement of surplus land in C L H - statement can be upheld only if the share of Sundari can be held to have devolved on Smt Adhari For this it is necessary to look into the provisions relating to succession contained in Ss 171 to 175 of U P Z A & L R Act (Act I of 1951) The general order of succession is governed by S 171 It lays down the devolution of the interest of a Bhumidhar. Sirdar, or Asami in his holding

"(a) On male lineal descendant in the male line of descent in equal share per stirpes,

provided .
provided .
provided .

(b) widow and widow mother and widow of a predeceased male lineal descendant, who have not re-married,

provided, firstly, that co-widows will together get one share,

provided, secondly that the widow of a near descendant, will exclude that of a remoter one in the same branch

(c) (d) (e)

(ee) unmarried daughter

(f) (ff)

(g) married daughter

(h) etc "

3. Ss 171 and 172 lay down the manner of devolution of land inherited by a female after and before the date of vesting Sub-s (1) provides that if a widow who after the date of vesting inherited an interest in any holding as a widow dies her interest in any holding,

"shall devolve upon the nearest surviving heir (such heir being ascertained in accordance with the provisions of S 171) of the last male bhumidhar, sirdar or Asami "

4. To this extent there appears to be no difficulty but does this provision apply even where there were more than one widow, as S 175 provides.

"In the case of co-widows, or co-tenure-holder who dies leaving no heir, entitled to succeed under the provisions of this Act, the interest in such holding shall pass by survivorship "

The applicability of this provision couched in general and wide words is, however, conditioned by the use of words 'leaving no heir entitled to succeed' That means if one of the co-widows is survived by personal heirs, such heirs being mentioned in S 174 of the Act, then the rule of survivorship does not apply But then the property shall devolve on whom. the personal heirs or heirs of last male tenant? The section is silent It can and has been legitimately argued that devolution of widow who inherited an interest after date of vesting is governed either by S 172 or 175 If S 175 does not apply then the devolution takes place u/s 172 read with S 171 on heirs of last male tenant Normally there would have been no difficulty in accepting this argument But if S 172 is applied then the property again devolves on co-widow, she being nearer than other heirs of last male tenant mentioned in S 171 In effect the property devolves on co-widow in either case, in one by survivorship and other by inheritance This could not have been the intention of Legislature because devolution on co-widow is ruled out if the deceased widow is survived by her personal heir The intention obviously was to benefit heirs of the widow entitled to succeed under provisions of the Act, in preference to co-widow This no doubt results in an anomaly as in case of one widow the property devolves on last male tenant but in case of more than one it may devolve on personal heirs of the deceased widow But this is because of the expression, 'leaving no heir entitled to inherit under provisions of this Act' used in S 175. It is true that S 172 on its own does not rule out its applicability to more than one widow But there being specific provision for co-widows in S 175 it is this provision which has to be looked into And as seen above it does not apply when the deceased widow is survived by her personal heirs By that it cannot be held that S 172 applies Consequently S 172 does not apply because of S 175 and S 175 does not apply because the deceased co-widow is survived by an heir entitled to succeed under provisions of this Act Then the question is, devolution in such a case shall be governed by which provision

5. These anomalies have frustrated any satisfactory situation The only way out appears to be to apply S 174 which is residuary provision in respect of devolution of holding held by a female to whom S 172 does not apply It avoids any unfortunate result and perpetrates the legislative intention discerned from the expression used in S 175 Therefore, it has to be held that S 172 applies to a case of one widow, S 175 to co-widows and S 174 where one of the co-widows dies

leaving an heir entitled to succeed under the provision of the Act

6. Interpreted in this manner the share of Smt Sundari devolved on petitioner u/s 174 and not on her co-widow The notice under S 10 (2) read with S 29 for re-determination of surplus land was, therefore, misconceived

7. In the result, this petition succeeds and is allowed The order passed by the Additional District Judge and Prescribed Authority is quashed The notice issued for determination of the surplus land is also quashed

Petition allowed

1981 ALL. L. J. 1049

H N SETH AND M WAHAJUDDIN, JJ

Sudama Singh, Petitioner v State of U P and another, Respondents

Habeas Corpus Petn No 7004 of 1981, D/-29-7-1981

(A) Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act (7 of 1980), S. 3 (1) — Detention under — Pendency of criminal case against detenu for contravention of provisions of Ss. 3 and 7 of Essential Commodities Act — Cannot prevent the detaining authority from, while passing detention order, taking into consideration facts on which said criminal case was based.

(Para 8)

(B) Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act (7 of 1980), S. 3 (1) — Detention under — Grounds — Two out of four grounds not backed up by any material — Detention is rendered illegal.

Where the satisfaction of the detaining authority that it is necessary to detain a person with a view to prevent him from acting in a manner prejudicial to the society, under a law relating to preventive detention, is based on a number of grounds and it is found that there is no material to support existence of some of those grounds, the entire detention order is rendered invalid (Para 33)

In the instant case, the detention was based on four grounds viz that the detenu had in the past been contravening clauses 3 and 23 of the Distribution Order, 1977, clause 3 of the Vanaspati Dealers Licencing Order and clause 4 of the Price Display Order There was material on the basis of which the District Magistrate could feel satisfied that he had contravened the provisions of Vanaspati Dealers Licencing Order, 1969 and clause 4 of the Price Display Order, 1977, there was no material on the basis of which he could feel satisfied that the petitioner had contravened the provisions of clauses 3 and 23 of the Distribution Order, 1977

Held, as in this case there was no material in support of two of the four grounds on which the District Magistrate felt satisfied that it was necessary to detain the detenu with a view to prevent him from acting in a manner prejudicial to maintenance and supplies of essential commodities, the order for detenu's detention was rendered invalid

(Para 33)

Cases Referred : Chronological Paras

AIR 1974 S C 2154 1974 Cri L J 1479 7

M P Singh, for Petitioner, Dy Govt Advocate, for Respondents

H. N. SETH, J. :— By this petition under Article 226 of the Constitution, petitioner Sudama Singh impugns the validity of his detention authorised under the order dated 19th June, 1981 passed by the District Magistrate, Gorakhpur, in exercise of his powers under section 3 (1) of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (Act No 7 of 1980)

2. Petitioner Sudama Singh had been Chairman of a Co-operative Society known as Kendriya Upbhokta Sahkari Bhandar Ltd., (Central Consumers Co-operative Society), Gorakhpur, from 18th May, 1978 to 14th May, 1981 On 6th January, 1981 ten fair price shops were, for distribution of essential commodities under the Public Distribution Scheme, allotted to the said Society In due course the Society appointed ten persons, one at each of the ten shops, to work as Salesmen It is said that on 6th May, 1981 the Executive Magistrate visited the Society for checking its stock and records The checking made by the Executive Magistrate at the shop and godown of the Society situated at station Gorakhpur in presence of Nand Lal and Ram Prasad, an employee of the Society, showed that certain stocks of essential commodities like vegetable oil, cloth, Ata, rice, sugar, wheat etc. were present in five godowns

1977, Clause 3 of the U P Vanaspati Dealers Licencing Order, and U P Essential Commodities (Display of Price and Stock and Control of Supplies and Distribution) Order, 1977

5. Whereas the material on the basis of which the District Magistrate thought that the petitioner had been contravening the provisions of clauses 3 and 23 of the U P Foodgrains and other Essential Articles Distribution Order, 1977, has been indicated in paragraph numbered as 1, that for contravention of U P Vanaspati Dealers Licencing Order, U P Essential Commodities (Display of Price and Stock and Control of Supplies and Distribution) Order, 1977, is mentioned in paragraph numbered as 2 in annexure 3 to the petition It may also be mentioned here that while stating the material in paragraph 1 of annexure 3 to the petition, the District Magistrate has also referred to the checking of the shops and godowns by the Executive Magistrate on 6th May, 1981, leading to registration of a criminal case against the petitioner under section 3/7 of the Essential Commodities Act

6. The learned counsel for the petitioner submits that petitioner's detention under the provisions of Black Marketing and Maintenance of Supplies of Essential Commodities Act (Act VII of 1980), hereinafter referred to as Act 7 of 1980, stands vitiated because of following reasons —

(1) Once on the basis of material gathered during the search made on 6th of May, 1981, a case under section 3/7 of the Essential Commodities Act had been registered and was pending, the District Magistrate was not competent to, on same facts, direct petitioner's detention under Act 7 of 1980

(2) The detaining authority did not make available to the petitioner copies of all documents referred to by it in the grounds for his detention The petitioner has thus been deprived of an opportunity of making an effective representation, resulting in contravention of Article 22 of the Constitution

(3) That there was no material before the detaining authority on which it could possibly be satisfied that some of the grounds relied upon by it for concluding that it was necessary to detain the petitioner with a view to prevent him from acting in a manner prejudicial to maintenance of supply of goods essential to the community existed

adjoining the shop at Station Road, Gorakhpur. Neither Sri Sudama Singh Chairman of the Society nor its Secretary were present at the spot It was found that stock registers, sales registers, receipt for daily sales, rate board and stock board were not available at the godown and no person authorised to sell the articles or to manage the sales was present there The Executive Magistrate accordingly lodged a first information report at police station Cantt on the basis of which a case under section 3/7 of the Essential Commodities Act was registered against petitioner Sudama Singh, Narendra Kumar Srivastava, Secretary of the Society Nand Lal and Ram Prasad Thapa Remaining shops allotted to the Society were inspected by the Executive Magistrate on 7th May, 1981 The inspection made by the Executive Magistrate revealed that at none of these nine shops the records concerning distribution of goods like wheat, rice, sugar and kerosene oil, obtained by the Society from the Government for public distribution, were available

3. Deputy Registrar, Co-operative Societies, suspended the committee of Management of the Society, vide his order dated 14th May, 1981 and on 17th May, 1981 he appointed Sri Ramhit Gupta as its Administrator The petitioner surrendered himself before the Chief Judicial Magistrate, Gorakhpur, in connection with the case under the Essential Commodities Act, on 27th May, 1981 and on the same day he was released on bail for a period of two months After petitioner's application for bail for a further period was rejected by the Chief Judicial Magistrate the petitioner obtained orders for being released on bail from the court of Sessions Judge, Gorakhpur Eventually, the District Magistrate, Gorakhpur, in exercise of his powers under section 3 (1) of the Act No 7 of 1980, passed the impugned order dated 19th June, 1981 and directed petitioner's detention

4. The grounds on which the petitioner has been directed to be detained were supplied to him on 21st June, 1981 (Annexure 3 to the petition) Its perusal shows that the District Magistrate felt the necessity of detaining the petitioner with a view to prevent him from acting in a manner prejudicial to the maintenance of supplies of commodities essential to the community on the ground that the petitioner had been in the past contravening the provisions contained in clauses 3 and 23 of the U P Foodgrains and other Essential Articles Distribution Order,

(4) The detaining authority had, while passing the impugned order, relied upon irrelevant material, and

(5) the grounds for detention supplied to the petitioner being vague, prevented him from making an effective representation

7. In the case of Haradhan Shah v State of West Bengal, AIR 1974 S C 2154, the Supreme Court, after noting its earlier decision observed thus (at p 2160) —

"The principle which can be broadly stated are these First, merely because a detenu is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the Code of Criminal Procedure would not, by itself, debar the Government from taking action for his detention under the Act Second, the fact that the police arrests a person and later enlarges him on bail and initiates steps to prosecute him under the Code of Criminal Procedure and even lodges a first information report may be no bar against the District Magistrate issuing an order under the Preventive Detention Act

Fourth, the mere circumstance that a detention order is passed during the pendency of the prosecution will not violate the order "

8. In view of the aforesaid observations made by the Supreme Court, it does not appear that there is any merit in the petitioner's first submission that pendency of the criminal case against the petitioner for contravention of the provisions of section 3/7 of Essential Commodities Act, prevented the detaining authority from, while passing the impugned order, taking into consideration facts on which the said criminal case was based

9. In support of his second submission, learned counsel for the petitioner invited our attention to paragraph 28 of the petition, specifying the particulars of as many as 12 documents relied upon in the grounds for his detention, it is stated that copies thereof have not been supplied to him by the detaining authority The District Magistrate controverted the allegations made in paragraph 28 of the petition in paragraph 16 of the counter-affidavit filed by him He asserted that copies of all documents excepting those at serial Nos 8, 10 and 11 in paragraph 28 of the petition had been supplied to the petitioner and signatures of the petitioner in token of having received all those documents are available on the record The District Magistrate further averred that so far as the document mentioned at serial No 8 was concerned, it did not exist and that it has not been taken into consideration in passing the detention order So far as documents mentioned at serial Nos 10 and 11 are concerned, they were one and the same and the order of detention nowhere refers to them Moreover, copy of the first information report containing the requisite material had already been supplied to the petitioner There is no reason to disbelieve the sworn statement of the District Magistrate in this regard It is thus clear that all relevant documents, so as to enable the petitioner to effectively represent his case, have been supplied to him In view of the statement made by the District Magistrate in his counter-affidavit, learned counsel for the petitioner did not press the second submission for impugning the validity of his detention

10. Coming now to the third submission, which has been seriously pressed by the learned counsel for the petitioner, we find that as per grounds for petitioner's detention (Annexure 3 of the petition), satisfaction of the District Magistrate that it was necessary to detain the petitioner with a view to prevent him from acting in a manner prejudicial to the maintenance of supplies of essential commodities like wheat, sugar, Atta, Vanaspati, exercise books and kerosene oil, was based on the ground that the petitioner had, in the past, been contravening following provisions of law for the time being in force, relating to supply, distribution and trade and commerce in aforementioned commodities, which were essential to the community —

(1) Clauses 3 and 23 of the Uttar Pradesh Foodgram and other Essential Articles, Distribution Order, 1977 (hereinafter referred to as Distribution Order, 1977)

(2) Clause 3 of U P Vanaspati Dealers Licencing Order, 1969, and

(3) U P Essential Commodities (Display of Price and Stock and Control of Supplies of Distribution) Order, 1977 (hereinafter referred to as the Price Display Order, 1977)

11. The material on which the District Magistrate felt satisfied that the petitioner has been contravening the provisions of clauses 3 and 23 of the Distribution Order, 1977, has been indicated in paragraph numbered as 1 in annexure 3 to the petition, which may be summarised thus —

(1) Petitioner functioned as Chairman of the Central Consumers Co-operative Society, to which ten Government Fair Price Shops were allotted on 6th January, 1981, from 18th of May, 1978, to 14th of May, 1981 As per letter dated 19th Feb . 1981, from the Secretary of the Society, 10 salesmen had been appointed by the Society to function at the Fair Price Shops indicated against their respective names

(2) During the months of March and April considerable quantity of sugar, rice, kerosene oil and wheat was supplied to the Society for distribution through the ten fair price shops allotted to it.

(3) Information received from the Food Corporation and the Senior Marketing Inspector revealed that bulk of sugar and entire quantity of rice and wheat supplied to the Society for distribution during the months of March and April, 1981, was lifted from the Food Corporation and Government godowns by one Nandlal Gupta

(4) The Administrator of the Society informed the Addl District Magistrate (Administration) that Nandlal Gupta was neither an employee of the Society nor had he been authorised by it to lift on its behalf any article supplied by the Government for distribution through the fair price shops belonging to the Society

(5) According to Cashier of the Society, the petitioner, who was the Chairman, and the Secretary of the Society, had been issuing oral orders to him for making payment for sugar, rice, wheat and kerosene oil lifted for distribution through fair price shops allotted to the Society

(6) The petitioner had personally verified the signatures of Nandlal Gupta to enable him to lift in the month of March, 1981, a part of the sugar on behalf of the Society meant to be distributed through the fair price shops

(7) On being required to produce the records of the fair price shops, seven out of ten appointed salesmen informed the authority that neither were the records available with them nor had they been working at the concerned fair price shops and that the Chairman and the Secretary of the Society have been getting all the work done through unknown persons

(8) During checking of nine shops on 7th May, 1981, records concerning wheat, rice, sugar and kerosene oil supplied by the Government for public distribution were not available at any of those shops

12. According to the District Magistrate aforementioned facts made it clear that the petitioner did not get wheat, rice and sugar supplied by the Government to the Society for public distribution, distributed through authorised salesmen and instead he got the same distributed in an irregular manner through Nandlal Gupta These facts further showed that no records in respect of the goods and kerosene oil, supplied for public distribution, had been kept at any of the nine shops Action of the petitioner in getting wheat, rice and sugar supplied by the Government to the Society for public distribution, through unauthorised persons and in not maintaining the records at the nine fair price shops resulted in contravention of the provisions of clauses 3 and 23 of the Distribution Order, 1977

13. Learned Counsel for the petitioner contended that even if it be assumed that there was credible material in support of the allegations mentioned above, they do not make out any case for contravention either of clause 3 or clause 23 of the Distribution Order, 1977, and this ground relied upon by the District Magistrate for detaining the petitioner cannot be said to exist

14. Clause 3 of the Distribution Order, 1977, runs thus —

"No person other than an authorised retail distributor shall sell any of the Government foodgrains or any other essential article supplied by the Government for distribution under this Order or any other Order"

15. The expression, "authorised retail distributor", has been defined in clause 2(b) of the Order as meaning a person appointed as agent (retail) by the District Magistrate, City Magistrate or Sub-Divisional Magistrate, for sale of Government foodgrains and other essential articles

16. A contravention of clause 3 can take place only if a person other than the authorised retail distributor effects the sale either of Government foodgrain or of other essential article, which is supplied by the Government for distribution Where the sale of such foodgrain or article is effected by the authorised retail dealer, no question of contravention of clause 3 aforesaid can possibly arise If, while so selling the foodgrain or other essential article, the authorised retail dealer contravenes any statutory provision or some legally enforceable order, he may become liable for contravention of some other provisions but

then he cannot be said to contravene clause 3 of the Distribution Order, 1977

17. In the instant case, it is not disputed that the Central Consumers Co-operative Society, to which various articles, like wheat, rice, sugar, kerosene oil, were supplied from Government and Food Corporation godowns, was the authorised retail distributor as defined by clause 2 of the Distribution Order, 1977 In substance the allegation made in the grounds for petitioner's detention in this regard is that while acting as Chairman of the Society, he got the wheat, sugar, rice and kerosene oil sold through an unauthorised man Sri Nandlal Gupta, who was not an employee of the Society, instead of getting the same sold through authorised salesmen In other words, the action of the petitioner in getting the goods sold would not have resulted in any contravention of clause 3 of the Distribution Order, 1977 if such sale had been effected through various salesmen appointed by the Society Viewed in this light what the allegations made against the petitioner in this connection amount to is that even though wheat, sugar, rice and kerosene oil have been sold by the Society, the petitioner contravened the provisions of clause 3 of the Distribution Order, 1977, as he got the same sold through a person who was not the salesman appointed by the Society

18. As already explained, in case the concerned sales of Government foodgrains and other essential articles had been effected by the Society, which, admittedly, was an authorised retail distributor, no question of contravention of clause 3 of the Distribution Order, 1977, can possibly arise If the Society sold the foodgrains etc through Nandlal Gupta who had not been legally authorised either to lift the foodgrain or to sell the same on behalf of the Society, the Society might be guilty of some provision other than that contained in clause 3 of the Distribution Order, 1977 Contravention in this regard of any provision other than that of clause 3 of the Distribution Order, 1977, has not been made the basis for detaining the petitioner

19. Learned Government Advocate, appearing for the respondents argued that as the concerned articles have been sold by unauthorised persons, such sale could not be treated as a sale made by the society itself They would be the sales made by the unauthorised persons themselves As the petitioner, who was the Chairman of the Society actively connived at such sales made by the unauthorised persons, he would, on the basis of provision contained in section 10 of the Essential Commodities Act, be taken to have contravened the provisions of clause 3 of the Distribution Order, 1977

20. We are unable to accept this submission In case the objectionable sales were not the sales made by the Society but were sales effected by unauthorised persons, it will be such unauthorised persons, who effected the sales, and not the Co-operative Society, which would be guilty of contravening the provisions of clause 3 of the Order Section 10 of the Essential Commodities Act makes the person in charge responsible for the conduct of the business of a corporate body as well as its such Director, Manager, Secretary or other officer who consent or connive at or whose neglect leads to a contravention by the corporate body, punishable under the Essential Commodities Act, also liable to be proceeded against and to be punished accordingly This section comes into play only when there has been some contravention by a corporate body which can be dealt with under the provisions of the Essential Commodities Act It has no application to a case where the contravention of the nature contemplated by the Essential Commodities Act is by an individual We are accordingly of opinion that even if some unauthorised persons have sold the foodgrains etc , meant to be distributed by the Society with petitioner's consent or connivance, it cannot be said that the petitioner can be made liable for contravention of clause 3 of the Distribution Order, 1977, with the aid of Section 10 of the Essential Commodities Act

21 Learned Government Advocate next submitted that the real import of the allegations contained in the grounds supplied to the petitioner with regard to contravention of clause 3 of the Distribution Order, 1977, was that it was the petitioner, who had misappropriated the Government foodgrains etc , supplied to the Society for distribution through fair price shops and he had himself sold the same through the agency of Nandlal Gupta As admittedly, the petitioner was not an authorised retail distributor, he would become liable for contravention of clause 3 of the Distribution Order, 1977

22. We find no merit in this submission As already explained, the real import of the allegations contained in the grounds of detention supplied to the petitioner was that there had been contravention of clause 3 of

the Order inasmuch as the Society got the foodgrains etc , supplied to it for distribution through the fair price shops, sold through unauthorised persons instead of through authorised salesmen This conclusion is further fortified by following allegations made in paragraphs 11 and 13 of the counter-affidavit —

"Paragraph 11 — In reply to the averments made in paras 17, 18 and 19 it is stated that although technically it may be correct that the Secretary as Chief Executive Officer is responsible for the day to day business and activities of the Society, section 30 of the U P Co-operative Societies Act, 1965, merely confers on the Chairman the power to control, direct and supervise the affairs and business of the Society The deponent has no reason to disbelieve the report given by the Cashier about his getting instructions from the Chairman through Sudama Singh and further deponent had reason to believe that Sri Nandlal Gupta, who is not a servant of the Society, was authorised by Sri Sudama Singh to lift the commodities on behalf of the Society Further, seven out of ten salesmen reported to have been appointed as such by the Society have also reported that under instructions of the Chairman and the Secretary of the Society, the business was actually being done by some other unauthorised persons As such, therefore, it is wrong to say that the petitioner did not do anything contrary to the provisions of law "

"Paragraph 13 — That in reply to the averments made in para 24 of the petition it is stated that the petitioner actually authorised one Sri Nandlal Gupta to lift the commodities on behalf of the Society and as such it is wrong to say that he did not authorise any outsider to assist him in the discharge of his duties "

23. It thus appears that is it detaining authority's own case that while getting the sale transacted through unauthorised persons, the petitioner was carrying on the business of the Society and that the concerned articles were not being sold by him on his own account

24. In the result, we are of opinion that there was no material before the detaining authority on the basis of which it could feel satisfied that the petitioner had contravened the provisions of clause 3 of the Distribution Order, 1977.

25. Material indicated in the grounds of petitioner's detention and relied upon by the detaining authority in so far as contravention by the petitioner of the provisions contained in clause 23 of the Distribution Order, 1977, which reads thus —

"Clause 23 — Maintenance of accounts etc — Every authorised retail distributor shall maintain in such form and manner as a District Magistrate may direct, an account of all purchases, sales and transactions, made by him of any foodgrains or other essential articles He shall also furnish information, returns, statements and reports as he may be required to furnish by the District Magistrate or under an order of the State Government made under the Act "

is concerned merely is that when on 7th May, 1981, nine out of ten fair price shops allotted to the Society were checked by the Executive Magistrate, the records concerning distribution of Essential Commodities, like wheat, rice, sugar and kerosene oil, supplied to the Society for public distribution through those shops, were not found at those shops.

26. A perusal of clause 23 shows that it can be contravened by an authorised retail distributor either, (1) if he does not maintain in such form and manner as the District Magistrate may direct, an account of all purchases, sales and transactions made by him of foodgrains or essential commodity or (2) if on being so required by the District Magistrate, he fails to furnish the information, return, statements or reports called for from him In this case the material communicated to the petitioner merely shows that on a particular date when nine fair price shops were inspected by the Executive Magistrate, records concerning distribution of essential commodities supplied to the Society for public distribution were not kept at those nine shops All that clause 23 obliges an authorised dealer to do is to maintain in such form and manner as the District Magistrate may require, records of purchases, sales and transactions made by him of the commodities supplied to him for public distribution It does not oblige the authorised retail dealer to necessarily maintain or keep such records at the place from where actual distribution of the commodities takes place There is nothing in the grounds supplied to the petitioner to show that such records had in fact not been maintained by the Society which in this case was the authorised dealer and that either it was the duty of the petitioner as its Chairman to maintain such records or that such non-maintenance of records was due to some negligence on the part of the

petitioner or was with his consent or connivance The grounds supplied to the petitioner also did not indicate that the detaining authority had, at any time, required the petitioner, who was Chairman of the Society (authorised retail distributor), to produce either the account books of the Society relating to distribution of essential commodities supplied to it for public distribution, or to furnish any other information, return, statement or report It thus appears that on the material so communicated it cannot be said that the petitioner had committed either of the two lapses which lead to contravention of the provisions of clause 23 of the Distribution Order, 1977 This ground for petitioner's detention also does not appear to be backed up by relevant material

27. In this connection, learned counsel for the petitioner also contended that as a Chairman, it was not his duty either to maintain accounts or to furnish to the District Magistrate any information on behalf of the Society It was the Secretary of the Society, who was responsible for maintaining the accounts and furnishing information on behalf of the Society In the circumstances, if at all, it was the Secretary of the Society who alone could be made liable for the contravention of clause 23 of the Distribution Order, 1977 Accordingly, the petitioner cannot, on the basis of the material communicated to him, be said to have contravened the provisions of clause 23 of the Distribution Order, 1977 However, in the view which we are taking it is not necessary for us to deal with or to express any opinion on this submission made by the learned counsel

28. So far as contravention by the petitioner, of the provisions contained in the Vanaspati Dealers Licencing Order, 1969, and the Price Display Order, 1977, is concerned, necessary material for the same has been indicated in paragraph 2 of the grounds served on the petitioner The material indicates that when on 6th of May, 1981, the Executive Magistrate inspected one of the ten fair price shops (namely, that located at Station Road, Gorakhpur) allotted to the Society, he found considerable quantity of Vanaspati, cloth, exercise book, rice, Ata and sugar, present in six godowns adjoining the said shop These six godowns did not belong to the Society and that the Vanaspati Ghee found therein also did not belong to the Society The material further indicated that the said godowns belonged to the petitioner who was in actual control of the commodities found there The petitioner did not possess any licence for dealing in Vanaspati At the time of inspection, no stock register, sales register, daily sales receipts, price lists and stock board were found either at the shop belonging to the Society or in any of five rooms or godowns attached thereto

29. It is not disputed that the petitioner does not hold licence under the Vanaspati Dealers Licencing Order, 1977, for dealing in Vanaspati As on the material available to him the detaining authority could feel satisfied that the petitioner was dealing in Vanaspati found in the godowns and that he was doing so without obtaining a licence under the Vanaspati Dealers Licencing Order, 1977, it cannot be said that the detaining authority committed any mistake in taking this ground into consideration while making an order for petitioner's detention

30. Coming now to the allegations regarding contravention of the provisions of the Price Display Order, 1977, the case of the respondents is that the petitioner has contravened the provisions of clause 4 thereof, relevant portion of which runs thus —

"(4) Exhibition of Price List and Stock by retailer — (1) Every retailer shall before the commencement of his business on any day exhibit at the entrance or some other prominent place of his business premises, the retail price list of different classes, varieties of scheduled commodities actually held in stock by him for sale as fixed or approved by the Central or State Government, if any or as fixed by the manufacturer, producer or distributor and where no such price is fixed or approved by the Government or fixed by the manufacturer, or producer, or distributor, the price (inclusive of all taxes) at which the scheduled commodity is offered for sale by the retailer ."

31. Learned counsel for the petitioner contended that before a retailer, who has been defined in clause 2 (b) as a person engaged in the business of purchase, sale or storage of any scheduled commodity by retail including his representative or agent, can be said to have contravened the provisions of clause 4 of the Price Display Order mentioned above, there must be material to show that the list contemplated by clause 4 had not been displayed by the retailer at his business premises Even if it be taken that the concerned goods were, on 6th of May, 1981 found in the godowns as mentioned in

paragraph 2 of annexure 3 and those goods belonged to the petitioner, it could not be said that the said godowns were the place of petitioner's business in the sense that the petitioner had been using that place for retail sales of those commodities There was no evidence to show that the petitioner ever conducted any sale from those godowns If the petitioner was selling the goods from some other place, it would be that other place which would be place of his business Merely because the detaining authority did not find the price list contemplated by clause 4 displayed at the godowns where the goods were stored, it did not mean that the said list had not been displayed at the place from where the petitioner was actually transacting his business of retail sale The shop adjoining the godowns where the price list had not been displayed by the petitioner was not his personal shop It was the shop belonging to the Society of which the petitioner was the Chairman It was, if at all, the place of Society's business and not that of the petitioner In the circumstances, the petitioner cannot be said to have contravened the provisions of clause 4 of the Order by not displaying the price list of the articles found in the godowns at the shop

32. Having given our careful consideration to the submission made by the learned counsel we find that it is not well founded It is not disputed that in case the goods found present in the six godowns on 6th of May, 1981, belonged to the petitioner and the same had been stored for sale the petitioner would be guilty of contravening the provisions of clause 4 of the Price Display Order if such godowns were petitioner's place of business within the meaning of clause 4 In this case, material has been brought on record to show that none of the six godowns which adjoined the fair price shop belonging to the Society, located at the Station Road, Gorakhpur, had been hired by the Society The electric connection for those godowns stood in the name of petitioner In one of the godowns there was sometime back a telephone connection which stood in the name of the petitioner. These facts could provide the basis for the District Magistrate's feeling that the said godowns and the commodities stored therein belonged to the petitioner. The quantity in which those foodgrains etc had been stored in the godowns could lead the District Magistrate to believe that the same had been stored there for purposes of sale As no price list as contemplated by clause 4 was found to have been displayed at any of the six godowns, the detaining authority could come to the conclusion that the petitioner had been contravening the provisions of clause 4 of the said Order, if there was any material before it on the basis of which it could feel that the petitioner had been using that place for conducting sales In our opinion, in a case where stock of essential commodities is found to be stored at a place in such quantity as has been found in the present case (leading to an inference that the same had been stored for sale) the detaining authority can,in absence of any claim made by the person to whom such goods belonged, presume and proceed on the footing that the goods were intended to be sold in retail from the very same place where they were found to be stored It is not the petitioner's case that he is conducting the sale of the articles from any place other than the place where the same were found to be stored In these circumstances it cannot be said that the conclusion of the District Magistrate that the petitioner had contravened the provisions of clause 4 of the Price Display Order inasmuch as he did not display the list contemplated by that clause at the godowns was based on no material We are, accordingly, not impressed by the petitioner's submission that there was no material in support of the ground that the petitioner had contravened the provisions of clause 4 of the Price Display Order, 1977

33. Upshot of aforesaid discussion is that whereas petitioner's detention was based on four grounds viz that he had, in the past, been contravening clauses 3 and 23 of the Distribution Order, 1977, clause 3 of the Vanaspati Dealers Licencing Order and clause 4 of the Price Display Order, there was material on the basis of which the District Magistrate could feel satisfied that he had contravened the provisions of Vanaspati Dealers Licencing Order, 1969 and clause 4 of the Price Display Order, 1977, there was no material on the basis of which he could feel satisfied that the petitioner had contravened the provisions of clauses 3 and 23 of the Distribution Order, 1977 It is now settled law that where the satisfaction of the detaining authority that it is necessary to detain a person with a view to prevent him from acting in a manner prejudicial to the Society, under a law relating to preventive detention, is based on a number of grounds and it is found that there is no material to support existence of some of those grounds, the entire detention order is rendered invalid As in this case we have found that there was

no material in support of two of the four grounds on which the District Magistrate felt satisfied that it was necessary to detain the petitioner with a view to prevent him from acting in a manner prejudicial to maintenance and supplies of essential commodities, the order for petitioner's detention impugned in this case is rendered invalid and the petition deserves to be allowed

34. In the aforesaid view of the matter we do not think it necessary to deal with or consider the fourth and fifth submission made by learned counsel for the petitioner Before parting with this case we may observe that if what has been stated in annexure 3 to the writ petition to justify passing of the order for petitioner's detention be true, the petitioner certainly is an anti-social element who deserves to be strictly dealt with under the law However, even the detention of such a person can be countenanced only if the same has been made in accordance with the provisions laid down in the concerned law relating to preventive detention As in this case we find that the requisite satisfaction of the District Magistrate for coming to the conclusion that it was necessary to detain the petitioner with a view to prevent him from acting in a manner prejudicial to the maintenance and supplies of essential commodities was based on four grounds, two of which were not backed by any material, we have no option but to hold that petitioner's detention is rendered illegal

35. In the result, the petition succeeds and is allowed The order dated 19th of June, 1981, passed by the District Magistrate, Gorakhpur, is quashed and the respondents are directed to release the petitioner from custody forthwith, unless wanted in connection with any order case

Petition allowed

1981 ALL. L. J. 1057

K N MISRA, J

Ram Charan and others, Petitioners v Dy Director of Consolidation and others, Respondents.

Civil Misc Writ No 1051 of 1974, D/- 7-7-1981

Limitation Act (36 of 1963), S. 5 — U. P. Consolidation of Holdings Act (5 of 1954),

HY/IV D698 81 IJS DVT

Ss. 9A (2), 9 (2) — Composite objection under Consolidation Act along with prayer to condone delay — Competent — Applicant pursuing remedy before wrong Court under wrong legal advice — Sufficient cause.

Provisions of S 5 of Limitation Act have been made applicable to the proceedings under the Consolidation Act and the delay in filing the objection can be condoned if pre-requisite conditions regarding sufficient cause are shown Nowhere in the Act or under the Rules it is provided that separate application for condonation of delay should be filed while filing the objection under S 9A (2) of the Consolidation Act The Consolidation Authorities can even without an application being filed under S 5 of Limitation Act, condone the delay, if sufficient grounds are shown for the same. AIR 1954 S C 411, AIR 1972 S C 749. Foll

(Para 4)

In an objection filed under S 9A (2) of Consolidation Act along with the determination of the Bhumidhari rights it was also prayed that the delay in filing the objection should be condoned as under the wrong legal advice, the applicants pursued the remedy for determination of title on the land dilgently, up to the revisional stage before a wrong Court

Held, that such a composite objection is competent and the objection should be determined on merits by condoning the delay in filing the objection under S 5 of Limitation Act (Paras 3, 4)

Cases Referred :	Chronological Paras
AIR 1972 S C 749	4
AIR 1954 S C 411	4

R S. Misra and R P Misra, for Petitioners, K. N Tripathi and B. D Misra, for Respondents

ORDER :— This writ petition is directed against the order dated 21st Nov. 1973 passed by the Dy. Director of Consolidation, certified copy of which has been annexed to the writ petition.

2. Briefly stated the facts of the case are as follows

The dispute in the present writ petition relates to grove plot No. 1076 area 0·70 acres situate in village Aktahia Tappa Nagwa Tikar, Parg, Silhat, tahsil and district Deoria. The petitioners claimed to be the Bhumidhars and in possession over the aforesaid grove

In the basic year a portion of the said grove plot i.e. plot No 1076 -M/00 40 acres was recorded in the name of the opposite parties Nos 3 and 4 Kishore and Bikau, while the remaining area i e plot No 1076/00 30 acres was recorded in the name of the petitioners The petitioners, on coming to know about the aforesaid wrong entries in the name of the opposite parties Nos 3 & 4, filed an objection under S 9A (2) before the Consolidation Officer praying that the name of the opposite parties Nos 3 & 4 be scored out and they be held to be the bhumidhars and their names be recorded as such The said objection was opposed by opposite parties Nos. 3 & 4 The Consolidation Officer, however, did not enter into the merits of the case, but dismissed the objection vide his order dt 25-12-1967 merely on the ground that the objection was not maintainable before him and since the petitioners had not filed objection before the Assistant Consolidation Officer the same cannot be looked into on merits He did not call for the report of the Assistant Consolidation Officer on the objection which was filed before him under S 9A (2) of the Act and preferred to reject it on the aforesaid ground Aggrieved by the said order dt 25-12-1967 the petitioners preferred an appeal which was heard and dismissed by the Assistant Settlement Officer (Consolidation) vide his order dated 12-8-1969 holding the appeal to be not maintainable The petitioners, thereupon, filed the revision against the said order which was heard and decided by the Dy. Director of Consolidation by an order dated 16-12-1970 on the ground that the objection filed by the petitioners was not competent as it could not be filed before the Consolidation Officer He also held that the objection could be considered on merits if it was filed before the Assistant Consolidation Officer After the dismissal of the revision on the aforesaid ground the petitioners filed an objection under s. 9A (2) before the Assistant Consolidation Officer on 7-1-1971 a true copy of which has been annexed as Annexure '2' to this writ petition The said objection contains a prayer regarding the condonation of delay in filing the objection on the ground specifically enumerated in paragraphs 5 & 6 of the objection The petitioners had mentioned that they had been labouring under the wrong legal advice and had been pursuing diligently the remedy for the determination of the title with regard to the land in dispute The Consolidation Officer dismissed the said objection vide order dated 30th August, 1971, holding that the objection is not maintainable under S 9 of the Act He did not enter into the merits of the grounds seeking condonation of delay in filing the objection He also appears to have based his order on some report of the Assistant Consolidation Officer which does not relate to the plot in question and, as such, his order cannot be taken to be an order passed on the facts of the case and is altogether erroneous It appears that the Consolidation Officer had not taken care to look into the record itself and cursorily decided the case Aggrieved by the said order the petitioners filed the revision which was rejected by the Dy Director of Consolidation, Deoria vide order dt 21-11-1975 The Dy Director of Consolidation has refused to condone the delay in filing the objection by mentioning wrongly that in the objection dated 7-1-1971 no grounds have been shown by the petitioner seeking condonation of delay. A perusal of the objection, true copy of which has been annexed as Annexure '2' would indicate that the petitioners had, in paragraphs 5 & 6 of the aforesaid objection, very clearly stated the grounds on which he sought condonation of dealy They have asserted that under the wrong legal advice they had filed objection and had been pursuing their remedy This order dated 21-11-1975, certified copy of which has been annexed to the writ petition, has been impugned by the petitioners

3. I have heard the learned counsel for the petitioners and have gone through the averments contained in the writ petition as well as in the counter affidavit The learned counsel for the petitioners has argued that the Dy Director of Consolidation has acted illegally in passing his order by mis-stating the facts that no ground has been shown for seeking the condonation of delay In support of his contention, the learned counsel referred to the aforesaid paragraphs Nos 5 & 6 of the objection dated 7-1-1971 I find substance in this submission The Dy Director of Consolidation has wrongly mentioned, in his order, that no ground has been shown by the petitioners for condonation of delay The impugned order passed on mis-statement of facts stands vitiated in law and deserves to be quashed on this ground alone

4. The learned counsel for the opposite parties Nos 3 & 4 however urged that the petitioners had not filed separate application seeking condonation of delay and a composite objection with a prayer for condoning the delay and for deciding the claim on merits under S 9A (2) of the Act would not be maintainable He further contended that there is nothing on record to indicate that the

aforesaid objection containing composite prayer was accompanied by an affidavit explaining each day's delay in preferring the objection I find no substance in these submissions The petitioners have stated grounds seeking condonation of delay in the objection In the prayer he has also sought condonation of delay in filing the objection and for determination of his claim regarding bhumidhari rights on the land in question There is no bar provided under the Act and the rules for such composite application Provisions of S 5 of the Limitation Act have been made applicable to the proceedings under the U P Consolidation of Holdings Act and the delay in filing the objection can be condoned if pre-requisite conditions regarding sufficient cause are shown Nowhere in the Act or under the rules it is provided that separate application for condonation of delay should be filed while filing the objection under S 9A (2) of the Act The consolidation authorities can even without an application being filed under S 5 of the Limitation Act, condone the delay, if sufficient grounds are shown for the same In exercising the jurisdiction for condoning the delay under S 5 the only pre-requisite condition is that there should be sufficient cause shown for condoning the delay It has been held by the Hon'ble Supreme Court in Dinabandhu Sahu v Jadumoni Mangaraj (AIR 1954 S C 411) that "Even if the matter had to be judged under S 5 of the Limitation Act it would have been a proper exercise of power under that section to have excused the delay The word 'sufficient cause' should receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fide is imputable to the appellant " The Hon Supreme Court in another case State of West Bengal v. The Administrator, Howrah Municipality, (AIR 1972 S C 749) has laid down that "if a party had acted in a particular manner on a wrong advice given by his legal Adviser, he cannot be held guilty of negligence so as to disentitle the party to plead sufficient cause under S 5 of the Limitation Act " The petitioners have averred, in their objection, that they, under the wrong legal advice, pursued their remedy up to the revisional stage and their objection was rejected on technical ground that the same should have been filed before the Assistant Consolidation Officer The petitioners had thereupon filed the present objection stating the aforesaid facts, which the Dy Director of Consolidation should have considered on merits. In his order he has wrongly mentioned that no grounds have been shown by the petitioners seeking condonation of delay Since in these proceedings under the U P C H Act title of the parties is to be decided finally on merit hence the consolidation authorities should take a liberal view in the matter while condoning the delay If there are no unexplained laches on their part it would serve the interest of justice if the delay is condoned and the objections are decided on merits and the same are not rejected merely on technicalities The petitioners, in the present case, had filed objections but, unfortunately, the same was filed before a wrong court The Consolidation Officer, instead of calling for a report from the Assistant Consolidation Officer, dismissed the same on the said technical ground that the objection was not filed before the proper court He should have, instead of rejecting the objection, returned the objection for presentation before the proper court and thus time would have been saved in deciding the title of the parties on merits I, therefore, find substance in the argument of the learned counsel for the petitioners, and I am of the opinion that since the earlier objection filed by the petitioners was rejected by the Consolidation Officer on the aforesaid technical ground instead of deciding it on merits after calling report on it from the Assistant Consolidation Officer to meet the technical objection in that manner or alternatively returning it to the petitioners for presentation before the Assistant Consolidation Officer, it would be quite just and proper that the delay be condoned and the petitioner who had bona fide filed their objection before the Consolidation Officer on legal advice, be permitted to get their claim in respect of land in dispute determined on merits by condoning the delay in filing the objection under S 5 of the Limitation Act

5. In the result the writ petition is allowed and the order dated 21-11-1975 passed by the Dy Director of Consolidation, Deoria, certified copy of which has been annexed to the writ petition, is quashed The Dy Director of Consolidation is directed to restore the revision and decide the same on merits in the light of the observations made above In the circumstances of the case I make no order as to costs

Petition allowed

1981 ALL. L. J. 1060

SATISH CHANDRA C J AND
KAMTA NATH SETH, J

Prem Chand, Appellant v Mohammad Sayeed and others, Respondents

First Appeal Nos 2 and 3 of 1971, D/- 20-5-1981

(A) Limitation Act (9 of 1908), Art. 132 — Limitation begins to run from date when money becomes due and not from date of mortgage deed. (Para 14)

(B) Civil P. C. (5 of 1908), O. 2, R. 2 — Mortgage suit — Creation of mortgage, partly simple and partly usufructuary — Suit for possession of mortgaged property based on right vested in usufructuary mortgagee dismissed — Second suit for recovery of mortgage money by sale of mortgaged property based on right vested in simple mortgagee is not barred by O. 2, R. 2.

The parties to the present suit had created a mortgage which was partly simple and partly usufructuary The mortgaged property was leased back to the mortgagor who refused to re-deliver possession to the mortgagees on expiry of the lease The mortgagees filed a suit for possession in their capacity as usufructuary mortgagees The suit was dismissed

Held, the subsequent suit for recovery of the mortgage money by sale of the mortgaged property was not barred by O 2, R 2 Such suit was based on a different and independent term in the transaction of mortgage, whereunder the mortgagee was entitled to sue for recovery of mortgage money at any time that he pleased, or, in any event, if his possession was disturbed Thus the right to recover the mortgage money by sale of the mortgaged property was a right vested in the mortgagees by an independent term of the transaction, which was in its nature a simple mortgage It had no link or connection with the right accruing under the lease or usufructuary part of the transaction It was in his capacity as a simple mortgagee that the suit for recovery of money by sale of the mortgaged property was based In a usufructuary mortgage the mortgagee had a right to sue for foreclosure only He had no right to recover the mortgage money by sale The previous suit was based upon the right of a usufructuary mortgagee to retain possession of the property till he was redeemed or till the right to redeem was barred by foreclosure The two rights were independent of each other and their infringement gave rise to independent causes of action The origin of the rights may have been the same transaction, but that was immaterial. AIR 1949 P C 78 Rel on AIR 1980 S C 161 Refd

(Para 27)

Cases Referred :	Chronological	Paras
AIR 1980 S C 161		22
AIR 1949 P C 78	75 Ind App 121	22
(1889) 22 QBD 128	58 L J Q B 120 Read v Brown	22
(1887-88) 15 Ind App 156 (P C)		22
(1884) 14 QBD 141	53 L J Q B 476 Brusden v Humphrey	22
(1867) 11 Moo Ind App 551 (P C)		22

K C Agarwal, for Appellant, G D Srivastava, for Respondents

SATISH CHANDRA, C.J.:— In both these appeals the defendant is the appellant

2. On Feb 18, 1947, Prem Chand (the defendant-appellant in First Appeal No 2 of 1971) executed a mortgage of the properties in suit in favour of certain persons for Rs 1,20,000/- The same day the mortgagees leased out the mortgaged properties back to the mortgagor The lease was for 3 years It was subsequently renewed for another period ending on July 17, 1955.

3. The original mortgagees transferred their rights to the plaintiff-respondents by deeds of sale dt Feb 1, 1957 and Oct 10, 1957

4. The transferees instituted suit No 25 of 1961 on Apr 15, 1961 on foot of the mortgage for sale of the mortgaged properties to recover the principal amount of Rs 1,20,000/- interest at 6% per annum from July 18, 1955 to the date of the suit amounting to Rs 41,340/- They claimed recovery of Rs 1,61,340/- in all They alleged that though the lease in favour of the mortgagors expired on July 15, 1955, the mortgagors did not hand over possession of the properties to the mortgagees or their transferees The mortgagees had brought a suit for possession of the mortgaged properties but the same had been dismissed Hence the present suit for recovery of money by sale of the mortgaged properties

5. The defendant-mortgagor, namely, Prem Chand, contested the suit He admitted the execution of the mortgage deed as well as the lease He raised many pleas only two of

which are relevant and material now He pleaded that the suit was barred by limitation and that it was also barred by Order II, Rule 2 C P C

6. Prem Chand's mother Smt Jainwati applied for and was also impleaded as a defendant in the suit She pleaded that she had a one-third share in the properties in dispute Prem Chand had no right to mortgage her share She wanted that her share be exempted

7. Not being content with this defence, Smt Jainwati filed a suit of her own (suit No 58 of 1964) for a declaration that she was the owner of the mortgaged properties to the extent of one-third share and mortgage in respect of that share was invalid She claimed that in Jain community there was a custom that a widow gets a share equal to her sons and, as such, she had a one-third share in the mortgaged property The transferees from the mortgagees contested the suit They denied the existence of any such custom

8. The trial court held that the suit was neither barred by limitation nor by O II, R 2 C P C It repelled the various other pleas raised in defence It further held that Smt Jainwati had failed to prove the alleged custom In the result, the suit filed by the transferees of the mortgagees was decreed while the suit for Smt. Jainwati was dismissed Aggrieved, the defendants have come to this Court in appeal First Appeal No. 2 of 1971 has been filed by Prem Chand, while First Appeal No 3 of 1971 has been instituted by Smt Jainwati

9. Two questions arise in Prem Chand's appeal —

(1) was the suit barred by time?

(2) Was it barred by Order II, Rule 2 C P C?

10. The only question half-heartedly raised in the appeal by Smt Jainwati relates to the proof of the alleged custom

11. We shall first take up the question of limitation The trial court found and it is also admitted between the parties that the mortgage of Feb 18, 1947 was an anomalous mortgage inasmuch as it was partially in the nature of a usufructuary mortgage and partially a simple mortgage It has further been found, and again the finding is not disputed by either party, that the mortgage and the lease constituted integral parts of the same transaction though separate documents were executed for them Under the mortgage the properties in suit were hypothecated, their possession was given to the mortgagees, the mortgagor undertook the liability to repay the amount personally as well. Under the lease, the mortgagees delivered possession back to the mortgagor on a fixed rent The rent was stated to be equal to the interest on the sum of Rs 1,20,000/-

12. The present is a suit for recovery of the mortgage money had interest by sale of the mortgaged property Since the suit for sale was filed in 1961, it will be governed by the Limitation Act of 1908 To such a suit Article 132 of the Limitation Act is applicable Article 132 applies to a suit "to enforce payment of money charged upon immovable property" The period of limitation is 12 years and it commences to run 'when the money sued for becomes due' The mortgage deed stated that the mortgagee shall have the right to recover the mortgage money whenever he liked In a subsequent part of the mortgage deed it was stated that in case the mortgagor does not deliver actual possession or he disturbs the mortgagee's possession in every such case the mortgagee shall have the right to recover the mortgage money along with interest at 6% per annum either by sale of the mortgaged property or from the person and other properties of the mortgagor

13. Learned counsel for the defendant-appellant submitted that the later part controlled the earlier discretion given to the mortgagee to recover the mortgage money whenever he liked and so he could recover the mortgage money only in case his possession was disturbed. Learned counsel went on to submit that before the expiry of the lease on July 17, 1955, the mortgagees gave notice to the mortgagor to deliver back the possession of the mortgaged properties to them The notice was dt. July 2, 1955 The mortgagor, however, did not comply. The mortgagees hence were in law dispossessed. At that time, the cause of action for a suit to recover the mortgage money accrued inasmuch as the mortgage money became due and the motgagees became entitled to sue Though we are not in agreement with the learned counsel as to the interpretation of the deed of mortgage but yet even on this basis the cause of action for the suit accrued on July 17, 1955, when the lease expired. The suit was filed on April 15, 1961 which is within 12 years of that date. We do not see how the suit was barred by limitation

14. The principal premise of the counsel for the appellant was that the period of

limitation for such a suit commences to run from the date of the mortgage deed In view of the clear terms of Articles 132 there is no basis for this contention

15. The trial court further held that the defendant-mortgagor had made acknowledgments of their liability under the mortgage in some earlier suits filed in 1956 and 1957 and that extended the period of limitation Though we are in general agreement with the finding, it is not necessary to discuss it in any detail because even without it the suit was clearly within time

16. The next question is whether the suit was barred by O II, R 2 C P C The relevant and material facts may now be stated in a little greater detail

17. The deed of mortgage stated that in consideration of Rs. 1,20,000/- Prem Chand, the mortgagor, has hypothecated and mortgaged the property in dispute with possession He had delivered actual possession of the properties to the mortgagees The profits of the property will be equal to and adjusted against the interest under the mortgage The mortgagor shall have no concern with the profits and the mortgagees shall have no concern with the interest The mortgagor was to remain responsible for the repairs and maintenance of the mortgaged properties The mortgagor was entitled to redeem the property on payment of the mortgage money without asking for any accounts of profits The mortgagee will also have the right to recover the mortgage money at any time he liked either by sale of the mortgaged property or from the person of the mortgagors or other properties at their free will. The document went on to give the warranty of title and stated that if in any manner the property goes out of the possession of the mortgagees or if the mortgagor disturbs the possession then the mortgagee will have a right to recover the mortgage money along with interest at 6% per annum by sale of the mortgaged property or from the person of the mortgagor or from his other properties

18. It may be remembered that the mortgagees had on the same day, namely, Feb. 18, 1947, leased back the property to the mortgagor on payment of Rs 525/- per month as rent The mortgagor undertook to pay the rent month by month He was given the right to use the mortgaged property the way he liked either by living in it or by letting it out to anyone else. Cl. (4) of the lease deed stated that in case the rent was not paid for three months the mortgagees will have the right to cancel the kararnama and then the mortgagor will have no interest in the property and the mortgagees will acquire the right to collect rents, etc from the tenants of the property The lease was renewed by execution of another deed of lease on Aug 9, 1949 which was to remain effective till July 17, 1955 The agreed rent was Rs 750/- per month It appears that the mortgagor did not pay the rent The mortgagees on July 2, 1955 served a notice on the mortgagor that on the expiry of the period of the lease he should deliver back the possession of the property to the mortgagees A demand for arrears of rent was also made Finding no response the mortgagees filed a suit (suit No 560 of 1956) for recovery of Rs 4,087/8/- as arrears of rent and interest The suit was decreed on Feb 8, 1960

19. On Apr 13, 1957, the mortgagees served on the mortgagor another notice requiring them to deliver possession of the mortgaged property to the mortgagees as well as pay them damages at the rate of Rs 750/- per month There being no response, the mortgagees (i e , the transferees of the original mortgagees) filed on May 17, 1957 a suit (No 46 of 1957) for possession of the mortgaged property and recovery of damages This suit was dismissed on Feb 5, 1960 It was held that under the terms of the mortgage the mortgagee had no right to recover possession in case the mortgagors refused to redeliver the possession Their only right was to file a suit for recovery of mortgage money

20. On Apr 15, 1961 the transferees filed the present suit for sale

21. The question is whether the suit was barred by O II, R 2 C P C Learned counsel for the defendant-appellant submitted that when the mortgagees sued for arrears of rent in 1956, the lease had expired The mortgagor had refused to redeliver possession and in that manner the mortgagees had been dispossessed They became entitled to sue for recovery of mortgage money Similar was the position when the suit for possession was filed on May 17, 1957 But in neither of those two suits did the mortgagees claim recovery of money by sale of the mortgaged properties as has been done in the present suit. The present suit was based on the same cause of action on which the previous two suits were based The mortgagees were not entitled to split up the causes of action and so the present suit was barred

22. Learned counsel for the plaintiff-respondents contested this submission by submitting that the previous suit for recovery of arrears of rent as well as the suit for possession and damages were based on independent and distinct causes of action from the present suit O II, R 2 is hence no bar O II, R 2 C P C runs thus —

"2(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

This provision came for interpretation before the Supreme Court in Kewal Singh v Mt Lajwanti, AIR 1980 S C 161 The Court held (at p. 163) —

"A perusal of O 2, R. 2 would clearly reveal that this provision applies to cases where a plaintiff omits to sue a portion of the cause of action on which the suit is based either by relinquishing the cause of action or by omitting a part of it. The provision has, therefore, no application to cases where the plaintiff bases his suit on separate and distinct causes of action and chooses to relinquish one or the other of them In such cases, it is always open to the plaintiff to file a fresh suit on the basis of a distinct cause of action which he may have so relinquished"

Their Lordships went on to rely on the Privy Council decision in Mohammad Khalil Khan v Mahbub Ali Mian 75 Ind App 121 (AIR 1949 P C 78) where it was observed —

"That the right and its infringement, and not the ground or origin of the right and its infringement, constitute the cause of action, but the cause of action for the Oudh suit (No 8 of 1928) so far as the Mahbub brothers are concerned was only a denial of title by them as that suit was mainly against Abadi Begam for possession of the Oudh property, whilst in the present suit the cause of action was wrongful possession by the Mahbub brothers of the Shahjahanpur property, and that the two causes of action were thus different ...

The principles laid down in the cases thus far discussed may be thus summarised (1) the correct test in cases falling under O II, R 2 is 'whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation for the former suit, (Moonshee Buzloor Ruheem v Shamsoonnissa Begum (1867) 11 Moo Ind App 551 (605) (P C) (2) The cause of action means every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment (Read v Brown, (1889) 22 QBD 128, 131) (3) If the evidence to support the two claims is different then the causes of action are also different (Brusden v Humphrey, (1884) 14 QBD 141) (4) The causes of action in the two suits may be considered to be the same if in substance they are identical. (Brunsden v Humphrey) (5) The cause of action has no relation whatsoever to the defence that may be set up by the defendant, nor does it depend on the character of the relief prayed for by the plaintiff It refers 'to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour' (Muss Chand Kour v. Pratap Singh, (1887-88) 15 Ind App 156 (P C) (6) This observation was made by Lord Watson in a case under S 43 of the Act of 1882 (corresponding to O II, R 2) where plaintiff made various claims in the same suit"

23. So far as the plea based on the first suit (No. 560 of 1956) for recovery of rent is concerned, it is negatived by O 34, R 14, C P. C O 34, R 14 provides —

"14(1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in O II, R 2

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended"

24. It is clear from this provision that a suit for sale in enforcement of a mortgage can be instituted though the mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage. This rule bars the mortgagee from bringing the mortgaged property to sale in execution of the money decree That also excludes the operation of O 2, R 2 to the bringing in of a suit for sale in enforcement of the mortgage even though the mortgagee may have previously filed a suit and obtained a decree for payment of money

25. Learned counsel then pressed the submission in relation to the second suit (No 46 of 1957) which was brought for possession of the mortgaged properties and recovery of damages

26. The mortgagee claimed the right to possession because the lease part of the transaction had come to an end and as usufructuary mortgagee he was entitled to possession The mortgagor had, however, refused to put him back in possession, and had thus infringed his right to possession

27. The present suit is based on a different and independent term in the transaction of mortgage, whereunder the mortgagee was entitled to sue for recovery of mortgage money at any time that he pleased, or, in any event, if his possession was disturbed Thus the right to recover the mortgage money by sale of the mortgaged property was a right vested in the mortgagees by an independent term of the transaction, which was in its nature a simple mortgage It had no link or connection with the right accruing under the lease or usufructuary part of the transaction It was in his capacity as a simple mortgagee that the suit for recovery of money by sale of the mortgaged property was based In a usufructuary mortgage the mortgagee has a right to sue for foreclosure only He has no right to recover the mortgage money by sale The previous suit was based upon the right of a usufructuary mortgagee to retain possession of the property till it is redeemed or till the right to redeem is barred by foreclosure The two rights were independent of each other and their infringement gave rise to independent causes of action The origin of the rights may have been the same transaction, but that is immaterial, as pointed out by the Privy Council in the case mentioned above — the right and its infringement, and not be ground or origin of the right and its infringement constitute the cause of action From the point of view of O 2, R. 2, C P. C the causes of action in the two suits may be considered to be the same if in substance they are identical If the evidence to support the two claims is different, then the causes of action are also different. To support the claim made in suit No. 46 of 1957 it had to be proved that the plaintiffs were entitled to possession and damages. For it proof of the fact that the mortgagees were entitled to recover the mortgage money by sale of the property was not at all needed or required. In view of the principles laid down by the Privy Council and accepted by the Supreme Court it is evident that the two suits were based upon distinct causes of action O 2, R 2 was hence no bar to the present suit.

28. In view of the fact that the Supreme Court has recently declared the law in relation to O 2, R 2, C P C, it is not necessary to deal with the various cases of different High Courts cited by learned counsel for either party

29. We see no merit in this submission either

30. First Appeal No 3 of 1971 has been filed by the defendant, Sm Jainwati Jain She is the mother of the mortgagor, Prem Chand Jain She pleaded that according to the custom prevalent in the Jain Community, a widow was entitled to a share equal to that of the sons But no evidence has been led to prove the said custom Smt Jainwati did not appear in the witness box She produced one Lakkha Mal as her witness This man was a self-appointed Chaudhry of the Jain community at Meerut He deposed that among the Jains, a widow gets a share But this Chaudhry was unable to say how much share does the widow get from the property of her deceased husband He admitted that there are several Chaudharis in the Jain community in the town of Meerut His testimony is too flimsy to rely on for proof of the alleged custom in the community The normal principles of Hindu Law hence governed the succession It is not disputed that if this custom is not established, Smt Jainwati had no rights in the mortgaged property The mortgagor, Prem Chand, was the exclusive owner We find no merit in this appeal either

31. In the result both the appeals fail, and are accordingly dismissed with costs

Appeals dismissed

1981 ALL. L. J. 1064

N D OJHA, J.

Lakshmi Narain Sharma, Petitioner v Arjun Deo Dhawan and others, Respondents

Civil Misc Writ Petn Nos 10481 of 1980, D/- 10-8-1981

U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act [13 of 1972],

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IY JY E183 81 JDD

S. 20 (4) and (6) — Deposit of amount in court under protest — Tenant held not entitled to benefit under S. 20 (4).

The purpose of Sub-secs (4) and (6) of S. 20 read together is that whatsoever amount was due from the tenant according to him has to be deposited unconditionally so that the said amount may be paid to the landlord forthwith If in regard in a particular item mentioned in S 20 (4) there is a dispute, it would be open to the tenant to deposit such amount which according to him was due from him and not necessarily the amount claimed by the landlord In respect of such a deposit if ultimately it was found that the defence of the tenant was correct, he will be entitled to the benefit of S 20 (4) of the Act, notwithstanding the fact that the deposit made by him was not of the whole amount claimed by the landlord If on the other hand, his defence is found to be false and the amount claimed by the landlord is found to be correct, the tenant would be denied the benefit of sub-sec (4) notwithstanding the deposit of the lesser amount which he may have made under s. 20 (4) of the Act In the instant case the tenant had deposited the amount in the Court with a pre-condition that the amount may be kept in deposit till the suit was decided

Held that the deposit had not been made unconditionally as contemplated by S 20 (4) and therefore the tenant would not be entitled to the benefit thereunder 1981 All L J 216, Rel on 1979 U P L T NOC 20, Ref

(Paras 3 & 4)

Cases Referred : Chronological Paras

1981 All L J 216 3
1979 U P L T NOC 20 1979 All W C 556 2

ORDER :— The petitioner is the tenant of an accommodation of which respondent No 1 is the landlord A suit was instituted by respondent No. 1 for the ejectment of the petitioner from the said accommodation as also for recovery of arrears of rent and damages on 27th July, 1972 on the ground that the petitioner was in arrears of rent for more than four months and had failed to pay the same within one month from the date of service of notice of demand upon him as contemplated by section 29 (2) (a) of the U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the Act) The petitioner contested the suit inter alia on the ground that the arrears of rent in respect of which the respondent No 1 had served upon him a notice of demand had already been paid to the Munim of the said respondent and that consequently the petitioner was not a defaulter in the payment of rent within the meaning of section 29 (2) (a) of the Act A dispute was raised in regard to certain other items also for instance Bhumi Bhawan etc which respondent No 1 claimed to be entitled After several adjournments on one ground or the other 1st July 1973 was the date fixed for hearing before the Judge Small Causes, respondent No 2 On that date, the petitioner made an application for adjournment which was allowed and 4th September, 1973 was the date fixed for hearing On that date, the case could not be taken up and 12th November, 1973 was fixed for hearing It appears that on 4th September, 1973 the petitioner tendered certain amount in court as deposit under section 20 (4) of the Act and that amount was deposited on some future date thereafter On 12th November, 1973 the defence of the petitioner was struck off for non-compliance of the requirements of order XV rule 5 of Code of Civil Procedure and after taking evidence of respondent No 1 the suit was decreed That decree was, however, set aside in revision by the Distt. Judge and the case came up for hearing before the Judge Small Causes again on 13th February, 1979 On that date, the suit was decreed. The benefit of section 20 (4) of the Act claimed by the petitioner in view of the deposit made by him as aforesaid was refused on two grounds Firstly the petitioner had challenged the title of the landlord of asserting that he was the owner of only 1/5th share and secondly that the deposit made under section 20 (4) of the Act was under protest and not unconditional. Against that order, a revision was preferred by the petitioner before the Distt. Judge which has been dismissed by respondent No. 3 the IV Additional Distt Judge, Agra on 16th September, 1980 Respondent No. 3 has upheld the finding of the Judge Small Causes that the petitioner was not entitled to the benefit of section 20 (4) of the Act inasmuch as the deposit made by him was not unconditional as contemplated by the said sub-section It is these two orders which are sought to be quashed in the present writ petition

2. It was urged by counsel for the petitioner relying upon a decision of this Court in Smt. Inder Kaur v. Chandra Shekhar Trivedi, 1979 All W C 556 (1979 U P L T NOC 20) that a deposit made under protest could not be termed as conditional deposit

In that case, it was further held that unconditional payment means that the amount can be paid to the landlord without any precondition being attached thereto In the instant case, a copy of the application which was made by the petitioner on 4th September, 1973 for making the deposit has been filed as an annexure to the counter affidavit. In the said application it was stated that the total sum of Rs. 654-75 was being deposited under protest as the arrears of rent, Bhumi Bhawan Kar etc. claimed by respondent No 1 was in excess of the amount due. Not only that in the prayer to that application, it was specifically stated "that the amount deposited be held in deposit and the defendant be relieved from ejectment and the question of rent etc be decided according to law." For the landlord respondent No 1 emphasis has been placed by his counsel not so much on the averment made in the said application that the deposit was being made under protest but on the prayer of the application wherein it had been stated "that the amount deposited be held in deposit" According to the counsel for respondent No 1 the prayer contained in the application itself indicates that the deposit made by the petitioner had been made under precondition that the said amount be held in deposit and be not paid over to respondent No 1 till the dispute raised by him was decided according to law. According to counsel for respondent No 1 the prayer in that application could not have any other meaning assigned to it In these circumstances it is clear that the deposit made by the petitioner had not been made 'unconditionally' as contemplated by section 20 (4) of the Act

3. Having heard counsel for the parties, I am of the opinion that the submission made by counsel for respondent No. 1 is well founded Two requirements of section 20 (4) of the Act are of significance One is that the payment, tender or deposit of the amount mentioned in the said sub-section has to be made by a tenant "Unconditionally" and the other is that what is to be deposited by the tenant is to be the amount "due from him". In this connection it would be useful to refer to sub-section (6) of section 20 of the Act which reads as follows —

"(6) Any amount deposited by the tenant under sub-section (4) or under Rule 5 of Order XV of the First Schedule to the Code of Civil Procedure, 1908 shall be paid to the landlord forthwith on his application without prejudice to the parties' pleadings and subject to the ultimate decision in the suit."

To me it appears that the purpose of sub-sections (4) and (6) of S 20 read together is that whatsoever amount was due from the tenant according to him has to be deposited unconditionally so that the said amount may be paid to the landlord forthwith. If in regard to a particular item mentioned in section 20 (4) there was a dispute, it was open to the tenant to deposit such amount which according to him was due from him and not necessarily the amount claimed by the landlord In respect of such a deposit if ultimately it was found that the defence of the tenant was correct, he will be entitled to the benefit of section 20 (4) of the Act, notwithstanding the fact that the deposit made by him was not of the whole amount claimed by the landlord, because the amount deposited by him would in view of the finding recorded in the suit represent the amount due from the tenant If on other hand, his defence is found to be false and the amount claimed by the landlord is found to be correct, the tenant would be denied the benefit of sub-section (4) nothwithstanding the deposit of the lesser amount which he may have made under Section 20 (4) of the Act In Har Prasad v Dharam Deo (1981 All L J 216) it has been held that (at p 217) —

"The test that seems to have been laid down by the Supreme Court as well as by the learned Single Judge, in the cases relied upon by the respondent, is that the money deposited should be readily available to the landlord A reading of sub-section (4) of Section 20 leads to the same conclusion. It waives ejectment" if the tenant unconditionally pays or tenders to the landlord or deposits in court the entire amount of rent and damages for use and occupation of the building". It is clear that the amount has to be paid to the landlord or at least to be tendered to him or it has to be deposited in the Court Sub-section (6) of section 20 lays down that if any amount has been deposited by tenant either under sub-section (4) of that section or under Rule 5 of order 15 C P C that has to be paid to the landlord without prejudice to the parties pleadings and subject to the ultimate decision of the suit The amounts so deposited are certainly available to the landlord as soon as the deposit is made "

4. As is apparent on the plain language of sub-section (4) of section 20 of the Act it contemplates payment, tender or deposit not only of the amount of rent due but also damages for use and occupation of the building calculated at the same rate as rent

and payable up to the date on which the deposit under the said sub-section is made The petitioner at no point of time seems to have disputed his liability to pay damages at the rate of Rs 8/- p. m which was the admitted rate of rent, from the date of the institution of the suit till the date of the deposit under section 20 (4) of the Act Consequently, the said amount was admittedly due from him He no doubt deposited this amount but attached a condition even in regard to this amount that the same may be kept in deposit meaning thereby that the same may not be paid to the landlord respondent No 1 till the suit was finally decided The deposit even of the admitted amount of damages as such was not made by the petitioner unconditionally even though it was due from him Further even in regard to the arrears of rent claimed by the landlord in the notice of demand, the finding recorded by the authorities below is that the petitioner had failed to substantiate his defence that he had paid the said amount to the Munim of the respondent No 1 The precondition attached by the petitioner that the said amount may be kept in deposit till the suit was decided was, therefore, even in regard to this amount not justified For all these reasons I am of the view that the respondents 2 and 3 cannot be said to have committed either any manifest error of law or error of jurisdiction in taking the view that the deposit made by the petitioner had not been made unconditionally as contemplated by S 20 (4) of the Act and that he was consequently not entitled to the benefit of the said sub-section in the matter of passing a decree for eviction against him

5. In the result, the writ petition fails and is dismissed but there shall be no order as to costs The petitioner is granted one month's time to vacate the accommodation in question

Petition dismissed

1981 ALL. L. J. 1067

M P MEHROTRA, J

Lachmi Singh, Petitioner v. State of U P and others, Respondents

Civil Misc Writ Petn No 8804 of 1981, D/- 25-8-1981

(A) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), Ss. 4A, 13A — Objector not raising controversy before prescribed authority — Prescribed Authority cannot suo motu go into same — Authority not committed error apparent on face of record in passing order — Controversy as to whether plots were irrigated or not would be decided under S. 13A.

Where no copy of the objection which the tenure-holder made in reply to the notice under S 10 (2) had been filed to enable the Court to see whether and in what manner an objection was raised to the treatment of certain plots as irrigated in the statement which was prepared under S 10 (1), the Prescribed Authority could not suo motu go into the same In such circumstances it could not be said that the prescribed authority had committed an error apparent on the face of the record in passing the order Case law discussed (Para 5)

Further, the controversy as to whether plots should be treated as irrigated or not was a matter which had to be decided in the regular ceiling proceedings in the manner as laid down under S 4A (Para 5)

(B) Constitution of India, Art. 227 — Order of Appellate Authority — Interference under Art. 227 — High Court could not interfere with finding of fact of Appellate Court.

The High Court would not be justified in interfering with the finding of fact reached by Appellate Court in exercise of its jurisdiction under Art 227, since this jurisdiction was limited only to seeing that the District Court functions within the limits of its authority and did not extend to correction of mere error AIR 1975 S C 1297, Rel on (Para 5)

Cases Referred : Chronological Paras

1979 U P L T NOC 31 1980 All L R (SOC) 16 4
1979 Allahabad Civil J. (SOC) 10 4, 5
1978 All L J 717 5
AIR 1978 All 270 4
AIR 1976 All 91 1975 All W C 1 (F B) 4
AIR 1975 S C 1297 5
1969 All L J 556 AIR 1970 All 130 (F B) 5
AIR 1958 S C 398 5

G S Srivastava, for Petitioner

ORDER :— This petition arises out of the proceedings under U P Imposition of Ceiling on Land Holdings Act

2. The facts, in brief, are these. The petitioner was issued the notice under

S 10 (2) of the Act and he filed objections They were decided by the Prescribed Authority by his order dated 13-12-1976, a true copy of which is Annexure 1 to the petition Thereafter, no appeal was filed but an application under S 13A of the Act was moved seeking two reliefs — one on the ground that certain land had been treated as irrigated without caring to look into records in the shape of Khasra etc, and the second point was that the area of the petitioner's holding underwent a reduction in the consolidation proceedings but the same was not given effect to in the order passed by the Prescribed Authority on 13-12-1976. A copy of this application is not on the record However, an order was passed by the Prescribed Authority on 31-2-1980 allowing in part the said application Certain area was held to be unirrigated on the basis of the Khasra entries, and in the result the surplus land was reduced Thereafter, the petitioner filed an appeal in the lower appellate Court but the same was dismissed on the ground that the exercise which the Prescribed Authority was required to do in the proceedings under S 13A of the Act was not such as could be done under the said provision of law and that the real remedy of the tenure-holder was to have filed the appeal against the order passed by the Prescribed Authority on 13-12-1976 Since this was not done, therefore, the tenure-holder was not entitled to any relief However, the appellate Court observed that as the State had not filed any appeal against the Prescribed Authority's order dated 31-3-1980, therefore, no interference could be made in the said order

3. Feeling aggrieved, the petitioner has now come up in the instant writ petition and in support therefor, I have heard Sri G S Srivastava, the learned counsel for the petitioner

4. The learned counsel contended that the appellate Court was wrong in thinking that in the instant case, there was no error apparent on the face of the record, and in this connection, he placed reliance on the followmg authorities —

1 Nanha v. Dy Director of Consolidation Kanpur (1975 All W C 1 (AIR 1976 All 91) (F B))

The answer which the Full Bench turned, was as follows (at p 94 of AIR) —

"If it appears that a court of fact has in substance based its findings on no evidence or that its finding is perverse in the sense that no reasonable person could possibly come to that conclusion or that it erroneously ignores the vital plea or material evidence which affects the result, a manifest error of law apparent on the face of the record leading to failure of justice can be said to be established But if a court or a tribunal bases its findmg on a consideration of all relevant evidence, but an appellate or a revisional court or Tribunal while affirming a finding does not refer to some material or contrary evidence in its order it cannot be said that it has been ignored from consideration so as to entitle the High Court to interfere under Art 226 of the Constitution"

2 Ram Surat v Shitla Prasad (AIR 1978 All 270)

3 Abdul Rehman & others v Prescribed Authority (1979 Allahabad Civil Journal (SOC) 10

4 1980 All L R (SOC) 16 (1979 U P L T NOC 31) Ram Narain v 3rd Addl Distt. Judge

5. It should be seen that the question as to whether there is error apparent on the face of the record has to be decided with reference to the facts of each case In the instant case, it should be seen that no copy of the objection, which the tenure-holder made in reply to the notice under S 10 (2) of the Act, has been filed to enable this Court to see whether and in what manner an objection was raised to the treatment of certain plots as irrigated in the statement which was prepared under S 10 (1) of the Act From the order, which was passed by the Prescribed Authority on 13th Dec 1976, it is not indicated as to in respect of which plot the said objection was taken Certain plots have been discussed in the said order and the discussion is as to whether they should be treated as single crop land It should be seen that the land in question is situated in Bundelkhand which is covered by S 4 (11) of the Act. If a party in his objections does not raise the controversy, the Prescribed Authority cannot suo motu be expected to go into the same, in such circumstances, it cannot be contended that the Prescribed Authority had committed an error apparent on the face of the record in passing the said order dated 13-12-1976 Further, it should be seen that the controversy as to whether certain plots should be treated as irrigated or not, is a matter which has to be decided in the regular ceiling proceedings in the manner as laid down under S. 4A of the Act While Khasras of the relevant year have been made relevant, other materials have also been mentioned in

the said section and in such circumstances, it was not possible to contend in the proceedings under S 13A of the Act that an interference should be made with the earlier order, which had been passed under S 12 of the Act on 13-12-1976 In respect of the abovementioned case-law, which the learned counsel has cited, I would not like to say anything more than what I have already stated above, namely that as to when there is an error apparent on the face of the record, will have to be decided in the totality of the facts and circumstances of each case It has never been the law that merely because a particular document has not been specifically referred to, therefore, it must be assumed that the same was not considered, and that that fact alone would justify the reopening of the proceedings As I said it all depends upon the total facts and circumstances of each case So far as the Division Bench pronouncement in Abdul Rehman v Prescribed Authority (Supra) it should be seen that an objection had been filed by certain transferees from the tenure-holder and the Division Bench held that even though such objections could not be treated as objections by the tenure-holder under S 10 (2) of the Act, the same could be treated as the objection under S 11 (2) of the Act. Presumably the Division Bench was following the Full Bench decision reported in Upper Ganges Sugar Mills Ltd v Civil Judge Bijnor (1969 All L J 556) (AIR 1970 All 130) and thereafter, the Division Bench pronouncement in Dilbagh Singh v State (1978 All L J 717) It should be seen that in the instant case, we are not concerned with any one other than the tenure-holder himself In this connection, I should like to invite attention to Babhutmal Rai Chand Oswal v Laxmibai R Tarte (AIR 1975 S C 1297), where it was laid down as under (at p 1302) —

"Here, when we turn to the judgment of the High Court, we find that the High Court has clearly misconceived the scope and extent of its power under Art 227 and overstepped the limits of its jurisdiction under that Article It has proceeded to reappreciate the evidence for the purpose of correcting errors of fact supposed to have been committed by the District Court That was clearly impermissible to the High Court in the exercise of its jurisdiction under Art. 227 The District Court was the final court of fact and there being no appeal provided against the findings of fact reached by the District Court, it was not open to the High Court to question the propriety or reasonableness of the conclusions drawn from the evidence by the Distt Court The High Court could not convert itself into a court of appeal and examine the correctness of findings of fact arrived at by the District Court The limited power of interference which the High Court, possessed under the Art 227 was to see that the District Court functions within the limits of its authority and so far as that was concerned, there was no complaint against the District Court that it transgressed the limits of its authority It is true that the High Court claimed to interfere with the findings of the fact reached by the District Court on the ground that the District Court had misread a part of the evidence and ignored another part of it but that was clearly outside the jurisdiction of the High Court to do under Art 227 This is precisely what the High Court did in Nagendra Nath Bora's case, 1958 SCR 1240 = (AIR 1958 S C 398) (Supra) while setting aside the orders of the Appellate Authority under the Excise Act and that was disapproved by this Court in clearest terms The exercise of the power of interference in that case was sought to be justified by reference both to Arts 226 and 227 So far as the exercise of jurisdiction under Art 226 is concerned, this Court pointed out that a writ or order of certiorari could be issued by the High Court only if there was an error of law apparent on the face of the record and no error of fact, howsoever apparent on the face of the record, could be a ground for interference by the High Court exercising its writ jurisdiction It was observed by this Court, while applying this principle to the facts of appeals before it

In the judgments and orders impugned in these appeals the High Court has exercised its supervisory jurisdiction in respect of errors which cannot be said to be errors of law apparent on the face of the record If at all they are errors, they are errors in appreciation of documentary evidence of affidavits, errors in drawing inferences or omission to draw inferences In other words, those are errors which a court sitting as a court of appeal only could have examined and, if necessary, corrected

The High Court, in its several judgments and orders has scrutinised, in great detail, the orders passed by the excise authorities under the Act, and has not thought it fit to examine the record or the orders below in any detail, because, in our opinion, it is not the function of the High Court or of this Court to do so The jurisdiction under Art. 226 of the Constitution is limited to seeing that the

Judicial or quasi-judicial tribunals or administrative bodies exercising quasi-judicial powers, do not exercise their powers in excess of their statutory jurisdiction but correctly administer the law within the ambit of the statute creating them or entrusting those functions to them The Act has created its own hierarchy of officers and appellate authorities as indicated above, to administer the law So long as those Authorities function within the letter and spirit of the law, the High Court has no concern with the manner in which these powers have been exercised In the instant cases, the High Court appears to have gone beyond the limits of its powers under Art 226

This Court also held that the High Court was not justified in interfering with the orders of the appellate authority in exercise of its jurisdiction under Art 227, since this jurisdiction was limited only to seeing that the District Court functions within the limits of its authority and did not extend to correction of mere errors What this court said in that case applies with equal force in the present case and we must hold that the High Court acted beyond the limits of its jurisdiction under Art 227 in interfering with the findings of fact reached by the District Court Even if the Special Civil Application had been under Art 226 that would have made no difference and the High Court would still have had no jurisdiction to disturb these findings of fact "

6. This petition accordingly fails and is dismissed in limine

Petition dismissed

1981 ALL. L. J. 1070

M P MEHROTRA, J

Pratap Swarup Dublish, Petitioner v State and others, Respondents

Civil Misc. Writ Petns. Nos 7498, 7550 and 7551 of 1980, D/- 19-8-1981

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 10(2) — U. P. Imposition of Ceiling on Land Holdings (Amendment) Act (20 of 1976), S. 31(3) — Order by Prescribed Authority in first ceiling proceedings in December 1974 declaring some land of certain tenure-holders as surplus — Fresh notice under S. 10(2) of Act (1 of 1961) issued in March 1980 — Barred by limitation under S. 31(3) of Amendment Act, 1978 All L J 1197 Foll. (Paras 5, 6)

Cases Referred : Chronological Paras

(1979) Civil Misc Writ Petn No 3073 of 1977, D/- 21-9-1979 (All) Kishan Kumar v State of U P 6

1978 All L J 1197 6

A K Sharma, for Petitioner, Standing Counsel, for Respondents

ORDER :— These three petitions are connected as the petitioners are real brothers and common questions are involved in all of them Accordingly, they are being disposed of by one common judgment

2. The facts, in brief, are these Each petitioner was treated as the tenure-holder and notices under S 10(2) of the Act were issued to each one of them It may be stated here that there have been successive ceiling proceedings each one of which started with the issuance of a fresh notice under S 10(2) of the Act It seems that the first notice under S 10(2) of the Act was issued to the three petitioners in March, 1974 and determination was done after deciding objections filed by the petitioners by the Prescribed Authority by his order dated 13th December, 1974 Some land of each of the three petitioners was declared as surplus Two cross-appeals were filed one by the tenure-holder and the other by the State in the case of each petitioner In other words, there were in all six connected appeals and cross-appeals All of them were disposed of by one common judgment passed by the appellate court on 23rd October, 1975 Thereafter, three writ petitions were filed, one by each of the three petitioners and all of them were dismissed on 12-2-1976 on the ground that they had become infructuous It seems that this was so done because a fresh notice under S 10(2) of the Act had been issued by the Prescribed Authority, wherein lands of the petitioners were sought to be clubbed with the lands held by the petitioners' father presumably treating the father as the real tenure-holder and the sons as merely ostensibly recorded. Objections were filed and they were decided by the Prescribed Authority by his order dated 31st December, 1976 Thereafter, five connected appeals were filed and they were disposed of by one common judgment dated 3-7-1978, a true copy of which is Annexure 7 to the petition The appellate court set aside the order passed by the Prescribed Authority

and the notice issued to the petitioners' father Anand Swarup Dublish under S 10(2) of the Act was quashed The reason why the notice was quashed, is to be found in the following extract from the said judgment of the appellate court

"After this decision, the case should have been remanded for fresh writing of judgment, but, on the date of the hearing the parties have given statement on paper 15 Ka-2 Both parties had mentioned that according to the appellant they are separate tenure-holders and the State counsel had agreed that if it is so, the notice u/s 10(2) should have been given separately to each tenure-holder and if separate tenure-holders have been given one notice, this can hardly be treated as a valid notice because the whole proceedings which have been done on the basis of illegal notices have to be quashed and then there will be no question of remanding the case "

Thereafter, the third notice under S 10(2) read with S 13-A of the Act was issued However, there is an order of the Prescribed Authority dated 27-2-1980, a true copy whereof is Annexure 9 to the petitions The order is as follows —

"I have heard Learned counsel for the tenure-holder and also seen the reply In view of para 5 of the said application fresh notice be issued "

Thereafter, the fourth and the last notice under S 10(2) of the Act was issued to each of the three petitioners and ceiling proceedings were sought to be started It seems that the three petitioners before me filed identical objections and a preliminary objection was taken that it was not open to the State to reopen the first ceiling proceedings which had been started by the notice dated 28-3-1974. The true copy of the objections filed by the tenure-holders is Annexure 11 to each of the three petitions. The prescribed Authority rejected the aforesaid preliminary objection by his order dated 13-6-1980, a true copy whereof is Annexure 12 to the petitions Thereafter, three separate appeals were filed by the three petitioners before the appellate court and they were dismissed on the ground that they were not maintainable A true copy of the appellate judgment dated 18-8-1980 is Annexure 15 to the petitions

3. Feeling aggrieved, the three petitioners have come up in the instant writ petitions and in support thereof, I have heard Sri S S Bhatnagar, learned counsel for the petitioners and in opposition the Learned Standing Counsel has made his submissions.

4. As I have stated above the appellate court dismissed the appeals on the ground that no appeal was maintainable against an order passed by the Prescribed Authority disposing of a preliminary objection I would not like to say anything on the merits of the said verdict of the appellate court However, it has seemed to me that in the facts of the instant case, the Prescribed Authority was wrong in rejecting the preliminary objection, which had been raised by the three petitioners, to the issuance of the fresh notice under S 10(2) of the Act. It should be seen that the ceiling law has been amended from time to time and certain amendments have been far reaching in their ambit and scope The Act was enacted as far back as in 1960 Drastic amendments were introduced by the U P Imposition of Ceiling on Land Holdings (Amendment) Act 1972 (U P Act No 18 of 1973) which came into force with effect from 8-6-1973. This was the most radical amending Act in the history of the Ceiling Law of the State Inter alia, it provided for the issuance of general notice under S. 9(2) of the Act calling for a statement from such tenure-holders who held land in excess of the ceiling area on 8-6-1973 S. 10(1) provided that when there was a failure on the part of the tenure-holder concerned to make returns voluntarily then the prescribed Authority would get a Statement prepared containing such particulars as may be prescribed. Sub-s. (2) of S 10 of the Act provides for issuance of a notice to the particular tenure-holder concerned, who would be supplied copy of the statement prepared under S 10(1) of the Act along with the notice under S 10(2) of the Act. Ss 11 and 12 of the Act provide for the determination of the surplus land and S 13 provides for appeals being filed by the parties aggrieved

5. Subsequently, the Act under-went further amendments. The amendments were effected by Ordinances which were subsequently replaced by Amending Acts. One such amending Act was U P Imposition of Ceiling on Land Holdings (Amendment) Act 1974 being the U P. Act No 2 of 1975 and thereafter, the U P. Ordinance No. 31 of 1975 was passed which in its turn was replaced by the U P. Ordinance No. 11 of 1976 and the latter was replaced by U. P. Act No. 20 of 1976 These Amending Acts made certain amendments in certain provisions of the parent Act and certain transitory provisions were made in such Amending Acts which

laid down the manner in which the ceiling proceedings, whether concluded or pending, were to be decided in consequence of the amendments made in the parent Act by the Amending Acts. In this connection S 31 of the U P Act No 20 of 1976 is relevant Sub-Ss (1) and (2) of the said section can be conveniently left as they have no bearing on the controversy at hand However, Sub-s (3) of the S 31 is important and is reproduced below

"Where an order determining the surplus land in relation to a tenure-holder has been made under the principal Act, before the tenth day of October, 1975, the Prescribed Authority (as defined in the principal Act) may, at any time within a period of two years from the said case, redetermine the surplus land in accordance with the principal Act as amended by this Act, whether or not any appeal was filed against such order and notwithstanding any appeal (whether pending or decided) against the original order of determination of surplus land"

Now in the instant case in the first ceiling proceedings the Prescribed Authority passed his order on 31-12-1974. Therefore, the order was passed before 10th October, 1975 and in accordance with the provisions contained in the aforesaid sub-s. (3) of the S 31 of the Act, it would have been open to the Prescribed Authority to redetermine the surplus land of the tenure-holder within a period of two years 'from the said date' Such redetermination had to be done in accordance with the principal Act as amended by the Amending Act (U P Act No 20 of 1976).

6. It is not necessary to advert to the controversy as to whether the subsequent notices, which were issued to the three petitioners under S. 10 (2) of the Act, were justified on the basis of the particular amendments brought about by the subsequent Amending Acts The petitions can be disposed of on another ground, namely, that the impugned notice was issued on 13th March, 1980 and on the said date, the period of Limitation laid down in sub-s (3) of S 31 of the Act had already elapsed In these three petitions again I do not wish to enter into the controversy as to whether the period of two years prescribed in sub-s. (3) of S 31 of the Act relates to the period within which the notice under S. 10(2) of the Act has to be issued or it relates to the passing of an order by the Prescribed Authority after disposing of the objections filed by the tenure-holder. In the facts of the instant three petitions, it will be seen that even the impugned notice was issued beyond the period of two years prescribed in the said sub-section The limitation laid down in sub-s (3) of S 31 of the Act expired on 10th October 1977, and therefore, there was no jurisdiction in the Prescribed Authority to issue the fresh notice on 13th March, 1980 It should be seen that the clear case law of this Court, as reported in Ram Lal v State (1978 All L J 1197) which was affirmed by the Division Bench in Kishan Kumar v State of U. P (Civil Misc Writ Petition No 3073 of 1977 decided on 21-9-1979), is that the scheme underlying S. 38-B of the parent Act read with the transitory provision contained in S 31 of the U P Amending Act No 20 of 1976, is that the earlier ceiling proceedings should be subsequently reopened only when the subsequent amendments in the law necessitated that a fresh determination of the surplus land should take place, and what really follows from this premises is that the finding recorded in the earlier ceiling proceedings shall operate as res judicata in the subsequent ceiling proceedings unless due to the subsequent amendment in the Ceiling Law, a fresh finding is called for These aspects of the matter, of course need not be gone into in the instant three writ petitions because, the very jurisdiction to issue fresh notice under S 10(2) of the Act, stood barred on the ground of limitation as laid down in the sub-s (3) of section 31 of the U P Act No 20 of 1976. In this view of the matter, I hereby allow all the three petitions and quash the order passed by the Prescribed Authority dated 13-6-1980 (Annexure 12) and the impugned notice dated 31-3-80 (Annexure 10) in each of the three writ petitions There will be no orders as to costs.

Petitions allowed

1981 ALL. L. J. 1072

\M P. MEHROTRA, J

Gaya Pd. Singh, Petitioner v. IInd Addl District Judge and others, Respondents

Civil Misc Writ No 4372 of 1981, D/- 1-9-1981

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), Ss. 13 and 13-A — Appeal by tenure-holder against order in

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IY/JY/E520/81/PGS/SNV

application under S. 13-A — No appeal filed by State against the order — State is not estopped from challenging maintainability of application itself — Contention upheld — Course open to Appellate Authority.

It could not be said that in the appeal filed by a tenure-holder against an order passed by the Prescribed Authority under S 13-A, the State could not raise the contention that the application under S 13-A was not maintainable merely because the State did not file an appeal against the order of the Prescribed Authority However, the appeal would have to be dismissed if the contention of the State was upheld but there could be no interference with the order passed by the Prescribed Authority because the State did not choose to file an appeal as in an appeal filed by the tenure-holder, even if the Appellate Court is of the view that the application under S 13-A was not maintainable, still in absence of an appeal by the State against such an order, the State will not be allowed to seek the setting aside of such an order passed by the Prescribed Authority. (Para 4)

Cases Referred : Chronological Paras

1978 All W C 671 (1) 4

C B Singh, for Petitioner, Standing Counsel, for Respondents

ORDER :— This petition arises out of the proceedings under the U P Imposition of Ceiling on Land Holdings Act

2. The facts, in brief, are these The petitioner Gaya Prasad Singh was issued notice under S 10 (2) of the Act and he filed objections They were decided by the Prescribed Authority and thereafter, no appeal was filed against the decision of the Prescribed Authority However, subsequently, an application under S 13-A of the Act was moved and the said application was partly allowed by the Prescribed Authority by his order dated 16-6-1980 A true copy of the said order partly allowing the application under S 13-A is Annexure 2 to the petition The surplus land was reduced to the extent of 4 Biswas 9 Biswansis and this reduction in the surplus land was effected in plot No 2353 Thereafter, no appeal was filed by the State against the said order but, the tenure-holder, who is the petitioner before me, filed his appeal and the same was dismissed by the appellate court by its judgment dated 20-11-1980, a true copy whereof is Annexure 3 to the petition. A certified copy of the said judgment is also on the record

3. Feeling aggrieved, the petitioner has now come, up in the instant petition and in support thereof, I have heard Sri C B Singh Learned counsel for the petitioner and in opposition, the learned Standing Counsel has made his submissions

4. The Learned counsel for the petitioner placed reliance on the decision of the Hon'ble K N Seth, J reported in Pratap Singh v District Judge, Banda (1978 All W C 671 (1)) In the said reported decision it was laid down that the appellate court would not be justified in holding an appeal to be not maintainable against an order passed under S 13A of the Act In the instant case, it should be seen that the appellate court has not held that the appeal was not maintainable The appeal was held to be maintainable by the tenure-holder but it was held that the application under S 13A of the Act was not maintainable and the Prescribed Authority was not right in treating the same to be maintainable The Learned Counsel for the petitioner contends that this course was not open to the appellate court and according to him once an application has been held to be maintainable by the Prescribed Authority then, unless the State questions such an order by filing an appeal, it is not open to the State as respondent to raise such a contention in an appeal which is filed by the tenure-holder It is this aspect of the matter which needs serious consideration I have not come across any provision of law which estops or debars the State from contending that an application under S 13A of the Act was wrongly held to be maintainable by the Prescribed Authority and the mere fact that no appeal was filed by the State against the said order cannot in law, amount to any kind of estoppel or acquiescence in the correctness of such an order The only result of the State not filing an appeal against such an order will be that the State will not be allowed as respondent in an appeal to seek the setting aside of such an order In other words, in an appeal filed by the tenure-holder, even if the appellate court is of the view that the application under S. 13A was not maintainable, still, in the absence of an appeal by the State against such an order, the State will not be allowed to seek the setting aside of such an order passed by the Prescribed Authority The order will stand and will not be interfered with because the State did not file an appeal against the same and only the tenure-holder filed the appeal. However, as I have stated

above, there is nothing in law to prevent the State as respondent from contending that the application under S. 13A was not maintainable in law and was wrongly allowed by the Prescribed Authority. If such a contention is raised and is accepted by the appellate court, then the only course, which the appellate court will follow, would be that the appeal would be dismissed but there will be no interference with the order passed by the Prescribed Authority because the State did not choose to file an appeal. In the instant case, I find that this is what has happened. the appellate court held that the application under S. 13A of the Act was not maintainable and yet the said court did not set aside the order passed by the Prescribed Authority. The appellate court only dismissed the appeal of the tenure-holder.

5. The learned counsel next contended that the merits of the controversy should have been examined. In my view, it was not necessary for the appellate court to go into the controversy as to which plot should have been treated as irrigated or unirrigated when it was held that the said controversy was not such as was to be decided in the proceedings under S. 13A of the Act.

6. This petition accordingly, fails and is dismissed but there will be no order as to costs.

Petition dismissed.

1981 ALL. L. J. 1074

N. D. OJHA, J.

Purshottam Saran, Petitioner v. III Additional District Judge, Moradabad and others, Respondents.

Civil Misc. Writ Petn. No. 3397 of 1980, D/- 5-8-1981.

(A) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 21 (1A) (as inserted by Act 28 of 1976) — Landlord vacating public building prior to Act — Benefit of sub-sec. (1A) is available to him.

S. 21 (1A) is applicable to even those cases where the Landlord has already vacated the public building prior to the commencement of the Act. (Para 2)

An application under sub-section (1A) can be made by a Landlord who was in occupation of a public building for residential purposes which he had to vacate on account of the cessation of his employment. It is apparent that the cessation of employment and eviction from the building are to be accomplished facts for entitling the landlord to make an application under the sub-section. It is settled law that the benefit of an enactment which came into force during the pendency of proceedings can always be given to a person for whose benefit the amendment has been made unless there is prohibition either expressly or by necessary implication contained in the enactment itself. There is nothing to indicate that the legislature did not intend to give benefit of sub-section (1A) to those landlords who had already filed applications for release prior to the commencement of the Act, and the applications were pending on the date when the amended provisions came into force.

(Para 2)

(B) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 21 (1A) (as inserted by Act 28 of 1976) — Landlord in occupation of public building — Consequent on cessation of service landlord vacating it and living elsewhere — He is entitled to benefit under provision.

A landlord who was in Government service and occupying Govt. quarter i.e. public building if he ceases to be in service and vacates the public building he is entitled to the benefit of S. 21 (1A) though he is actually occupying some other accommodation since his own building is in possession of a tenant.

(Para 3)

S. 21 (1A) applies to those cases alone where the landlord 'had to vacate a public building on account of the cessation of his employment' If he has been forced to vacate the public building on account of cessation of his employment, the landlord, of course, will have to occupy some other accommodation till his own building is vacated by the tenant. The position may be different if the landlord owns several buildings and he has occupied one of his own buildings other than the building for which the application under section 21 (1A) has been made.

(Para 3)

(C) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 21 (1A) (as inserted by Act 28 of 1976) — Application for release filed prior to insertion of sub-sec. (1A) — Benefit of amended

provision — No formal amendment of application — Benefit could be given (Civil P. C. (1908), O. 6, R 17)

The landlord in his release application stated that he was in the government employment and has retired and that consequent upon his retirement, he was required to vacate the government quarter occupied by him and for want of an alternative accommodation was continuing in the said quarter and that he had every risk of being evicted from the same at any time

Held, that it was a question of applying the law on the facts already pleaded and established and no formal amendment of application was necessary (Para 4)

The requirement of formally amending the application is one of procedure and the mere fact that no formal amendment was carried out in the release application claiming the benefit of sub-section (1A) will have no consequence On the facts of the instant case absolutely no prejudice has been caused to the tenant on account of no formal amendment being made in the release application AIR 1976 S C 1177 Foll

(Para 4)

(D) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 21 (1A) (as inserted by Act 28 of 1976) — Provision is not violative of Art. 14 Constitution (Constitution of India, Art. 14)

Reasonable classification is not prohibited by Art 14 of the Constitution All such government servants who were in the occupation of public buildings in connection with their employments and who had to vacate the public buildings as a consequence of cessation of their employments constituted a class by themselves and sub-section (1A) has been made applicable to all the government servants falling in this category It makes no distinction between one government servant and the other, so far as the conferment of benefit of sub-section (1A) is concerned, Therefore, it cannot be said that this sub-section is hit by Art 14 of the Constitution (Para 5)

(E) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 21 (1) and (1A) (as inserted by Act 28 of 1976) — Release application — Order requiring tenant to vacate entire building is valid.

S 21 (1) has been made applicable "to a building under tenancy or any specified part thereof" In sub-section (1A) however, the word 'building' alone was used and the words or any specified part thereof' are conspicuous by their absence therein This clearly indicates that the purpose of sub-section (1A) was different than the purpose of sub-section (1) of S 21 Whereas, while dealing with a case covered by sub-section (1) of S 21 of the Act, it was open to the prescribed authority to direct eviction of a tenant either from the whole of the building or from any specified part thereof, an order under sub-section (1A) was envisaged against the whole of the building Hence an order requiring the tenant to vacate the entire building is valid (Para 6)

(F) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 21 (1) Proviso and (1A) (as inserted by Act 28 of 1976) — Hardship to tenant — Release of premises under sub-sec. (1A) — Hardship of tenant need not be considered.

A proviso was added to sub-section (1) of S 21 by U P Act 28 of 1976, namely, the same Act by which sub-section (1A) was inserted But that Proviso was not made applicable to the cases covered by sub-section (1-A) It was, in these circumstances, not necessary for either the prescribed authority or the Additional District Judge to consider the question of hardship likely to be caused to the petitioner AIR 1976 All 328 and 1978 All L J 1306. Relied on (Para 8)

(G) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Ss. 21 (1A) and 24-B (as inserted by Act 28 of 1976) and S. 3 — Tenant using part of building as clinic — Release of building including that part is valid.

The scheme underlying some of the amendments introduced in the Act of 1972 by U P Act 28 of 1976 indicates that no distinction was made in regard to the nature of the user of the building in so far as the applicability of sub-section (1A) is concerned Apart from inserting sub-section (1A) in the Act, the amending Act 28 of 1976, inter alia, substituted sub-section (2) of S 2 Sub-section (1A) of S 21 has thus been made applicable even to those buildings to which the Act was not otherwise applicable S 24-B was also inserted in the Act by U. P Act 28 of 1976 and seems to be in pari materia with sub-section (1A) of S 21 It would be seen that even though the words 'residential building' were used in section 24-B, the word 'building' alone was used in sub-section (1A) 'Building' according to the definition of the term in s 3(1) of the Act, inter alia, means a residential or non-residential roofed

structure As such it is apparent that sub-section (1A) does not place any restriction on the power of the prescribed authority in passing an order of release in respect of a building even if a portion of it is for the time being used by the tenant for commercial purposes 1976 All L R 564 and 1968 All L J 289 Relied on (Para 9)

Cases Referred : Chronological Paras

1978 All L J 1306 8
AIR 1976 S C 1177 1976 Lab I C 777 4
AIR 1976 All 328 1976 All L J 226 (FB) 8
1976 All L R 564 9
1968 All L J 289 9

ORDER :— The petitioner is the tenant of an accommodation of which respondent No 3 Shri Shambhu Saran Singh is the landlord The respondent No 3 filed an application for the release of the aforesaid accommodation in his favour on 25th Sept 1974 on the allegations that he was employed as an upper division clerk in the Ministry of Food and Civil Supplies at Delhi, that in connection with his employment, he was in the occupation of a Government quarter and that he retired from the aforesaid service on 7th Feb 1972 It was further stated that consequent upon his retirement, he was required to vacate the Government quarter Since his own house was not available for occupation, he was continuing in the Government quarter and was paying penal rent at the rate of Rs 182/- P M when his pension was Rs 150/- P M only It was further stated in the said application that there was a risk of his being dispossessed from this Government quarter at any time It appears that the respondent No 3 had to vacate the Government quarter aforesaid on 28th April, 1975 By the time the release application came up for decision before the Prescribed Authority, a sub-section being sub-section (1A) was inserted in S 21 of the U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the Act) This sub-section reads as follows —

"(1-A) Notwithstanding anything contained in S 2, the Prescribed Authority shall, on the application of a landlord in that behalf, order the eviction of a tenant from any building under tenancy, if it is satisfied that the landlord of such building was in occupation of a public building for residential purposes which he had to vacate on account of the cessation of his employment

Provided that an application under this sub-section may also be given by a landlord in occupation of such public building at any time within a period of one year before the expected date of cessation of his employment, but the order of eviction on such application shall take effect only on the date of his actual cessation "

The prescribed authority was of the view that on the facts of the instant case sub-section (1-A) aforesaid was squarely applicable and allowed the release application on 28th Feb 1979 An appeal was preferred by the petitioner against that order before the District Judge which was dismissed by the III Addl District Judge, respondent No 1 on 3rd Apr 1980 It is these two orders which are sought to be quashed in the present writ petition

2. It was urged by the counsel for the petitioner that sub-section (1-A) of S 21 of the Act, which was inserted by U P Act XXVIII of 1976, was not retrospective and applies only in those cases where the landlord had retired and had to vacate a public building after the commencement of the Act. According to the counsel, since in the instant case, the respondent No 3 had retired on 7th Feb. 1972, i e. before the commencement not only of U. P. Act XXVIII of 1976 but also of U P. Act XIII of 1972, he could not be given the benefit of that sub-section On a plain reading of sub-section (1A) of S 21, however, I find no substance in this submission. An application under sub-section (1A) can be made by a landlord who was in occupation of a public building for residential purposes "which he had to vacate on account of the cessation of his employment" It is apparent that the cessation of employment and eviction from the building are to be accomplished facts for entitling the landlord to make an application under the said sub-section If a landlord was to make an application under the said sub-section on 5th July, 1976, namely the date of the commencement of the U P. Act XXVIII of 1976 it would have been necessary for him to state that he was in occupation of a public building prior to the making of the application and that he had to vacate the said building on account of the cessation of his employment Even a plain reading of sub-section (1A) indicates that it is applicable to even those cases where the landlord has already vacated the public building prior to the commencement of the Act The circumstance that the application in the instant case had been made on 25th Sept 1974, i.e before sub-section (1A) was inserted is also, in my opinion of no

significance It is settled law that the benefit of an enactment which came into force during the pendency of proceedings can always be given to a person for whose benefit the said amendment has been made unless there is prohibition either expressly or by necessary implication contained in the enactment itself Nothing has been brought to my notice which may indicate that the legislature did not intend to give benefit of sub-section (1A) to those landlords who had already filed applications for release prior to the commencement of the Act, and the said applications were pending on the date when the amended provision came into force

3. The other submission which was made by the counsel for the petitioner in this connection was that since the respondent No 3 had already vacated the government quarter, which was a public building within the meaning of sub-section (1A) on 28th April, 1975 and was actually occupying some other accommodation, he was not entitled to get the benefit of sub-section (1A) I find no substance in this submission either As seen above, sub-section (1A) applies to those cases alone where the landlord 'had to vacate a public building on account of the cessation of his employment'. If he has been forced to vacate the public building on account of cessation of his employment, the landlord, of course, will have to occupy some other accommodation till his own building is vacated by the tenant If that circumstance is material then a landlord can be given benefit of section 21 (1A) perhaps only in those cases where he may be living just on the road side for want of any other shelter This obviously was not meant by section 21(1A) The position may be different if the landlord owns several buildings and he has occupied one of his own buildings other than the building for which the application under section 21(1A) has been made. It is, however, not the case of the petitioner that the respondent No. 3, after having vacated the public building, is in occupation of any other building of his own

4. It was then urged that after the commencement of U. P. Act XXVIII of 1976, the respondent No. 3 did not formally amend his application for release claiming the benefit of sub-section (1A) of S 21 and consequently, the authorities below erred in granting him the benefit of sub-section (1A) I am unable to find any substance in this submission. In the instant case, the facts that the respondent No. 3 was in the government employment and has retired and that consequent upon his retirement, he was required to vacate the government quarter occupied by him and for want of an alternative accommodation was continuing in the said quarter and that he had every risk of being evicted from the same at any time, had all been stated in the release application The fact that he had to actually vacate the government quarter on 28th April, 1975 before the commencement of U P Act XXVIII of 1976 has not been disputed In this view of the matter it was a question of applying the law on the facts already pleaded and established The requirement of formally amending the application is one of procedure and the mere fact that no formal amendment was carried out in the release application claiming the benefit of sub-section (1A) will have no consequence On the facts of the instant case absolutely no prejudice has been caused to the petitioner on account of no formal amendment being made in the release application In State of Punjab v. Shamlal Murari, AIR 1976 S C 1177, it was held (at p 1179) that

"We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice It has been wisely observed that procedural prescriptions are the hand-maid and not the mistress, a lubricant, not a resistant in the administration of justice Where the non-compliance, the procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum After all, Courts are to do justice, not to wreck this end-product on technicalities"

5. Counsel for the petitioner then urged that sub-section (1A) was discriminatory and hit by Art. 14 of the Constitution Nothing, however, has been pointed out as to how the said sub-section is hit by Art 14 of the Constitution Reasonable classification is not prohibited by Art. 14 of the Constitution All such government servants who were in the occupation of public buildings in connection with their employments and who had to vacate the public buildings as a consequence of cessation of their employments constituted a class by themselves and sub-section (1A) has been made applicable to all the government servants falling in this category It makes no distinction between one government servant and the other, so far as the conferment of benefit of sub-section (1A)

is concerned Therefore, it cannot be said that this sub-section is hit by Art 14 of the Constitution

6. It was next contended that the petitioner should have been ordered to be evicted from only a part of the building and the order requiring him to be evicted from the entire building was not sustainable A perusal of Sec 21(1) of the Act will indicate that the said sub-section has been made applicable "to a building under tenancy or any specified part thereof" In sub-section (1A) however, the word 'building' alone was used and the words 'or any specified part thereof' are conspicuous by their absence therein This clearly indicates that the purpose of sub-section (1-A) was different than the purpose of sub-section (1) of S 21 Whereas, while dealing with a case covered by sub-section (1) of S 21 of the Act, it was open to the prescribed authority to direct eviction of a tenant either from the whole of the building or from any specified part thereof, an order under sub-section (1A) was envisaged against the whole of the building The impugned orders cannot, therefore be quashed on this ground either

7. Counsel for the petitioner then submitted that the hardship likely to be caused to the petitioner was not taken into consideration by the authorities below and consequently their orders are vitiated in law

8. In this connection, it would be seen that prior to the commencement of U P Act XXVIII of 1976, a Full Bench of this Court in C K Shah v District Judge, 1976 All L J 226 (AIR 1976 All 328) had held on 9th Jan 1976 that the use of the words 'bona fide required' in S 21(1) do not justify the consideration of the need of or hardship to the tenant In order to get over with what was held in that case, a proviso was added to sub-section (1) of S 21 by U P Act XXVIII of 1976, namely, the same Act by which sub-section (1A) was inserted The said proviso reads as under —

"The prescribed authority shall, except in cases provided for in the Explanation, take into account the likely hardship to the tenant from the grant of the application as against the likely hardship to the landlord from the refusal of the application

Even though, as seen above sub-section (1A) was also inserted by U P Act XXVIII of 1976, the aforesaid proviso was not made applicable to the cases covered by sub-section (1A) as it was in those circumstances not necessary for either the prescribed authority or the Additional District Judge to consider the question of hardship likely to be caused to the petitioner The view which I take finds support from a decision of this Court in J C Gupta v. District Judge, Dehradun, 1978 All L J 1306

9. Lastly, it was urged that the petitioner was also running a clinic in a portion of the accommodation in question and since that portion was being used for commercial purposes and not for residential purposes, the application for release of respondent No 3 could not have been allowed in respect of the portion. To me it appears that there is no substance in this submission either The scheme underlying some of the amendments introduced in the Act by U P Act XXVIII of 1976 indicates that no distinction was made in regard to the nature of the user of the building in so far as the applicability of sub-section (1A) is concerned Apart from inserting sub-section (1A) in the Act, U P Act XXVIII of 1976, inter alia, substituted sub-section (2) of S 2 and the relevant portion of sub-section (2) reads as under —

"Except as provided in sub-section (5) of S 12, sub-section (1A) of S 21, sub-section (2) of S 24, Sections 24A, 24B, 24C or sub-section (3) of S 29, nothing in this Act shall apply to a building during a period of ten years from the date on which its construction is completed "

Sub-section (1A) of S, 21 has thus been made applicable even to those buildings to which the Act is not otherwise applicable Likewise section 24B has been made applicable even to those buildings to which the Act was not otherwise applicable S 24B was also inserted in the Act by U P Act XXVIII of 1976 and seems to be in part materia with sub-section (1A) of S 21 It would be seen that even though the words 'residential building' were used in section 24B, the word 'building' alone was used in sub-section (1A) 'Building' according to the definition of said term in S. 3(1) of the Act, inter alia, means a residential or non-residential roofed structure. As such it is apparent that sub-section (1A) does not place any restriction on the power of the prescribed authority in passing an order of release in respect of a building even if a portion of it is for the time being used by the tenant for commercial purposes. Further, in Smt. Lilawati v Addl. District Judge, Muzaffarnagar 1976 All L R 564, it was held that establishing a chamber in a part of the building does not amount to converting a residential accommodation into

a non-residential accommodation In Ram Swarup v Ram Niwas, 1968 All L J 289, it was held that even if an advocate, doctor or businessman used a room of a residential building for his trade, profession or business, the user of that building continued to be for residential purposes It appears from the judgment of the prescribed authority that the petitioner started using a room and verandah of the accommodation in question as clinic and the prescribed authority has held that notwithstanding the said user, the building still retained the character of a building meant for residential purposes

10. No other point has been pressed

11. In the result, the writ petition fails and is dismissed but there shall be no order as to costs The petitioner is granted one month's time to vacate the accommodation in question

Petition dismissed

1981 ALL. L. J. 1079

K N MISRA, J

Ram Swarup and others, Petitioners v Deputy Director of Consolidation, Meerut and others, Respondents

Civil Misc Writ No 11968 of 1975, D/- 7-7-1981

(A) U. P. Consolidation of Holdings Act (5 of 1954), S. 48 — Revision — Deputy Director of Consolidation failing to consider oral evidence and reversing order of lower Courts — Order vitiated.

Where the Deputy Director of Consolidation failed to consider the oral evidence and analytical assessment of the same while arriving at a finding contrary to the finding recorded by the two Courts below, his order would be vitiated, because since the order was not an order of affirmance it was incumbent upon him to consider on merits the entire evidence on record while reversing the finding of the Courts below (Para 6)

(B) U. P. Consolidation of Holdings Act (5 of 1954), Ss. 9A(2), 48 — Sale deed challenged on ground that it was fraudulent and fictitious — Power of consolidation authorities to consider its validity. (T. P. Act (1882), S. 53).

Where sons of the deceased tenure-holder filed an objection under S 9-A(2) and challenged that the transfer of the disputed land was a fictitious transfer and the sale deed in question was a sham deed of sale and also that it was a fraudulent transfer, it could not be said that unless the sale deed was got cancelled its validity could not be gone into by the consolidation authorities No doubt it is true that the sale deed would be branded as a voidable transaction if challenged on the ground of fraud alone AIR 1937 Oudh 20, AIR 1942 All 344 Rel On (Para 8)

(C) U. P Consolidation of Holdings Act (5 of 1954), Ss. 9A (2), 48 — Deputy Director of Consolidation failing to record finding about validity of sale deed challenged as fictitious — Effect

Where sons of the deceased tenure-holder challenged the sale deed executed by their father, on ground that it was a fictitious and fraudelent one but the Deputy Director of Consolidation failed to record a finding on the question as to whether there was intelligent execution and due attestation of the sale deed and whether any sale consideration was paid or not and thus whether the disputed sale-deed was void or voidable, he would be deemed to have acted illegally and with substantial irregularity in exercise of jurisdiction in refusing to consider the validity of the document, which would be void and ineffective if the claimant would succeed to substantiate their plea that it was a fictitious transfer and the sale deed in question was a sham deed of sale (Para 8)

Cases Referred	Chronological	Paras
1975 All L J 410	1975 All W C 23	6
1974 Un Rev Cas 674 (All)		6
AIR 1942 All 344	1942 All L J 399	8
AIR 1937 Oudh 20		8

ORDER :— This writ petition under Art 226 of the Constitution is directed against the judgment passed by the Deputy Director of Consolidation, Meerut, opposite party no 1 whereby the revision filed by the contesting opposite party Brahma Pal was allowed and his name was directed to be recorded on the land in dispute on the basis of the sale deed said to have been executed by Durjan the father of petitioners and opposite parties nos 4 and 5

2. The brief facts giving rise to the present petition are that the land of Khata no 96 of village Bachhauta, district Meerut was recorded in the basic year khataun in the name of Durjan the father of petitioners and the opposite parties nos 4 and 5, in the remarks column of the khataun In the remarks column the names of opposite parties nos 4 and 5 namely, Brahmapal and Sheesh Ram was mutated on the basis of the sale deed dated 24th Dec 1970 said to have been executed by Durjan in their favour Upon the publication of C H Form no 5 the petitioners filed an objection under S 9A (2) of the U P Consolidation of Holdings Act, hereinafter referred to as the Act, with the allegations that their father Durjan was bhumidhar of the land in dispute and after his death they and their brothers Brahmapal and Sheesh Ram opposite parties nos 4 and 5 inherited the land and came in possession It was further pleaded that opposite parties nos 4 and 5 had got their names recorded in the revenue records on the basis of the aforesaid alleged sale deed dated 24th Dec 1970, which, according to them, was not executed by their father and opposite parties nos 4 and 5 fraudulently got the sale deed executed in their favour without paying any consideration for the same The petitioners thus contended that they are co-tenure holders along with their brothers, opposite parties nos. 4 and 5 in the land in dispute. The case was contested by opposite parties nos. 4 and 5, who alleged that the sale deed was duly executed by their father, Durjan and the same was not obtained by practising fraud on him. They also asserted that the sale consideration was paid by them to the vendor Durjan and they are in exclusive possession over the land in dispute ever since then The petitioners, in support of their case, led both oral and documentary evidence and the petitioner no 2 Jagjit besides examining himself produced one Mangal Singh, who is one of the marginal witnesses of the impugned sale deed The said witness is said to have deposed that Durjan was not in his proper senses and he was made to sign certain document without being told about the contents of the same He further deposed that no money was paid to Durjan in his presence. Opposite parties nos. 4 and 5 examined themselves in support of their aforesaid case.

3. The Consolidation Officer, after taking into consideration the oral and documentary evidence on record, allowed the objection filed by the petitioners holding that the sale deed was fictitiously got executed and sale consideration was not paid to Durjan and holding the sale deed to be illegal and fictitious he ordered the names of opposite parties nos 4 and 5 to be recorded as co-tenure holders Aggrieved by the said order opposite parties nos 4 and 5 filed an appeal which was dismissed by the Assistant Settlement Officer (Consolidation), Meerut vide order dated 23rd Sept 1974, confirming the findings recorded by the Consolidation Officer

4. The Settlement Officer Consolidation, after taking into consideration the entire oral and documentary evidence on record, came to the conclusion that the intelligent execution of the sale deed by Durjan has not been proved and that opposite parties nos. 4 and 5 taking advantage of the old age and infirmity of their father tried to take advantage in excluding their brothers from inheriting the property Opposite parties nos 4 and 5 thereupon filed a revision under S 48 of the Act, which was heard and allowed by the Deputy Director of Consolidation vide the impugned order dated 25th Aug 1975 by holding that the sale deed in question was executed by Durjan and the same was not fraudulently obtained by opposite parties Nos 4 and 5. He further held that since the sale deed was not got cancelled by filing civil suit hence the consolidation courts cannot declare it to be void and they have no jurisdiction to cancel the same The petitioners aggrieved by the said order, have preferred this writ petition.

5. Learned counsel for the petitioners has argued that the Deputy Director of Consolidation, while recording the finding that the sale deed was executed by Durjan and that no fraud was practised on him, has not taken into consideration the oral evidence led by them in support of their case and that the finding recorded is altogether conjectural. Learned counsel further argued that since the two courts below had concurrently held, after taking into consideration the entire oral and documentary evidence on record that the sale deed was fictitiously got executed and its intelligent execution was not proved and no sale consideration was paid, the Deputy Director of Consolidation while recording a contrary finding, ought to have taken into consideration the entire evidence and having not done so the findings recorded by him stand vitiated in law. Learned counsel for

opposite parties Nos 4 and 5 in reply contended that the omission to refer to the oral evidence will not vitiate the findings recorded by the Deputy Director of Consolidation, who, taking into consideration the facts and circumstances of the case, has recorded a categorical finding that the sale deed was not fictitiously got executed by opposite parties Nos. 4 and 5 and no fraud was practised on Durjan

6. I have considered the arguments advanced by the learned counsel for the parties carefully and have gone through the averments made in the writ petition as well as the counter affidavit and the rejoinder affidavit and I am of the opinion that the order passed by the Deputy Director of Consolidation cannot be sustained as the findings recorded by him are conjectural and the material oral evidence on record has not been considered at all I am supported in my view by the rulings reported in Autar Krishna v Gaon Sabha, 1975 All W C 23 (1975 All L J 410) and in Mahabir v Deputy Director 1974 Un. Rev. Cas 674. In the former case it has been held that the oral evidence cannot be unceremoniously left unnoticed when it is relevant to the matter in dispute. In the later case it has been held that where the Deputy Director of Consolidation ignored the material evidence in the case his order cannot be sustained The Deputy Director is the last court of fact and the findings recorded by it normally cannot be challenged in the High Court under Art 226 of the Constitution but it is essential for the Deputy Director to consider the entire evidence on record in the case and when the Deputy Director has ignored material evidence on record in the case his order cannot be sustained In the present case the oral evidence has not been considered by the Deputy Director of Consolidation which he should have considered and analytical assessment of the same should have been made while arriving at a finding contrary to the finding recorded by the two courts below Since the order was not an order of affirmance it was incumbent upon the Deputy Director to consider on merits the entire evidence on record while reversing the finding of the courts below. Having not done so the impugned order stands vitiated and cannot be sustained for a moment

7. Learned counsel for opposite parties Nos 4 and 5 further argued that the sale deed in question being not a void document the consolidation authorities had no jurisdiction to consider its validity This contention is not sustainable In my opinion the consolidation courts could consider on merits and decide the question as to whether the alleged sale deed was executed by the vendor Durjan, after intelligently understanding the contents of the document. If the intelligent execution and due attestation of the sale deed is not established, the document would be non est and void and title in the land in question would not pass to the vendees on its basis The question whether the sale deed was fictitiously got executed would also depend on the consideration whether any sale consideration had been paid or not No doubt it is true that in a genuine transaction third party cannot dispute payment of consideration but a third party can so challenge if the document is fictitious In spite of recital of payment of price in the sale deed a party may show that consideration did not pass at all and the sale transaction is altogether fictitious so as not to confer any title upon the vendee and this question can very well be gone into on merits by the consolidation authorities while determining whether the alleged sale transaction was sham transaction and the sale deed was fictitiously got executed, which would then be a void document and would not create title in favour of vendees.

8. The petitioners have challenged the alleged transfer by Durjan inter alia on the ground that it was fictitious transfer and the sale deed in question was a sham deed of sale. The transfer has also been challenged on the ground that it was a fraudulent transfer. Simply because sale deed is challenged also on the ground of being a fraudulent transfer it cannot be said that unless sale deed is got cancelled its validity cannot be gone into by the consolidation authorities No doubt it is true that the sale deed would be branded as a voidable transaction if challenged on the ground of fraud alone In the present case it has also been challenged on the ground of being an altogether fictitious transaction and a sham deed of sale. It has been held by this Court in Jagdamba v. Ram Khelawan, AIR 1942 All 344, that a fraudulent transfer should be distinguished from a fictitious transfer which in fact is no transfer at all and while in the former case there is a transfer but on account of a conspiracy it can be avoided but in the latter case it being no transfer in the eye of law would not at all confer title upon vendees. The Oudh Chief Court in Mt. Boota v Gur

Prasad, AIR 1937 Oudh 20 has also held that the sham deed of sale even if registered does not pass title, for the sale does not become complete in such a case by mere execution of the deed The Deputy Director of Consolidation therefore, should have considered on merits whether the alleged sale consideration was in fact paid by the vendees to the vendor, who was no one else but their own father with whom they jointly lived The non-payment of consideration money would be a very strong factor to be taken into consideration in determining whether the conveyance was or was not a real transaction Similarly the question whether the vendor had any necessity to transfer the property or not and that he was not defrauded in executing the document in question would also be a relevant fact for arriving at a correct conclusion on the question whether it was fictitious transaction and was got manipulated fictitiously by opposite parties Nos 4 and 5 just to deprive the petitioners their due share in the property in question If there was no occasion for making transfer the non-payment of sale consideration would be a material circumstance and would afford a ground for holding the document to be fictitious conferring no title on the vendees In view of what has been said above the Deputy Director of Consolidation acted illegally in refusing to consider the validity of the sale deed which was impugned by the petitioners on the aforesaid grounds, which deserved consideration on merits in these proceedings under S. 9-A(2) of the Act which involved determination of title of the parties in the land in question, in respect of which petitioners claimed inheritance being sons of Durjan and opposite parties Nos 4 and 5 claimed it exclusively on the basis of the sale deed in question of which intelligent execution and attestation and its validity was disputed The Deputy Director of Consolidation without recording a finding on the question as to whether the document is void or voidable has acted illegally and with substantial irregularity in exercise of jurisdiction in refusing to consider the validity of the document, which would be void and ineffective if the petitioners would succeed to substantiate their plea that it was a fictitious transfer and the sale deed in question was a sham deed of sale

9. The petitioners in support of their contention examined one of the marginal witnesses Mangal Singh. His testimony was a very material piece of evidence for deciding the controversy, but the Deputy Director of Consolidation has altogether ignored to consider it The two courts below have referred to the evidence indicating the contradictions in the evidence of opposite parties Nos 4 and 5 who had examined themselves in the case They had also noticed the fictitious nature of the alleged transaction by referring to the evidence about the alleged payment of sale consideration The Settlement Officer (Consolidation) has referred to the evidence of Mangal Singh, the attesting witness, and placing reliance upon his testimony has held that due execution and attestation of the document by Durjan has not been proved The Deputy Director of Consolidation ignored the material oral evidence on record, hence the findings recorded by him stand legally vitiated and cannot be sustained The impugned order dated 25th August 1975 passed by the Deputy Director of Consolidation contained in Annexure 7, therefore, deserves to be quashed

10. The writ petition is accordingly allowed, the impugned order passed by the Deputy Director of Consolidation is hereby quashed and he is directed to restore the revision and to decide it on merits in the light of the observations made above In the circumstances of the case the parties shall bear their own costs

Petition allowed

1981 ALL. L. J. 1082
= AIR 1981 Supreme Court 1878

(From Allahabad)

R S PATHAK AND O CHINNAPPA REDDY, JJ

Civil Appeal No 196 of 1970, D/- 4-9-1981

Math Sauna and others, Appellants v. Kedar Nath alias Uma Shankar and others, Respondents

Hindu Law — Religious endowment — Math — Personal properties of Mahant — Purchase of properties by Mahant of Math belonging to Dashnami Sanyasi sect, from funds inherited from predecessor — Funds acquired by predecessor in consequence of his personal learning — No nucleus of Math

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property — They would be his personal property — Held, properties purchased with such funds would be personal property of Mahant and not of deity when successor and predecessor were grihasthas and not celibates in life before becoming mahants.

Where the total income from the properties belonging to the Math could not have left any appreciable surplus after performance of ceremonies indicated in the waqf deed, the funds acquired by the Mahant of the Math must be deemed to be his personal property when he was a man of learning and attainments and had a large number of Chelas including many affluent persons and from them he received personal bhents or pranamis of large amounts of money Therefore the properties in question, purchased with such funds which devolved on his successor would be the personal properties of the successor Mahant and would not belong to the Math or the deity when the Math belonged to the Dashnami Sanyasi sect and Mahants of the Math of that sect were entitled to possess and own private property if they were grihasthas in earlier life and both Mahants were not celibates and had been grihasthas in earlier life AIR 1934 Pat 431. AIR 1968 S C 1032. Rel on

(Paras 6, 7, 8, 11)

Cases Referred :	Chronological Paras
AIR 1968 S C 1032	6
AIR 1934 Pat 431	6

PATHAK, J.:— This appeal arises on a certificate under sub-cl (b) of clause (1) of Article 133 of the Constitution granted by the Allahabad High Court against its judgment and decree dated April 21, 1969 disposing of appeals out of a suit for declaration and possession

2. The plaintiffs filed a suit claiming that the property in dispute belonged to the Math Sauna or the deity Sri Thakur Gokarneshwar Mahadeo Ji installed in the Math Sauna temple, and that Mahant Sadashiva Yati was in possession as Mahant and Sarbarakar It was claimed that in the event of Mahant Sadashiva Yati being found out of possession a decree for possession should be made Sadashiv Yati pleaded that on the death of Mahant Shivshanker Yati he was elected Mahant of Math Sauna and was therefore, entitled as Sarbarakar to all the properties recorded in the name of the deity Mahadeo Ji or in the name of Mahant Shivshanker Yati These properties included properties in village Amauli He asserted that Shivshanker Yati possessed no personal property The suit was contested by the first defendant Kedar Nath Chaubey, also referred to as Uma Shanker Yati He alleged that Mahant Shivshanker Yati owned personal properties which included the properties in village Amauli, that he was the chela of Mahant Shivshanker Yati and the Amauli properties had passed to him under a will executed by the Mahant We are concerned in this appeal solely with the Amauli properties

3. Math Sauna is an old Math situated in the village of that name in Tehsil Saidpur in the district of Ghazipur One of the earliest Mahants of the Math Mahant Gokaran Yati, raised a temple in the premises of the Math and installed a deity acclaimed by the name of "Gokarneshwar Mahadeo" On his death he was succeeded by Mahant Shivbaran Yati who executed a waqf deed on November 12, 1892 dedicating various properties to the deity with the intent that arrangements for bhog, deepdan and other expenses be met from them The surplus, the deed directed, was to be employed for acquiring further property in the name of the deity and was not to be applied by the Sarbarakar to his personal use

4. The learned Civil Judge decreed the suit but included a finding in his judgment that Sadashiv Yati was not a regularly constituted Mahant of Math Sauna and Sarbarakar of the deity Two appeals were filed in the High Court First Appeal No 80 of 1964 was filed by Kedar Nath Chaubey alias Uma Shanker Yati against the declaration that the Amauli properties were owned by Math Sauna or the deity and that Sadashiv Yati was in possession thereof as Mahant and Sarbarakar The other appeal, First Appeal No 270 of 1965 was filed by the plaintiffs for the relief that Sadashiv Yati was a properly constituted Mahant of Math Sauna and Sarbarakar of the deity The High Court allowed both the appeals by its judgment and decree dated April 21, 1969 It held that the Amauli properties had been purchased by Shivshanker Yati in 1921 from the personal and separate funds inherited by him from his predecessor Shivpher Yati, and that the Amauli properties must therefore be regarded as his personal and separate properties and they did not belong to the Math or the deity The present appeal is directed against that part of the judgment and decree of the High Court

5. It is admitted between the parties that the Amauli properties were purchased by

Mahant Shivshankar Yati for Rs 40,000/- forming part of a fund left behind by his predecessor Mahant Shivpher Yati The point for decision is whether the fund was the personal property of Mahant Shivpher Yati, and if so, whether it devolved on Mahant Shivshanker Yati

6. The mahants and members of Math Sauna belonged to the Dashnami Sanyasi sect The material on the record establishes that they could own and possess personal property They included sanyasis, who had formerly been married men and householders, men who had passed through the grihastha ashram Some of them continued to possess and even to acquire personal property after taking sanyas It was observed in Sushi Chandra Sen v Gobind Chandra Das, AIR 1934 Pat 431 that Dashnami sanyasis mixed freely in the business world and carried on trade and often accumulated property This court in Gurcharan Prasad v Krishnanand, AIR 1968 S C 1032 affirmed that Nihang Dashnami Sanyasis could pursue money-lending business and could own property as absolute owners, and enjoy them as their personal property That certain sects of sanyasis could acquire personal property was accepted by that eminent Judge Dr B K Mukherjee, in his "Hindu Law of Religious and Charitable Trusts", 4th Edn pp 358, 359 & 7 57, 7 58, where he says "A mohunt, and for the matter of that, any other Sanyasi can acquire personal property of his own The Pranamis given to a Mohunt are generally his personal property The mere fact that a Mohunt is an ascetic does not raise any presumption that a property in his possession is not his personal property Strictly speaking, there is no presumption either one way or the other, and in each case the burden is upon the plaintiff to establish that the properties in respect of which he is asking for possession are properties to the possession of which he is entitled in the right in which he sues"

7. There is reason to believe that Mahant Shivbaran Yati, Mohant Shivpher Yati and Mahant Shivshanker Yati were not celibates and had been grihasthas, and were entitled to possess, enjoy and acquire personal property The evidence discloses that Mahant Shivpher Yati was held in high regard on account of his personal learning and attainments, and had a large number of chelas including many affluent persons from whom he received personal bhents or pranamis of large amounts of money His personal property, on his death, included cash, sovereigns and gold besides two fixed deposits with the Bank of Bengal of Rupees 45,000/- He had also inherited the personal property of Mahant Shivbaran Yati, who owned three private properties in village Shiv Dass in the district of Banaras On his death in 1917, all those properties and wealth devolved on Mahant Shivshanker Yati He was granted a succession certificate by the District Judge, Ghazipur in respect of the two fixed deposits made by Mahant Shivpher Yati in the Bank of Bengal Mahant Shivshanker Yati employed the inherited money in the purchase of two properties in village Amauli in 1921 paying Rupees 30,000/- for a full interest in one property and Rs 10,000/- for a moiety share in the other In respect of both properties, the revenue records mentioned the name of Mahant Shivshanker Yati and not that of the Math or the deity Small parcels of these properties were transferred by Mahant Shivshanker Yati from time to time, and none of those transfers was challenged by the plaintiffs in the present suit

8. It is urged for the appellants that where a nucleus of dedicated property exists the acquisition of additional property should be attributed to the application of the nucleus and must, therefore, be regarded as property belonging to the Math or the deity As has been observed, that there can be no presumption either way All the facts and circumstances must be taken into consideration and on a balancing of the entire evidence it has to be determined whether the property can be said to belong to the Math or deity or is the personal property of the Mahant, the burden of proof resting on the party who makes the claim In the present case, it is difficult to conclude from the material before us that the total income from the properties belonging to the Math and the deity left any appreciable surplus after meeting the expenditure on account of bhog, arpan, deepdan, daily and annual puja and the other obligations specified in the waqf deed We are in agreement with the High Court that the fund from which the Amauli properties were acquired constituted the personal property of Mahant Shivpher Yati. On his death in 1917, the fund passed to Mahant Shivshanker Yati, who in 1921 employed it for the purchase of the Amauli properties

9. Mahant Shivshanker Yati executed a will in 1956, and it appears beyond dispute

that by virtue of this will the Amauli properties devolved on Umashankar Yati

10. It is pointed out before us that in assessment proceedings under the U P Agricultural Income-tax Act 1948 (1949), the Amauli properties were described by Mahant Shivshankar Yati as properties of the Math and therefore a claim to exemption from the levy was made The High Court has found that the claim was not accepted by the assessing authority, and that the position in regard to those properties taken in the assessment proceedings was adopted by the Mahant only for the purpose of escaping personal liability to tax We concur with that finding

11. In our judgment, the High Court is right in the view that the Amauli properties constitute the personal property of Umashankar Yati and do not form part of the properties of the Math Sauna or of the deity, Sri Thakur Gokarneshwar Mahadeoji

12. In the result, the appeal is dismissed with costs

Appeal dismissed

1981 ALL. L. J. 1085

M P MEHROTRA, J

Jagdish Prasad, Petitioner v State of U P and others, Respondents

Civil Misc Writ Petn No 8424 of 1980, D/- 9-9-1981

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), Ss. 13, 32 — Appeal by State Govt. after expiry of limitation with application under S. 5 Limitation Act — Court allowing application subject to payment of costs to other side — Costs not paid by State within time — Court rejected the application and dismissed the appeal — Application by State to set aside order rejecting application under S. 5 Limitation Act — Court allowing application — Appeal is bound to be heard on merits. (Limitation Act (1963), S. 5). **(Para 4)**

Cases Referred : Chronological Paras

1972 All L J 169 AIR 1972 All 246 (F B) 4

Virendra Singh, for Petitioner.

ORDER :— This petition arises out of the proceedings under the U. P Imposition of Ceiling on Land Holdings Act

2. The facts, in brief, are these The petitioner was treated as the tenure-holder and the notice under S 10(2) of the Act was issued Thereafter, the proceedings took place culminating in a writ petition which was filed in this Court This Court allowed the writ petition and remanded the case to the Prescribed Authority for a fresh decision in accordance with the directions given in the said remand order Thereafter, the Prescribed Authority decided the ceiling case in accordance with the directions and allowed the tenure-holder's objections The Prescribed Authority discharged the notice issued to the petitioner under S 10(2) of the Act The Prescribed Authority's order is dt 28-7-1979 It seems that thereafter, a time barred appeal was filed by the State against the said order and the memorandum of appeal in the said appeal was accompanied by an application under S 5 of the Limitation Act seeking condonation of delay in the filing of the appeal The appellate court allowed, vide its order dt. 4-7-1980, the said application under S 5 on condition that a certain amount was to be paid as costs to the other side within a month of the said order The costs were not paid within one month and accordingly, on 4-8-1980 or 5-8-80 an order was passed whereby the application under S 5 was declared to stand rejected and the appeal was dismissed on the ground of being time barred A true copy of the said order is Annexure 3 to the petition Thereafter, the next day the State moved an application stating that there was some confusion on the part of its counsel and therefore, the costs could not be paid within one month and a readiness was expressed to pay the costs. It was further stated that such costs were tendered to the counsel for the petitioner but he did not accept the same Therefore, a prayer was made that the aforesaid order dt 4th or 5th August, 1980 (it is not clear, there seems some confusion in the recording of the date of Annexure 3) be recalled. The said application was allowed by the appellate court by its impugned order dt. 12-9-1980, a true copy whereof is Annexure 6 to the petition A certified copy of the said order is also on the record.

3. Now the petitioner has come up in the instant writ petition against the said order dt 12-9-1980 and in support thereof, I have heard Sri Virendra Singh, learned counsel for the

petitioner, and in opposition, the learned Standing Counsel has made his submissions

4. Learned counsel for the petitioner contended that the Full Bench decision of this Court reported in Gobardhan Singh v Barsati (AIR 1972 All 246) 1972 All L J 169 is distinguishable on the ground that in the instant case the appeal had also been dismissed and therefore, the impugned order could not be passed I am not impressed with this argument It should be seen that the appeal was dismissed in consequence of the rejection of the application under S 5 of the Limitation Act When the appellate court allowed the appellant's application for setting aside the order whereby the application under S 5 of the Limitation Act had been declared to stand rejected, then obviously the appeal was also bound to be entertained because the court had allowed the application under S 5 of Limitation Act and had condoned the delay The appeal was, therefore, bound to be heard on merits

5. This petition fails and is dismissed but there will be no order as to costs

Petition dismissed

1981 ALL. L. J. 1086

M. P. MEHROTRA, J

Smt Chanda Devi and others, Petitioners
v
State of U P and others, Respondents

Civil Misc Writ Petn No 9980 of 1980, D/- 10-9-1981

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 10(2) — U. P. Imposition of Ceiling on Land Holdings Rules (1961), R. 8 First Proviso — Notice under — Necessity of — Ceiling proceedings — Donees of tenure-holder filing objections — No notice issued to them — Decision in Proceedings against them is not void — That decision would operate as res judicata in subsequent attempt to rake up the old controversy — (Civil P. C. (1908), S. 11).

Where the appearance was put in on behalf of the donees of the tenure-holder whose names were mutated in the record, before the Prescribed Authority in the ceiling proceedings against the tenure-holder and they had filed objections before the Prescribed Authority in the said proceedings, the decision in the proceedings that transfers in their favour by way of gift was liable to be ignored, could not be said to be void and without jurisdiction on the ground that no notices were issued to them as required by the proviso to R 8 It is obvious that the aim of issuing the notice to the persons mentioned in the first proviso to R 8 is to give an opportunity to such persons to contest the claim of the state that certain lands are merely ostensible recorded in their names and that they are not the real tenure-holders of such lands However, when such persons who are claimed to be merely ostensibly recorded and whole lands are sought to be included in the holding of the tenure-holder, themselves filed objections before the Prescribed Authority in the proceedings taken against the tenure-holders, then the legislative aim is fully fulfilled, namely, that such allegedly ostensibly recorded persons should get a fair opportunity to contest the claim of the State in this regard 1979 All L J 1174 (F B) Distinguished (Para 8)

Further, the decision given in the proceedings which was confirmed in appeal and writ petition, would operate as res judicata in any subsequent proceeding initiated to rake up the settled controversy (Para 8)

Cases Referred : Chronological Paras

1979 All L J 1174 1979 All W C 585 AIR 1980 NOC 6 (F B)

V B Singh, for Petitioners, Standing Counsel, for Respondents

ORDER :— This petition arises out of the proceedings under the U P Imposition of Ceiling on Land Holdings Act The facts, in brief, are as under

2. The petitioner No 7 Smt Ram Dulari was treated as the tenure-holder and the notice under S 10(2) of the Act was issued to her in that capacity Objections were filed by the said tenure-holder and also by her daughters These objections were decided by the Prescribed Authority by his order dated 15-6-76, a true copy of which is annexure 1 to the petition One of the objections was that certain lands which were alleged to have been gifted by the said tenure-holder in favour of her daughters and a daughter's sons, were wrongly included in the holding of the said tenure-holder, namely Smt Ram Dulari It was contended that the document of gift was there and further that

mutations had been done in respect of the said transactions and that the donees were in separate possession of the gifted lands. The Prescribed Authority rejected the alleged transactions of gift and passed the aforementioned order dated 15-6-76 (annexure 1). Feeling aggrieved, an appeal was filed against the said order of the Prescribed Authority and the same was decided by the appellate court by its judgment dated 7-10-76, a true copy whereof is annexure 2 to the petition. From the appellate court's judgment it is obvious that all the seven petitioners before me were appellants in the appeal before the lower appellate court. The controversy regarding the gift deeds dated 16th Oct 1970 was considered in great detail by the appellate court and it was held that the said gift deeds were rightly ignored by the Prescribed Authority and that the said tenure-holder Smt. Ram Dulari was rightly treated to be the tenure-holder of the lands which were allegedly gifted by her to her daughters and to the sons of one of her daughters. Thereafter a writ petition was filed in this court against the aforesaid judgment of the appellate court, dated 7th Oct 1976. This court by its judgment dated 11-12-1977 dismissed the said writ petition. A true copy of the said judgment is annexure 3 to the petition and again from the same I find that all the present seven petitioners before me were the petitioners in the aforesaid writ petition No. 210 of 1977, which had been dismissed by a learned Judge of this Court on 12-7-1977 (annexure 3). The learned Judge while deciding the said writ petition had observed as follows

"The finding of the III Additional District Judge, Hamirpur, in effect is that the gift deed relied upon by the petitioners was a sham transaction and that it had never been acted upon. In the circumstances, the authorities under the Ceiling Act were justified in ignoring the gift deed while computing the surplus area of the petitioners. There is no force in this petition. Rejected."

3. A Special Appeal thereafter was filed against the said judgment of the learned Single Judge in the said writ petition but the Special Appeal was dismissed on the ground that it was not maintainable. The order passed by the Division Bench holding the Special Appeal to be not maintainable is annexure 4 to the petition.

4. Thereafter is seems that the Prescribed Authority was again approached by the petitioners seeking to raise the same controversy regarding the alleged gift by the tenure-holder in favour of her daughters and the sons of one of her daughters and further contending that a fresh notice under S. 10(2) of the Act should be issued to them. This application was rejected by the Prescribed Authority by his order dated 30-9-77. A true copy of the said order is annexure 5 to the petition. Thereafter an appeal was filed by the petitioners against the said order dated 30-9-77, but the same was dismissed by the appellate court by its judgment dated 10-7-80. A true copy of the said judgment is annexure 6 to the petition. A certified copy of the said judgment is also on the record.

5. Feeling aggrieved, the petitioners have now come up in the instant petition and in support thereof, I have heard Sri V. B. Singh, learned counsel for the petitioners. In opposition, the learned Standing Counsel has also made his submissions. Learned counsel for the petitioners contended that on the Authority of the Full Bench decision of this Court in Shantanu Kumar v. State of U. P. (1979 All. W. C. 585) (1979 All. L. J. 1174) the entire proceedings were without jurisdiction because no notices were issued to the transferees, who stood recorded on 8-6-1973. Learned counsel contended that even if appearance was put in on behalf of the donees before the Prescribed Authority in the Ceiling proceedings against the tenure-holder and they had filed objections before the Prescribed Authority in the said proceedings, still, the proceedings against them must be held to be void and without jurisdiction because no notices were issued as required by the proviso to rule 8 of the rules framed under the U. P. Imposition of Ceiling on Land Holdings Act. In my view, this contention cannot be accepted. It is obvious that the aim of issuing the notice to the persons mentioned in the first proviso to rule 8 is to give an opportunity to such persons to contest the claim of the State that certain lands are merely ostensibly recorded in their names and that they are not the real tenure-holders of such lands. However, when such persons who are claimed to be merely ostensibly recorded and whose lands are sought to be included in the holding of the tenure-holder, themselves filed objections before the Prescribed Authority in the proceedings taken against the tenure-holder, then the legislative aim is fully fulfilled, namely, that such allegedly ostensibly recorded persons should get a fair

opportunity to contest the claim of the State in this regard It should be seen that in the aforesaid Full Bench decision the case was not decided with reference to a person who might have been found to have filed the objections in the ceiling proceedings The Full Bench decision is, therefore, clearly distinguishable on the said ground In the facts of the instant case, as I have stated above, all the petitioners were before the Prescribed Authority with their objections Thereafter all these petitioners went up in appeal and pressed their contention before the appellate court and thereafter they came up in a writ petition to this court which too was dismissed In such circumstances, it was not open to the petitioners to seek to have a second innings by moving their fresh objection which was clearly not maintainable and was rightly dismissed The appeal against the said order was also rightly dismissed The earlier adjudication will clearly bar the application which was rejected by the order dated 30-9-77 on the principle of res judicata In this view of the matter, it is not necessary to advert to the contention of the learned counsel for the petitioners that in the earlier adjudication only the point of view of the tenure-holder Smt Ram Dulari was considered and not the point of view of the alleged transferees After the decision of the learned Single Judge dated 12-7-1977, passed in the aforesaid earlier writ petition No 210 of 1977, holding that the gift deed was a sham transaction, it is not open to me to go into the said controversy

6. Accordingly, I dismiss this petition However, I wish to make it clear that the appellate court's judgment dated 7-10-1976 remanding the case to the learned Prescribed Authority with certain directions should be treated as effective and be given effect to by the Prescribed Authority In the circumstances of the case, there will be no order as to costs

Petition dismissed

1981 ALL. L. J. 1088

K. C. AGRAWAL AND V. K. KHANNA, JJ

Janardan Rai, Petitioner v State of U P and others, Respondents.

Civil Misc. Writ No. 8376 of 1981, D/- 7-7-1981.

(A) Constitution of India, Arts. 226, 32 — Mandamus — Convict released on bail during pendency of his writ petition before Supreme Court — Dismissal of writ petition and cancellation of bail — Sessions Judges order issuing warrant of arrest of convict — Not invalid — No interference under Art. 226.

Where during pendency of petition under Art 32 of Constitution by a convict (undergoing life imprisonment for being convicted of murder) Challenging validity of Section 433A, Criminal P C, the Supreme Court passed order releasing the convict on bail provided he was entitled to premature release, but the Sessions Judge released the convict on bail without going into question or premature release, on cancellation of convict's bail by Supreme Court because of dismissal of his writ petition the Sessions Judge's order issuing warrant of arrest of the convict could not be said to be invalid so as to require interference and issuance of mandamus under Art 226 of Constitution

(Paras 4, 9)

(B) Constitution of India, Art. 226 — Jurisdiction of High Court — Nature of — Remission of sentence of convict — Power is exclusively that of State Government and not of Court (U. P. Prisoners' Release on Probation Act (8 of 1938); S. 8 — Criminal P. C (1974) S. 432)

The High Court under Art 226 of Constitution has no power to go into question of remission of sentence of a convict (undergoing life imprisonment for being convicted of murder) The power to grant remission is exclusively that of the State Government. This power cannot be exercised by a Court of law To cut short a sentence is an exercise of the executive power Hence, the High Court cannot itself remit the sentence of a convict AIR 1961 S C 334, AIR 1961 S C 600 and AIR 1980 S C 2147, Relon.

(Paras 5, 8)

Cases Referred : Chronological	Paras
AIR 1980 S C 2147	2, 7
AIR 1961 S C 334	5
AIR 1961 S C 600 : (1961) 1 Cri L J 736	6, 7

P M N. Singh, for Petitioner, Standing Counsel, for Respondents

ORDER :— Janardan Rai, the petitioner, was convicted in Sessions Trial No 144 of

1968, under Sections 302/34 I P C on 30-4-1969 and was awarded life imprisonment An appeal preferred against the Judgment of the Sessions Judge failed The petitioner, thereafter, moved an application for Special Leave to the Supreme Court This application was also rejected After the dismissal of the appeal, the petitioner surrendered himself in the Court of the Additional District Magistrate (Judicial), Azamgarh, on 27-11-1979 While the petitioner was undergoing the sentence of life imprisonment, the Code of Criminal Procedure, 1973, was amended by means of Amending Act of 1978, as a result whereof Section 433A was inserted This was made to prohibit premature release where a sentence of life imprisonment is imposed on conviction of a person for an offence for which death is one of the punishments provided by law This Section lays down that such person cannot be released from the prison unless he has several fourteen years of imprisonment

2. Thereupon, the petitioner and many others filed writ petitions in the Supreme Court under Art 32 of the Constitution challenging the validity of Section 433A on a number of grounds On the application for bail moved by the petitioner in this case, the Supreme Court directed the petitioner to be released if he was entitled to premature release order under the law prevalent in the State of which he was a citizen Pursuant to the aforesaid order of the Supreme Court, the petitioner was released The writ petition of Maru Ram was decided by the Supreme Court on 11-11-1980 (reported in AIR 1980 S C 2147) The Supreme Court found that Section 433A was not violative of Art 14 of the Constitution

The view, however, taken was that this section was prospective in operation and did not apply to cases where a person had been convicted by the trial court before 18th December, 1978, when Section 433A came into force Upon the dismissal of the writ petition filed by the petitioner, proceedings for arrest of the petitioner were started On 25-2-1981, the Sessions Judge, Azamgarh ordered for the issue of warrants of arrest of the petitioner Thereupon, the petitioner filed the present writ petition claiming, inter alia, the relief directing the respondents not to arrest the petitioner and to quash the order of the Sessions Judge issuing the warrants for his arrest

3. Two contentions had been raised in support of this petition by the learned counsel appearing for the petitioner The first was that as the petitioner had been released on 6-8-1980, on the basis of an unconditional warrant of release, the Sessions Judge had no power on 25-2-1981 to direct for his arrest Elaborating his submission, counsel urged that unconditional release of the petitioner having been granted on the basis that the petitioner was entitled to remission of the sentence awarded to him, there was no authority in law in the Sessions Judge to direct for his re-arrest for the same offence The submission is not tenable

Taking all the facts and circumstances into account, it would be found that the release of the petitioner on 6-8-1980 had been made in pursuance of the order of the Supreme Court The Court making the order for release held that the Supreme Court's order was that the petitioner was to be released on bail to the satisfaction of the Sessions Judge, provided premature release had become due Having found that the jail authorities were taking time in complying with the order of the Supreme Court, the learned Sessions Judge thought it appropriate to release the petitioner without going into the controversy as to whether the petitioner was entitled to premature release

4. From the above, it would be found that the order of release had been made by the Supreme Court in the writ petition which had been preferred by the petitioner The life of the order for release could not last longer than the period for which the writ petition itself was pending After the dismissal of the writ petition, the interim order made for release of the petitioner lapsed and became inoperative As a consequence thereof, the petitioner cannot claim any right on the basis of the said order and argue that as the petitioner had been released on the basis of the same, he could not be re-arrested

It may be further pointed out that the Supreme Court made the order for release of the petitioner provided premature release had become due In the present case, it would be seen that the Sessions Judge while releasing the petitioner on 6-8-1980 did not go into that question by clearly observing that "in some cases I have already held that it is not for this Court to decide whether the premature release has become due or not" The question of premature release was neither decided by the Sessions Judge nor by the State Government This order lapsed on 11-11-1980, when the writ petition of the petitioner failed Consequently, the impugned order of the Sessions Judge dated 25-2-1981 for the arrest of the petitioner cannot be held to be invalid In fact, the

Supreme Court while finally deciding the writ petition cancelled the bail granted to the petitioner and directed that the petitioner would serve out the remaining period of his sentence

5. The second question that was argued was that the petitioner had become entitled to remission under S 8 of U P Prisoners' Release on Probation Act, 1938 For the entitlement of his release, the petitioner referred to various Government Orders issued from time to time by the State Government remitting the sentence S 8 of the aforesaid Act confers power on the Sate Government to remit the whole or a part of the sentence of a prisoner sentenced to imprisonment for an offence under any Act Rule 15 lays down that a prisoner would be entitled to move an application for remission of sentence under S 8 of the Act to the District Magistrate of the District in which he was convicted Sub-r (2) of R 15 provides that the District Magistrate shall, on a consideration of the antecedents of the prisoner, his conduct in jail and his environment, and after consulting the Probation Officer, direct for release of the prisoner

In the present case, the petitioner brought to our notice that he had filed an application to the District Magistrate as provided for by R 15 of the aforesaid Rules for grant of remission, but the District Magistrate had not passed any order on the same Counsel urged with the help of the allegations made in the various paragraphs of the writ petition that if the petitioner was given the benefit of remissions granted by the State Government on various occasions, the petitioner would not be liable to be sent to jail The question, however, that needs considerations is whether the High Court has power under Article 226 of the Constitution to go into this question and to hold that the petitioner was entitled to remission It has been settled by the various decisions of the Supreme Court that the power of remission is executive and it solely rests with the State Government This power cannot be exercised by the Court In Sarat Chandra v Khagendranath (AIR 1961 S C 334), the Supreme Court approved the following passage from Wester's "Constitutional Law" at page 176,

"The judicial power and the executive power over sentences are readily distinguishable, observed Justice Suther-land To render a judgment is a judicial function To carry the judgment into effect is an executive function To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it qua judgment "

6. In G V Godse v State of Maharashtra, (AIR 1961 S C 600), this question was again considered The Supreme Court held that (at p 604)

"Unless the said sentence is commuted or remitted by appropriate authority under the relevant provisions of the Indian Penal Code or the Code of Criminal Procedure, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison The Rules framed under the Prisons Act enable such a prisoner to earn remissions — ordinary, special and State — and the said remissions will be given credit towards his term of imprisonment The question of remission is exclusively within the province of the appropriate Government, and in this case it is admitted that, though the appropriate Government made certain remissions under Section 401 of the Code of Criminal Procedure, it did not remit the entire sentence We, therefore, hold that the petitioner has not yet acquired any right to release "

7. The above proposition was accepted in Maru Ram v Union of India, (AIR 1980 S C 2147) The Supreme Court observed (at p 2174)

"We follow Godse's case (AIR 1961 S C 600) (Supra) to hold that imprisonment for life lasts until the last breath and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by Government "

8. From the above decision, it is apparent that the power to grant remission is exclusively that of the State Government This power cannot be exercised by a Court of law To cut short a sentence is an exercise of the executive power Hence, the High Court cannot itself remit the sentence of the petitioner and find that as the petitioner had become entitled to remission, he was not liable to be re-arrested in pursuance of the order of the Sessions Judge made on 6-2-1981 The High Court cannot assume jurisdiction of the State Government and pass an order of remission. The jurisdiction conferred by Art. 226 is supervisory in nature. It is an extraordinary jurisdiction and in matters like the present, the High Court can

only direct the authorities concerned to proceed in accordance with law

It cannot assume the function of the authorities itself and after calculating the period of remissions, to which the petitioner may be found entitled, remit the sentence To do so would be to usurp the power of the executive It is an erroneous notion that since the power granted by Art 226 of the Constitution is wide in nature, the High Court can take upon itself the job of considering the entitlement of an accused to get remissions and after having found that he is so entitled, it can direct his release We could not go into this question in the present proceedings Even if we would have found after examining the merits that the petitioner was entitled to remission, the only course left would have been to call upon the State Government to make an appropriate order in that regard

9. From the facts narrated in the writ petition, it, however, appears that the jail authorities had recommended the case of the petitioner for remission to the District Magistrate The petitioner had also applied on October, 1980, to the District Magistrate under R 15(2) for being granted the remission The District Magistrate was required by the aforesaid provision to decide the application Since the petitioner alleges that the aforesaid application is still pending and has not been decided, he is entitled to a Mandamus directing the District Magistrate to decide the same But, as already held above the impugned order of the Sessions Judge directing the arrest of the petitioner cannot be said to be illegal

The petitioner will become entitled to release only when the District Magistrate has forwarded the application for remission to the State Government and an order to that effect has been made Till the State Government grants the remission to the petitioner, he has got to remain in jail It is, however, made clear that the District Magistrate if has already decided the application made by the petitioner for grant of remission, he would not be required to decide the same again The direction for deciding the application has been given on the assumption that the application is pending decision before him

10. Subject to the above the writ petition is dismissed summarily

Petition dismissed

1981 ALL. L. J. 1091

M P MEHROTRA, J

Surendra Pal Singh, Petitioner v State of U P and others, Respondents

Civil Misc Writ Petn No 4620 of 1980, D/- 7-9-1981

Constitution of India, Art. 226 — Writ petition — Appreciation of Evidence — Prescribed Authority giving detailed reasons for rejecting application of petitioner that somebody else impersonated on his behalf in ceiling proceedings — Order rejecting application, not jurisdictionally erroneous — It cannot be interfered with in writ jurisdiction.

Where the Prescribed Authority had given his detailed reasons why in the circumstances of the case, the petitioner's version that somebody else had impersonated him in the earlier ceiling proceedings, was not accepted by him and the petitioner apart from filing his own affidavit to support the application before the Prescribed Authority that he was the real person did not lead any other evidence in support of his contention the order passed by the Prescribed Authority rejecting his application could not be said to be without jurisdiction Consequently, within the narrow ambit of a writ petition against the order rejecting the application, the contention that the affidavit should not have been disbelieved as it was uncontroverted could not be accepted as it was not for the High Court to reappraise the evidence on the record in the proceedings under Art 226 of the Constitution If in the facts and circumstances of a case, a court feels that the version of a party as contained in the affidavit, should not be relied upon or accepted, then the Court in its writ jurisdiction will not hold such an order to be without jurisdiction Further, when there was no mention of an oral request to make a comparison of the signature of the petitioner with that on the record of the ceiling proceedings either in the order of the Prescribed Authority or in the judgment of the appellate court it could not be raised in writ petition (Paras 4 & 5)

Cases Referred : Chronological **Paras**

AIR 1975 S C 1297 5

JY/JY I 550/81/SMA/SNV

R K Sharma, for Petitioner, Standing Counsel, for Respondents

ORDER :— This petition arises out of the proceedings under the U P Imposition of Ceiling on Land Holdings Act

2. The notice under S 10 (2) of the Act was issued to the tenure-holder named as Surendrapal Singh The said tenure-holder filed an objection contending that no land in his holding was liable to be declared as surplus The Prescribed Authority decided the said objections after recording the evidence tendered on behalf of the tenure-holder It seems that in support of his objection, the tenure-holder Surendrapal Singh examined himself and also his witness Ajit Singh, and on behalf of the State the Lekhpal was examined in the witness-box and some documentary evidence in the shape of extract of Khasra was also tendered in evidence. The Prescribed Authority by his order dated 6-2-1975 decided the objections of the tenure-holder and declared 22 57 acres of land as surplus A certified copy of the said order dated 6-2-1975 is on the record and has been marked as Annexure 1 to the petition It seems that thereafter an appeal was filed by the tenure-holder and the same was dismissed on 3-9-1975 A true copy of the said appellate judgment has not been appended to the petition, but it is clear from the record that such an appeal was filed by the said tenure-holder and the same was dismissed on the aforesaid date, namely, on 3-9-1975 It has been stated in the impugned orders that after the said appeal was dismissed, the possession of the surplus land was taken and compensation was paid to the said tenure-holder and other subsequent proceedings visualized under the Ceiling Act have also been taken On 18-8-1979 an application was moved on behalf of the present petitioner before the Prescribed Authority contending that he was the real person, namely, Surendrapal Singh and that somebody had impersonated on his behalf in the earlier proceedings and that in reality he had not filed any objection and, in fact, no notice under S. 10 (2) was served upon him and he had not appointed any counsel in the ceiling proceedings and had not filed any appeal before the appellate court He, therefore, prayed that the Prescribed Authority should set aside the earlier order dated 6-2-1975 which was alleged to have been passed by the said authority ex parte An affidavit was filed in support of the said application A true copy of the said application dated 18-8-1979 as Annexure A2 and a copy of the affidavit in support of the application is Annexure A3 to the writ petition The Prescribed Authority by his impugned order dated 4-10-1979 rejected the said application The Prescribed Authority disbelieved the version given by the petitioner, and, therefore, rejected the said application A certified copy of the Prescribed Authority's order dated 4-10-1979 rejecting the said application is on the record, and a true copy of the same is Annexure A4 to the writ petition Thereafter, an appeal was filed but the same was also dismissed by the appellate court by its judgment dated 9-4-1980, a true copy whereof is Annexure A5 to the writ petition A certified copy of the said judgment is also on the record

3. Feeling aggrieved, the petitioner has now come up in the instant writ petition and in support thereof, I have heard the learned counsel for the petitioner and in opposition, the learned Standing Counsel has made his submissions

4 The learned counsel for the petitioner contended that the affidavit of the petitioner should not have been disbelieved as it was uncontroverted In my view, this contention cannot be accepted within the narrow ambit of a petition under Art 226 of the Constitution The Prescribed Authority has given his detailed reasons why in the circumstances of the case, the petitioner's version was not accepted by him It was not for this court to reappraise the evidence on the record in the proceedings under Art 226 of the Constitution If in the facts and circumstances of a case, a court feels that the version of a party as contained in the affidavit should not be relied upon or accepted, then this Court in its writ jurisdiction will not hold such an order to be without jurisdiction As I have stated above, the Prescribed Authority has given his reasons for not accepting the version of the petitioner It should be seen that apart from filing his own affidavit, no other evidence was led by the petitioner in support of his contention In such circumstances, I do not think that the impugned orders can be said to be jurisdictionally erroneous

5. Learned counsel for the petitioner contended that an oral request was made to the Prescribed Authority to make a comparison of the signature of the petitioner with that on the record of the earlier ceiling proceedings There is no such allegation of any such request either in the order of the Prescribed Authority or in the judgment of the appellate court, and I do not think that the learned counsel for the petitioner is

entitled to raise the said contention Even apart from that, I am not sitting as appellate court in this jurisdiction In this connection, a reference may be made to Babhutmal Rai Chand Oswal v Laxmibai Rai R Tarte (AIR 1975 S C 1297)

6. This petition fails and is dismissed but there will be no order as to costs

Petition dismissed

1981 ALL. L. J. 1093

M P MEHROTRA, J

Ranbir Singh, Petitioner v State of U P and others, Respondents

Civil Misc Writ Petn No 10858 of 1980, D/- 4-9-1981

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 13-A — Surplus land — Declaration of — Finding of Prescribed Authority as to holdings of tenure-holder, confirmed by appellate court and High Court — Subsequent declaration of surplus land by rectifying mistake on basis of statement of tenure-holder by Prescribed Authority — Cannot be interfered with in writ petition. (Constitution of India, Art. 226). (Para 4)

Cases Referred : Chronological Paras

(1977) Civil Misc Writ Petn No 3661 of 1977 (All) 2

G N Verma, for Petitioner, Standing Counsel, for Respondents

ORDER :— This petition arises out of the proceedings under the U P Imposition of Ceiling on Land Holdings Act

2. The facts, in brief, are these The petitioner was treated as the tenure-holder and successive ceiling proceedings took place against him It seems that in such proceedings, it was held that the petitioner had no surplus land In this connection a reference may be made to Annexure 2 which is a copy of the judgment of this Court in Civil Misc. Writ Petn No 3661 of 1977 The said petition was filed by the State against the judgment of the appellate court in the case of the petitioner However, the said petition was dismissed by this Court It seems that subsequently a notice under S. 13-A of the Act dated 13-2-1980 was issued to the petitioner, a true copy whereof are Annexures 3-A and 3-B to the writ petition Objections were filed to the said notice and a true copy whereof is Annexure 4 to the petition Thereafter, the prescribed authority passed his order dated 31-7-1980 on the said application and true copy of the same is Annexure 5 to the petition Thereafter, the petitioner filed an appeal and the same was dismissed by the appellate court by its judgment dated 5-11-1980, a true copy whereof is on the record and the certified copy of the same is also on the record

3. Feeling aggrieved, the petitioner has now come up in the instant writ petition and in support thereof, I have heard Sri G N Verma, learned counsel for the petitioner

4. The learned counsel contended that the mistake which was sought to be rectified, could not be described as a mistake apparent on the face of the record and, therefore, S 13-A was not applicable Learned counsel further contended that since the order of the prescribed authority had merged in the order of the appellate court and since the order of the appellate court itself was not interfered with by this Court in the aforesaid writ petition, therefore, it was not open to the prescribed authority to rectify the alleged mistake in his original order dated 19-10-1974 In my view, it is not necessary to go into these contentions raised by the learned counsel for the petitioner because even if the said contentions are correct, it is not a fit case where this Court should interfere in its extraordinary jurisdiction under Art 226 of the Constitution It should be seen that the petitioner himself admitted that his family consisted of six members and there was one adult son In this view of the matter, admittedly the tenure-holder was entitled to 4 hectares of additional land only under S. 5(3) of the Act and not to 6 hectares of land as he was wrongly allowed in the ceiling proceedings When this mistake was admittedly there on the basis of the tenure-holder's own statement, the order rectifying the mistake should not be interfered with in this writ petition Even if the contentions of Sri G N Verma, were held to be correct, it would not be a proper exercise of discretion to interfere with such an order which is in accordance with the own admission of the tenure-holder

5. This petition is accordingly dismissed but there will be no order as to costs

Petition dismissed

1981 ALL. L. J. 1094

M P SAXENA, J

Bhagwat Prasad, Applicant v State of U P, Respondent

Criminal Revn No 1634 of 1980. D/- 10-7-1981

Prevention of Food Adulteration Act (37 of 1954), Ss. 13(2), (2B), 7 and 16 — Prevention of Food Adulteration Rules (1955), R. 4(3) — Application by accused under S. 13(2) for analysis of sample by Central Food Laboratory — Nothing to show that Magistrate complied with provisions of S. 13(2B) before sending sample — Specimen impression of seal, not sent to Director of Laboratory separately — Mandatory provision of R. 4(3) contravened — Accused, held, was denied benefit of S. 13(2) — Conviction under S. 7/16 could not be sustained (1976) 1 F A C 15 (Guj.); 1977 Cri L J 1353 (Gauhati); (1980) 1 F A C 112 (Bom.); 1980 Cri L J 240 (All.) Rel. on.

(Paras 6, 7, 9)

Cases Referred : Chronological Paras

1980 Cri L J 240 (1980) 1 F A C 436 (All) 9
(1980) 1 F A C 112 (Bom) 8
1977 Cri L J 1353 (1977) 2 F A C 167 (Gauhati) 7
(1976) 1 F A C 15 (Guj) 7

Ravi Kiran Jain, for Applicant, Addl. Govt Advocate and Mool Behari Saxena, for Respondent

ORDER :— Bhagwat has filed this revision application against the judgment and order dated 3-10-1980 passed by the VIIth Additional Sessions Judge, Meerut, dismissing his appeal and confirming his conviction under S 7/16, Prevention of Food Adulteration Act, and six months' R I and a fine of Rs. 1,000/- In default of payment of fine three months' further R I was awarded

2. Briefly stated the facts are that on 5-11-1977 at about 12 O'clock in the noon Mahesh Chandra Garg, Chief Food Inspector, Meerut, visited the shop of the revisionist in village Shahjahanpur, P S Kithora, district Meerut He found him selling spices and other goods Sri Garg suspected that Zira which the revisionist was selling or exposing for sale was adulterated Therefore, he purchased 600 grams of Zira and paid Rs 10-80 informing the revisionist that he was taking it for analysis by the Public Analyst The Zira was kept in three bottles which were properly sealed and necessary documents were prepared One of those bottles was sent to the Public Analyst, U P Government, who reported as follows

"1 Inorganic extraneous matter 0 1%
2 Organic extraneous matter 14 51%
3 Zira 85 39"

The organic extraneous matter exceeds the maximum permissible limit of 5% "

Hence the sample was held to be adulterated After obtaining the requisite sanction of the Chief Medical Officer of Health a complaint was filed against the revisionist

3 The revisionist denied the said charge and gave out that the Zira was not ready for sale It was being cleaned and thereafter it would have been sold to the public According to him, this fact was brought to the notice of the Food Inspector but he paid no heed

4. On 11-5-1978 the revisionist moved an application that another sample of the Zira lying in the custody of the health authorities at Meerut be sent to the Director, Central Food Laboratory, for examination Accordingly, the second bottle of sample of Zira was sent to the Central Food Laboratory and the Director sent a report on 24-6-1978 to the following effect

"1 The sample shows presence of live infestation
2 Extraneous matter 20% by weight
3 Insect damaged grains 6 2% by weight
4 Edible seeds other than cumin seeds Nil"

In his opinion the sample was adulterated He also appended a note that specimen impression of seal was not given on the memorandum

5. After going through the material on the record the learned trial court held that the Zira was really meant for sale and was adulterated The revisionist was convicted and sentenced as aforesaid and the appeal filed by him was dismissed

6. Several points have been urged before me by the learned counsel for the revisionist but one of them is quite weighty on the basis

of which the revision is bound to succeed It is argued that the sample seal was not sent to the Director of Central Food Laboratory along with the sample phial with the result that he had no occasion to check the genuineness of the seals and the salutary R 4(3), Prevention of Food Adulteration Rules, was contravened and no reliance can be placed on the report of the Director The relevant portion of S 13, Prevention of Food Adulteration Act, reads as follows

"(1)

(2) On receipt of the report of the result of the analysis under sub-s (1) to the effect that the article of food is adulterated, the Local (Health) Authority shall, after the institution of prosecution against the person from whom the sample of article of food was taken and the person, if any, whose name, address and other particulars have been disclosed under S 14A, forward, in such manner as may be prescribed, a copy of the report of the result of analysis to such person or persons or as the case may be, informing such person or persons that if it is so desired, either or both of them may make an application to the court within a period of ten days from the date of receipt of the copy of the report to get the sample of the article of food kept by the Local (Health) Authority analysed by the Central Food Laboratory

(2-A) When an application is made to the court under sub-s (2), the court shall require the Local (Health) Authority to forward the part or parts of the sample kept by the said Authority and upon such requisition being made, the said Authority shall forward the part or parts of the sample to the court within a period of five days from the date of receipt of such requisition

(2-B) On receipt of the part or parts of sample from the Local (Health) Authority under sub-s (2-A), the court shall first ascertain that the mark and seal or fastening as provided in cl (b) of sub-s (1) of S 11 are intact and the signature or thumb impression, as the case may be, is not tampered with, and despatch the part or, as the case may be, one of the parts of the sample under its own seal to the Director of the Central Food Laboratory who shall thereupon send a certificate to the court in the prescribed form within one month from the date of receipt of the part of the sample specifying the result of the analysis

(2-C)

(2-D)

(2-E)

(3)

(4)

(5) "

In the instant case when copy of the Public Analyst's report was furnished to the revisionist he immediately applied for obtaining second bottle of the sample and to send it to the Central Food Laboratory for analysis The same was obtained by the Magistrate There is nothing on the record to warrant that S 13 (2-B) was complied with There is nothing to show that the court had ascertained that the mark and seal or fastening were intact and the signature or thumb mark was not tampered with The Food Inspector who appeared in the witness box frankly admitted that he was not present when the bottle was produced before the court and was sent to the Central Food Laboratory There is no note of the court anywhere to the effect that he had satisfied himself that the seals were intact and the signature or thumb mark was not tampered with Rule 4(3), P F A Rules, 1955, lays down

"4 (1) Samples of food for analysis whether under sub-s (2) of S 13 of the Act or under cl (A) of R 3 shall be sent either through a messenger or by registered post in a sealed packet, enclosed together with a memorandum in Form I in an outer cover addressed to the Director

(2)

(3) A copy of the memorandum and a specimen impression of the seal used to seal the container and the cover shall be sent separately by registered post to the Director"

7. There is not an iota of evidence on the record to show that the requirements of the aforesaid rule were complied with After a resume of several cases the Gujarat High Court held in the case of Harchand Gajpal v State ((1976) 1 F A C 15) that R 4 (3) is mandatory In Tezpur Municipal Board v Mohan Lal Tibrwal, ((1977) 2 F A C 167) (1977 Cri L J 1353) the Gauhati High Court held that where there is no material on the record of any kind whatsoever to show that a copy of the memorandum and a specimen impression of seal used to seal the container and the cover were sent separately as required by R 4 (3) it cannot be presumed that the rules were followed In such a case the accused was deprived of a valuable right conferred by S 13 (2), P F A Act and his conviction cannot be sustained.

8. In Gopinath Babu More v State of Maharashtra, ((1980) 1 F A C 112 (Bom) also it was held that sub-rr (3) and (4) of R 4 are mandatory and if they are not complied with the prosecution must fail

9. This question came up for consideration before a learned Single Judge of this Court also in Hirday Narain v State ((1980) 1 F A C 436 at p 439 (1980 Cri L J 240 at p 242) it was observed

"In R 4 of the P F A Rules a similar procedure has been provided when the sample of food is sent for analysis to the Director, Central Food Laboratory Under that rule also a sample is sent either through a messenger or by registered post in a sealed packet with an enclosed memorandum addressed to the Director Rule 4 sub-cl (3) also requires that a copy of the memorandum and specimen impression of the seal used to seal the container shall be sent separately by registered post to the Director"

It is thus clear that a double check has been placed by the legislature on the despatch of the containers of the samples A corresponding duty has been placed upon the Public Analyst as well as the Director, Central Food Laboratory to check up the seals of the sample bottles along with the specimen impression of the seal despatched separately to him This safeguard has been provided with the object of eliminating the chances of tampering of the sample during the course of transit Such a course appears to be extremely necessary because the report of the Public Analyst and or of the Director, Central Food Laboratory, can be used in evidence of the facts stated therein in any proceedings taken against the accused under the Act and he can be convicted thereon If R 18 of the P F A Rules is not strictly complied with, there could be no safeguard provided to the accused against tempering of the sample taken from him during the course of its transmission to the Public Analyst or the Director, Central Food Laboratory The comparison contemplated by R 7 and by R 4, Prevention of Food Adulteration Rules, becomes meaningful only when a copy of the memorandum and the specimen signature of the seal used for sealing the packet is separately despatched to the analysing authority In the instant case the report of the Director makes it clear that no sample seal was sent to him and he had no occasion to compare the seals on the container In this manner the mandatory provision of R 4 (3) of the Rules was not complied with It prejudiced the revisionist in as much as he could not get the benefit of S 13, P F A Act in the manner prescribed In his statement the Food Inspector gave out that he was not even present at the time the sample was sent to the Director, Central Food Laboratory and he could not say whether the court itself had done the comparison or not In such a case the accused had been denied the benefit contemplated by S 13 of the Act (and) his conviction cannot be sustained

10. The revision application is allowed and the revisionist's conviction under S 7/16, Prevention of Food Adulteration Act, and the sentence awarded thereunder are set aside The fine, if deposited, shall be refunded to him

Revision allowed

1981 ALL. L. J. 1096

M P MEHROTRA, J

Khushal Pal Singh, Petitioner v 3rd Additional District and Sessions Judge, Meerut and others, Respondents

Civil Misc Writ Petn No 9191 of 1980, D/- 24-8-1981

Civil P. C. (5 of 1908), S. 148, O. 41, R. 19 — Restoration of appeal on condition of payment of costs within stipulated time — Extention of time for making payment sought — Appellate Court has power to extend time.

Where the restoration of appeal was allowed on condition of payment of costs within stipulated time and the appellant filed the application for extension of time for payment of the costs before the Appellate Court on certain grounds, the Appellate Court could extend the time for the payment of the costs even though the period of 15 days had earlier elapsed It was open to the Appellate Court not to extend the time only if it felt that the reason given by the appellant was not adequate or sufficient AIR 1972 All 246 (F B) and AIR 1955 S C 425, Rel. on (Para 4)

Cases Referred : Chronological Paras

1972 All L J 169 AIR 1972 All 246 (F B) 4
AIR 1955 S C 425 5

Akshar Dev, for Petitioner

ORDER :— This petition arises out of the proceedings under the U P Imposition of Ceiling on Land Holdings Act

2. It is not necessary to state the facts in detail because the controversy is a short one In the ceiling proceedings, an appeal was filed but the same was dismissed in default on 7-4-1979 Thereafter, an application for restoration was made and the same was allowed on 13-5-1980 and a conditional order was passed whereby a direction was given that the earlier order dismissing the appeal in default would stand set aside in case a sum of Rs 50/- was paid within 15 days from the date of the said order The allegation of the petitioner is that the said application for restoration had been actually heard earlier in April, 1980 and the order had been reserved It is further his allegation that his counsel was not aware of the said order before 16-7-1980 and when on the said date, the counsel came to know of the said order, a letter was sent by the said counsel to the petitioner and after receiving the said letter, the petitioner turned up and moved the appellate court on 24-7-1980 for extension of time for paying the costs A true copy of the said application dated 24-7-1980 is Annexure 7 to the writ petition The said application was, however, rejected by the appellate court by its order dated 26-7-1980, a true copy whereof is Annexure 8 to the writ petition A certified copy of the said order is also on the record

3. Feeling aggrieved, the petitioner has now come up in the instant writ petition and in support thereof, I have heard Sri A D Prabhakar, learned counsel for the petitioner In opposition, the learned Standing Counsel has made his submissions

4. Sri Prabhakar contended that the appellate court was under a misconception of law in thinking that it had no jurisdiction to extend the time in a case where a conditional order had been passed He has placed reliance on the Full Bench decision of this Court reported in Govardhan Singh v Barsati (AIR 1972 All 246) (1972 All L J 169) In my view, this contention is correct The appellate court in the impugned order has said

"The order was self-contained and was conditional, since the condition was not fulfilled the application for restoration stood dismissed At this stage, therefore, it is not possible to modify the order The application is accordingly rejected "

It was open to the appellate court to extend the time for the payment of the costs even though the period of 15 days had earlier elapsed It was also open to the said court not to extend the time if it felt that the reason given by the petitioner was not adequate or sufficient The Court, however, was bound to consider the allegation which had been made by the petitioner in his application dated 24-7-80 and only thereafter, an order should have been passed This was not done

5. Accordingly, I allow this petition and quash the impugned order dated 26-7-1980 (Annexure 8) The case is sent back to the appellate court for a fresh decision on the application dated 24-7-1980 It will, of course, be for the said court to decide the controversy but I wish to emphasise that the law of this country favours an adjudication on merits after hearing both the parties The attention of the court is drawn to the observations made by the Supreme Court in Sangram Singh v Election Tribunal Kotah, (AIR 1955 S C 425) In the circumstances, there will be no order as to costs

Petition allowed

1981 ALL. L. J. 1097

N D OJHA, J

Rai Chand Chhajar, Petitioner v District Judge, Mirzapur, etc, Respondents.

Civil Misc Writ Petn No 9697 of 1979, D/- 20-8-1981

(A) Constitution of India, Art. 226 — U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Ss. 12, 16 — Order in application under of Prescribed Authority — Review of — Not permissible in absence of express power.

The Prescribed Authority while dealing with an application under S 16 read with S 12 exercises a quasi-judicial power It is settled law that power to review a judicial or quasi-judicial order is creature of statute and has to be specifically provided for In the absence of any such express power the Prescribed Authority cannot review his previous order and if he does so his order can be quashed under Art. 226 of the Constitution. (Para 7)

IY/JY/E166/81/AAJ

It could not be said that the Prescribed Authority had inherent jurisdiction to entertain an application for review No order passed by a judicial or quasi-judicial authority, can be reviewed under the so called inherent powers after reappraisal of the evidence on the basis of which the order sought to be reviewed was passed or even on the basis of additional evidence AIR 1966 All 26 Rel on (Para 8)

(B) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 21 — Landlord filing application for release of house, along with an affidavit — Tenant filing no counter-affidavit — Prescribed Authority dismissing application without accepting the uncontroverted statement made in Landlord's affidavit — Order held suffered from manifest error of law. AIR 1962 All 407, Rel. on. (Para 9)

Cases Referred :	Chronological Paras
AIR 1966 S C 641	7
AIR 1966 All 26	8
1962 All L J 495 AIR 1962 All 407	9

B D Madhyan, Narendra Mohan, for Petitioner, Sankatha Rai, for Respondents

ORDER :— Respondent 3, Smt Indira Devi, made an application before the Prescribed Authority, Mirzapur on 18-1-1977 for release under S 16 of U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the Act) in respect of a part of the accommodation in occupation of the petitioner on the ground that the said accommodation was deemed to be vacant under S 12 of the Act It was asserted by her that she needed the aforesaid accommodation for her own use An Inspector of the department was required to submit a report by the Prescribed Authority After a perusal of the report submitted by the Inspector, and the material placed by respondent 3, the Prescribed Authority dismissed the aforesaid application on 22-9-1977 Respondent 3 made an application on 29-9-1977 with a prayer that the order dated 22-9-1977 may be reviewed and the said accommodation may be released in her favour. This application was allowed by the Prescribed Authority on 21-6-1978 The petitioner made an application on 5-8-78 for setting aside the order dated 21-6-1978 on the ground that the said order had been passed behind the back of the petitioner without any notice being served on him. The said application was, however, dismissed by the Prescribed Authority on 7-2-1979 The petitioner filed a revision against that order which was dismissed by the District Judge Mirzapur on 27-11-1979 on the ground that it was not maintainable The orders dated 21-6-1978 and 7-8-1979 (7-2-1979?) passed by the Prescribed Authority and the order dated 27-11-1979 passed by the District Judge are sought to be quashed in the present writ petition

2. It has been urged by counsel for the petitioner that after purchasing the house in question respondent 3 made an application under S 21 of the Act for release of the said house in her favour on the ground that she needed it bona fide for her own use The said application was contested by the petitioner and was dismissed by the Prescribed Authority on 18-11-1974 An appeal preferred by respondent 3 against that order was dismissed on 26-2-1976 The aforesaid two orders were challenged in a writ petition before this Court which too was dismissed on 8-10-1976 It was only thereafter that the application dated 18-1-1977 was filed It has been pointed out that, respondent 3 suppressed in the application dated 18-1-1977, even though the said application had been made shortly after the dismissal of the writ petition in respect of the earlier proceedings under S 21 of the Act, the fact that an application under S 21 had been made by her as well as the orders passed on the said application Indeed, an effort was made by respondent 3 to bypass those orders It was also urged by counsel for the petitioner that, it is apparent from the copy of the release application filed as an annexure to the rejoinder affidavit and the orders passed thereon by the Prescribed Authority and the District Judge, that the said application had been made in respect of the entire house which was purchased by respondent 3 on 2-8-1971 and her need having been found not to be bona fide in those proceedings, the application for release made on 18-1-1977 was on the face of it, not maintainable, it not having been stated therein that some new facts have intervened after the dismissal of the release application under S 21 of the Act which made the need of respondent 3 bona fide notwithstanding the earlier orders

3. The next submission made by counsel for the petitioner was that the application dated 18-1-1977 having been dismissed on 22-9-1977, the review application filed on 29-9-1977 on which the impugned order dated 21-6-1978 was passed by the Prescribed Authority was not maintainable inasmuch as there was no provision authorising the

Prescribed Authority to entertain an application for review against an order such as was passed on 22-9-1977 Lastly, it was urged that even though the application made by the petitioner on 5-8-1978 for setting aside the order dated 21-6-1978 was accompanied with an affidavit and no counter affidavit was filed by respondent 3, the Prescribed Authority chose to still dismiss the said application on 7-2-1979 The order of the Prescribed Authority accordingly suffered from a manifest error of law and deserved to be quashed on this ground also

4. For respondent 3, it has been urged by her counsel that since neither the Prescribed Authority nor the District Judge had gone into the question as to what was the effect of the application under S 21 of the Act being dismissed, it was not open to the petitioner to challenge the impugned orders on the basis of the orders passed in proceedings under S 21 It was also urged by him that simply because no mention was made in the application dated 18-1-1977 about the orders passed on the application under S 21 of the Act, it could not be said that the petitioner had not come with clean hands Regarding the power of the Prescribed Authority to review its earlier order dated 22-9-1977, it was urged by counsel for respondent 3 that the said authority was entitled to entertain an application for review under its inherent powers In the alternative, it was urged that the application which was made by respondent 3 on 29-9-1977 was really treated by the Prescribed Authority as a second application for release and, as such, even if no power of review vested in the Prescribed Authority, the order passed by it on 21-6-1978 was within its jurisdiction In regard to the submission made by counsel for the petitioner that no counter affidavit had been filed by respondent 3 to the affidavit filed on behalf of the petitioner in support of the restoration application dated 5-8-1978, it was urged by counsel for respondent that no copy of the said affidavit appears to have been served on respondent 3 and, as such, no counter affidavit could be filed

5. Having heard counsel for the parties I am of opinion that the impugned orders cannot be sustained and deserve to be quashed Even if the orders passed in proceedings under S 21 of the Act are not taken into consideration and likewise the conduct of the petitioner in not mentioning those orders in her application dated 18-1-1977 is ignored, I am of opinion that the impugned orders cannot be sustained being without jurisdiction A copy of the application dated 18-1-1977 has been filed as annexure I to the writ petition This application purported to have been made under S 12 of the Act Not only that the provision under which the said application had been made was mentioned to be S 12 of the Act, even in the body of the application it was stated that the portion of the building in respect of which the application was made would be deemed to be vacant under the said S 12 As already pointed out above, an Inspector was required to submit a report and respondent 3 was permitted to produce evidence in support of her case that the portion of the building in respect of which the application had been made was to be treated as vacant and also in regard to her need being bona fide After taking into consideration the report of the Inspector and the evidence produced by respondent 3, the then Prescribed Authority dismissed the application dated 18-1-1977 by its order dated 22-9-1977 holding that respondent 3 had failed to establish either that the portion of the building in respect of which the application had been made was vacant or that her need was bona fide The submission made by counsel for respondent 3 that the said application was not dismissed on merits but was dismissed on the ground that for lack of evidence it was not possible to record any finding, cannot be accepted on a plain reading of the order dated 22-9-1977 In the said order the report of the Inspector has been considered and so has been considered whatever evidence respondent 3 chose to produce in support of her case The Prescribed Authority was of the view that respondent 3 had failed to produce any cogent evidence to substantiate her case The application was dismissed on this ground, as is apparent, not only from the tenor of the order but also from the operative portion thereof

6. The question which, therefore, arises for consideration is whether the application made by respondent 3 on 29-9-1977 for review of that order was maintainable Before adverting to the relevant provisions of law in this behalf I wish to deal with the submission made by counsel for respondent 3 in the alternative that the said application has been allowed by the Prescribed Authority not as a review application but as an independent second application for release This submission, in my opinion, cannot be accepted even on a plain reading of the order dated 21-6-1978 The Prescribed Authority has started by saying that the application

which was being disposed of by that order was application for review which had been filed before his predecessor in office At this place it may be mentioned that the order dated 22-9-1977 was passed by an officer other than the officer who passed the impugned order dated 21-6-1978 The application which was made by respondent 3 on 29-9-1977, a copy whereof has been filed as annexure 3 to the writ petition, also leads to the same conclusion that it was only an application for review and not a second application for release It appears from this application that the application dated 18-1-1977, made by respondent 3, had been numbered as case No 2 of 1977 The application dated 29-9-1977 was made in case No 2 of 1977, as is apparent not only from the heading of the application but also from the opening para thereof A perusal of the said application particularly of paras 1 and 3 thereof makes it abundantly clear that what the petitioner wanted was to have the order dated 22-9-1977 passed on her application dated 18-1-1977 reviewed on the basis of the same material, namely, the report of the Inspector and the evidence already produced by her Even the prayer in that application, in unequivocal terms, was to review the order dated 22-9-1977 and to allow the application for release For these reasons, it is difficult to accept the submission made by counsel for respondent 3 that the order dated 21-6-78 should be treated as an order not on review but on a fresh application for release The mere fact, that in the operative portion of the order dated 21-6-1978 it has not been specifically stated that the order dated 22-9-1977 is being reviewed, is in the circumstances pointed out above, of no consequence It is the substance which matters and not the form

7. That the Prescribed Authority while dealing with an application under S 16 read with S. 12 of the Act exercises a quasi judicial power admits of no doubt It is settled law that power to review a judicial or quasi judicial order is creature of Statute and has to be specifically provided for. In the absence of any such express power the Prescribed Authority cannot review his previous order and if he does so his order can be quashed under Art, 226 of the Constitution If authority were needed for this proposition a reference may be made to Harbhajan Singh v Karam Singh (AIR 1966 S C 641).

8. Coming to the provisions of the Act and the Rules framed thereunder it would be seen that in respect of an order dismissing an application for release under S 16 on the ground that the landlord had failed to establish that the accommodation in respect of which the release application had been made was vacant and that her need was bona fide, no provision for review has been made Section 34 of the Act and R 22 framed thereunder make certain provisions of the Code of Civil Procedure applicable to the proceedings under the Act and the District Magistrate, the Prescribed Authority or any appellate or revising authority for the purposes of holding an inquiry or hearing any appeal or revision under the Act are empowered to exercise the powers conferred by those provisions Order 47 Rule 1 which provides for review has not been included either in S 34 of the Act or in R 22 of the Rules Where a power of review was sought to be conferred, it has been specifically conferred, as is apparent from S 16(5)(a) of the Act which reads

"Where the landlord or any other person claiming to be lawful occupant of the building or any part thereof comprised in the allotment or release order satisfies the District Magistrate that such order was not made in accordance with cl (a) or cl (b), as the case may be, of sub-s (1), the District Magistrate may review the order"

Sub-section (5)(a) of S 16 has no application to this case That provision contemplates a review of an order of allotment or release at the instance of the landlord or any other person claiming to be lawful occupant of the building or any part thereof comprised in such order of allotment or release In the instant case the petitioner never wanted review of any order either of allotment or of release In this view of the matter the Prescribed Authority did not have any jurisdiction to entertain the application dated 29-9-1977 made by respondent 3 for review of the order dated 22-9-1977 The order dated 21-6-1978 passed on the said review application is accordingly without jurisdiction Coming to the submission made by counsel for respondent 3 that the Prescribed Authority had inherent jurisdiction to entertain an application for review, suffice it to point out that no order passed by a judicial or quasi judicial authority, can be reviewed under the so called inherent powers after reappraisal of the evidence on the basis of which the order sought to be reviewed was passed or even on the basis of additional evidence Reference in this connection may be made to the decision of a

Division Bench of this Court in Jagdish Prasad v District Board (AIR 1966 All 26, para 12)

9. In my opinion, there is substance even in this submission made by counsel for the petitioner that no counter-affidavit having been filed to the affidavit filed on behalf of the petitioner in support of his application dated 5-8-1978, the Prescribed Authority should have accepted the uncontroverted statement made in the said affidavit and the order dismissing the application dated 5-8-1978 suffered from a manifest error of law A Division Bench of this Court in Juggi Lal v R J Gupta (AIR 1962 All 407) (1962 All L J 495) held that where a Court had before it a duly sworn affidavit of the pairokar of the plaintiff in support of his application under O 9, R 9 for restoration of his suit dismissed for default of appearance and there was no counter-affidavit in traverse of the allegations contained in that affidavit, it was not open to the court to disbelieve the allegations of the plaintiff in the affidavit

10. The impugned order dated 7-2-1979 deserved to be quashed on this ground also However, the dismissal of the application made by the petitioner on 5-8-1978 by the Prescribed Authority on 7-2-1979 as also the dismissal of his revision by the District Judge on 27-11-1979 on the ground that the revision was not maintainable lose their significance once it is held that the impugned order dated 21-6-1978 passed by the Prescribed Authority itself was without jurisdiction

11. In the result, the writ petition succeeds and is allowed and the impugned orders dated 21-6-1978 and 7-2-1979 passed by the Prescribed Authority are quashed In so far as the order dated 27-11-1979 passed by the District Judge dismissing the revision on the ground that it was not maintainable is concerned, it is not necessary to quash the same in as much as, as already pointed out above, it loses its significance in view of the order dated 21-6-1978 passed by the Prescribed Authority having itself been quashed The petitioner will be entitled to his costs from respondent 3

Petition allowed

1981 ALL. L. J. 1101

M M GUPTA, J

Manohar Lal Mangal, Appellant v Samanta and others, Respondents

Criminal Appeal No 1535 of 1977, D/- 27-7-1981

Penal Code (45 of 1860), S. 441 — "In the possession of another" — Execution of eviction decree — Tenants (accused) evicted — Possession delivered to landlady (complainant) — Some days thereafter, accused taking unauthorised possession of courtyard — They would be criminal trespassers.

Where in pursuance of execution of decree of eviction of tenants (accused) delivery of possession was given to landlady (complainant), of the tenanted premises consisting of shop and room, but some days thereafter at some odd hour of the night the accused took unauthorised possession of the courtyard over which the tenants had no tenancy rights, in not withdrawing from the courtyard even after receipt of notice from complainant, the accused would become criminal trespassers within the meaning of S 441 (Para 8)

J C Gupta and Keshav Sahai, for Appellant, Addl Govt Advocate and S P Dixit, for Respondents

JUDGMENT :— This appeal has been filed by the complainant Manohar Lal Mangal against the acquittal of the respondent under S 447, I P C

2. Respondent Samanta is the husband of Smt Narain respondent 2 and respondents 3 and 4 respectively Balbir and Jasram are their sons

3. According to the complaint filed by Manohar Lal Mangal, appellant, his wife Smt Radharani owns a property in Civil Lines, Mathura It includes two shops on the road side and a room on the back of it There is also an open space like an Angan enclosed by walls on all sides Out of the two shops one shop and the room behind it were in the tenancy of Samanta The Rasta of the room was through the Angan which was in the possession of Smt. Radharani Smt Radharani obtained a decree for eviction of Samanta from the shop and the room in suit

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No 392 of 1972 on 26-3-1974 The Dakhaldihani in pursuance of that decree took place on 5-4-1974 through a lawyer Commissioner At the time when the Commissioner went to deliver the possession Samanta and other respondents tried to pick up a quarrel with the complainant and indulged in the marpit and a report in that connection was also lodged at the police station On the 18th April 1974 at some odd hour of the night the respondents took unauthorised possession of the Angan On 19th April 1974 on coming to know of the trespass a report was also lodged at the Police Station in that connection Thereafter a registered notice was given to the respondents Out of those notices Balbir and Smt Naraini refused to accept them On behalf of the respondents reply to the notices was also given by a lawyer Since the respondents had committed a criminal trespass a complaint was filed on 11th May 1974

4. Respondent Samanta admitted that he was the tenant of Smt Radharani He also admitted that a decree for eviction was passed against him and the Dakhaldihani was given against him on 5-4-1974 He denied that he committed any criminal trespass on the Angan in question He claimed that he is not in possession over that portion of the property from which he was evicted The other respondents Balbir and Jasram claimed that they were made accused as they were the sons of respondent Samanta Smt Naraini also claimed that she was made an accused because she was the wife of respondent Samanta.

5. The prosecution in support of its case examined Ram Krishna Chaturvedi The other witnesses of fact examined are Manohar Lal Mangal complainant himself as P W 5, Harindar Kumar P W 1, and P W 3 Ramesh Chandra Gautam P W 4 S P Chaturvedi is a formal witness

6. The learned Special Judicial Magistrate who decided the case came to the conclusion that the Dakhaldihani in this case was obtained only over the shop and the room in the tenancy of the respondent Samanta but no possession was delivered over the Angan In such circumstances he held that it was not a case of criminal trespass and as such the respondents were entitled to acquittal

7. The learned counsel for the appellant has contented that the findings of the learned Special Judicial Magistrate were perverse

8. It is not disputed that Smt Radharani had obtained a decree for eviction against respondent Samanta The decree describes the property from which the respondent Samanta was to be evicted as "Ek Dukan, Ek Kamara Jo 10 Civil Line Mathura Mein Hai" The decree was executed by Sri Ram Krishna Chaturvedi P W 2 who went to deliver the possession His report is also on the record Sri Ram Krishna Chaturvedi P W 2 deposes that he had delivered possession of the property to Smt Radharani in accordance with the terms of the aforementioned decree He has stated

"Yeh Dakhal Maine Ek Dukan Va Ek Kamre Ka Vadim Radharani Ko Dilaya · Isi Mein Se Sab Saman Nikalwaya"

He further states

"Kamara Ke Bad Ek Angan Khuli Jagah Hai Jiska Ghera Bana Hua Hai Uske Poorab Mein Gali Hai Saman Samanta Ka Jo Kamara, Dalan, Va Angan Mein Tha Sab Nikal Diya Tha Koee Bhi Baki Nahin Chhora Gaya Tha Aur Sare Saman Ki Pheharist Banai Gayee Thi"

After some resistence by the judgment Debtor or his sons, his son after some time took possession over the movables taken out from the decretal property He has reasserted in cross-examination, "Jisme Angan Sammilit Tha" The learned Special Judicial Magistrate has not relied on the testimony of Ram Krishna Chaturvedi when he stated that he had delivered possession over the Angan also on account of the fact that it was not mentioned in the Dakhaldihani or the decree that the respondent was to be evicted from the Angan. That may be true but the respondent Samanta or any other respondent does not claim that they were also tenants of the Angan They do not claim any right in the Angan There was, therefore, no question of their eviction from the Angan Even if it be presumed that they were in possession of the Angan along with the room or the shop they could not remain in its possession after the decree for their eviction was executed against them Thus, they had no right in the Angan whatsoever They had neither the tenancy rights in the Angan nor any other right in it Even if it be assumed that they were not evicted from the Angan but they had no right in the Angan, they would become criminal trespassers within the meaning of S 441

para (2) after they failed to withdraw from the land after the receipt of the notice to vacate it as provided under S 441 I P C It is not disputed that the notice was not given and its reply was received by Smt Radharani In such circumstances the learned Special Judicial Magistrate committed illegality by not holding that it was a case of criminal trespass On the facts and merits of the case the view taken by the learned Special Judicial Magistrate could not be taken

9. The offence of criminal trespass in this case was clearly made out under S 447, I P C All the respondents were guilty of it The order of their acquittal is therefore set aside In the circumstances of the case proper sentence against the respondents should be a fine of Rs 50/- (Rupees fifty) against each one of them In default of payment of fine they shall undergo rigorous imprisonment for three weeks

10. The appeal is, therefore, allowed The order of acquittal of the respondents is hereby set aside Each one of the respondents is convicted under S 447, I P C., and each one of them is sentenced to pay a fine of rupees fifty (Rs 50-00) In default of payment of fine they shall undergo rigorous imprisonment for three weeks

Appeal allowed

1981 ALL. L. J. 1103

M P MEHROTRA, J

Sudarshan Singh, Petitioner v State of U P and others, Respondents

Civil Misc Writ Petn No 9423 of 1980, D/- 14-8-1981.

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), Ss. 4(ii), Explns., 4A — Interpretation — Legislative intention. (Interpretation of Statutes).

It would be against the legislative intention incorporated in S 4 with S 4A to say that if the land produced more than one crop, then it should be treated as unirrigated land and the multiple of 2½ times should be applied

(Para 3)

The broad legislative intention in S 4(ii) was that the lands which were capable of producing two crops in an agricultural year in consequence on assured irrigation from any State Irrigation Work or Private Irrigation Work should be treated as irrigated lands and not as unirrigated land. A special facility was given in respect of the areas detailed in S 4(ii) in respect of which a special category was improvised and described as "single crop land" In such areas because of the lack of fertility, only one crop was capable of being produced in an agricultural year and, therefore, multiple of 1½ times applied If the land was not capable of producing even one crop in the year, then it would be unirrigated land in such areas for which the multiple of 2½ times would be applicable

(Para 3)

D P S Chauhan, for Petitioner, Standing Counsel, for Respondents

ORDER :— This petition arises out of the proceedings under the U P Imposition of Ceiling on Land Holdings Act The controversy is a short one Some land was treated as single crop land by the Prescribed Authority and thereafter the appellate Court has also affirmed the said finding

2. Now the tenure holder has come up in the instant petition and in support thereof, I have heard Sri D P S Chauhan, learned counsel for the petitioner. In opposition, the learned Standing Counsel has made his submissions

3. Shri Chauhan made a very interesting point and on the strict phraseology used in the Explanation to S 4 one may find some merit also in the contention of the learned counsel for the petitioner He contended that the Explanation to S 4 lays down that the expression 'single crop land' will mean only such unirrigated land which is capable of growing one crop in an agricultural year in consequence of assured irrigation from any State Irrigation Work or private irrigation work. He contends that if the land is capable of producing more than one crop, then on the language of the provisions, it will have to be treated unirrigated and not a single crop land and the higher multiple of 2½ times has to be applied to such lands as laid down in S 4(ii) He placed before me the finding recorded by the appellate court and particularly underlined the sentence "In view of the above facts it is immaterial that whether the appellant had raised single or the double crops on the land in question." In my view, in these circumstances one has not

to go merely by the strict literal interpretation One has to find out the real legislative intention enshrined in the said provision Obviously the legislative intention could not be that a higher multiple of unirrigated land to irrigated land should be applicable to lands which grew two crops than to a piece of land which grew only one crop in an agricultural year The broad legislative intention was that the lands which were capable of producing two crops in an agricultural year in consequence of assured irrigation from any State Irrigation Work or Private Irigation Work should be treated as irrigated lands and not as unirrigated land A special facility was given in respect of the areas detailed in S 4(n) in respect of which a special category was improvised and described as "single crop land" In such areas because of the lack of fertility, only one crop was capable of being produced in an agricultural year and, therefore, multiple of 1½ times was applied If the land was not capable of producing even one crop in the year, then it would be unirrigated land in such areas for which the multiple of 2½ times would be applicable The argument that if the land produced more than one crop, then it should be treated as unirrigated land and the multiple of 2½ times should be applied would be against the legislative intention, which is incorporated in S 4 with S 4A of the Act

4. This petition accordingly fails and is dismissed, but there will be no order as to costs

Petition dismissed

1981 ALL. L. J. 1104

M P MEHROTRA, J

Swami Pratap Singh, Petitioner v State of U P and another, Respondents

Civil Misc Writ Petn No 6742 of 1980, D/- 13-8-1981

Constitution of India, Art. 226 - Limitation Act (1963), S. 5 — Dismissal of appeal on ground of default — Application for restoration along with application for condonation of delay — Sufficient cause whether shown or not raised no jurisdictional controversy — Rejection of application without accepting explanation for condonation of delay — High Court could interfere in writ petition with order of dismissal of application. (Case law discussed). (Paras 4, 5)

Cases Referred . Chronological Paras

1981 All L J 704 AIR 1981 S C 1400 5
(1981) Civil Misc Writ Petn No 9357 of 1980, D/- 13-8-1981 (All) Yogendra Singh v District Judge 5
1979 All L J 70 1979 All W C 26 4
1979 All W C 437 4
AIR 1964 S C 1336 4, 5
1962 All L J 495 AIR 1962 All 407 4
AIR 1962 All 439 4
AIR 1950 F C 131 5, 6

B P Singh, for Petitioner, Standing Counsel, for Respondents

ORDER — This petition arises out of the proceedings under the U P Imposition of Ceiling on Land Holdings Act

2 It is not necessary to state the facts in any detail because the controversy is a very short one It seems that the objections under S 10 (2) of the Act of the petitioner and the objections filed by his brother Pramod Kumar Singh under the same section were dismissed in default and applications were made by the two brothers separately for the restoration of their cases It seems that the Prescribed Authority dismissed both these applications and thereafter, the two brothers filed the separate appeals The appeal of Pramod Kumar Singh was allowed by the appellate court and the order of the Prescribed Authority was set aside However, the appeal of the petitioner was dismissed on 11th July, 1977 and the dismissal was in default because no one was present to press the appeal Thereafter, the petitioner moved an application on 31-1-1978 for restoration along with an application for condoning the delay in the filing of the restoration application The application was obviously made under S 5 of the Limitation Act The said application was dismissed by the appellate court by the impugned order dated 3-5-1980

3. Feeling aggrieved, the petitioner has now come up in the instant writ petition and in support thereof, I have heard Sri B P Singh, the learned counsel for the petitioner and in opposition the learned Standing Counsel has made his submissions

4. The learned counsel for the petitioner contended that on the authority of the two pronouncements of this Court reported in Jugglal Kamla Pat v Ram Janki Gupta, (AIR

1962 All 407), and the other also reported in this very volume, Himanshu Dhar Singh v Addl Registrar Co-operative societies U P (AIR 1962 All 439), it should be held that when the averments made in the affidavit have not been controverted by a counter-affidavit, then normally such averments should be accepted as true The learned counsel further placed reliance on Tribhuwan Duttar v Civil Judge (1979 All W C 26) (1979 All L J 70), where a learned Judge of this Court has discussed the expression 'sufficient cause' under S 5 of the Lim Act Lastly, reliance was placed on the pronouncement of this Court in Jamuna Narain Verma v District Judge (1979 All W C 437) I have considered this case law but in my view no interference is possible in the instant petition It should be seen that the Supreme Court in Manindra Land & Building Corporation Ltd v Bhutnath Banerjee, (AIR 1964 S C 1336) clearly laid down that 'sufficiency of cause' under S 5 of the Lim Act, in contrast to S 3 of the Lim Act, raises no jurisdictional controversy and it is open to the authorities deciding an application under S 5 of the Lim Act as to whether sufficient cause has been made out or not, to decide the same rightly or wrongly In such a finding no interference is called for in the revisional jurisdiction of the High Court It should be seen that in the instant case, the appellate court has given reasons why the petitioner's version was not acceptable and the learned counsel merely stated that Pramod Kumar Singh's inability to appear has been explained in the writ petition itself Such inability was admittedly not explained in the affidavit filed in support of the application under S 5 of the Lim Act It has seemed to me that the case law, on which reliance has been placed, is not applicable to the facts of the instant case There is no gainsaying that sufficiency of cause is incapable of being rigidly defined and that will depend upon the facts of each case The two Allahabad decisions reported in AIR 1962 All (Supra) were made in regular appeals where the evidence was being considered .The learned single Judge, who considered the expression 'sufficiency of cause' in 1979 All W C 26 (1979 All L J 70), did so in the context of the facts of that case I do not think that it was the intention of the learned Judge to lay down any general standard which would be applicable to the facts of each case In the last decision it was found that the affidavit was rejected without any reason being given whatsoever In the instant case, the appellate court has given clear reasons why the version of the petitioner was not being accepted As I have said above, the Supreme Court has clearly laid down that irrespective of the fact whether the said finding should be held correct or incorrect on the appraisal of the evidence on record, this Court should not, on its revisional side (which is akin to the jurisdiction under Art 226 of the Constitution), interfere in such a finding

5. The learned counsel for the petitioner has also invited my attention to Rafiq v Munshilal (AIR 1981 S C 1400) (1981 All L J 704) and to Mst Jamna Kuer v Lal Bahadur, (AIR 1950 F C 131) So far as the first case is concerned I have distinguished the same in Civil Misc Writ Petn No 9357 of 1980 Yogendra Singh v District Judge which I have decided today Therein I observed as follows —

"It should be seen that the Supreme Court was dealing with the matter in an appeal Further, it should be seen that the order dismissing the appeal in default was passed by the High Court and the following observation in this connection may be seen

'Therefore, the party having done every thing in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to enquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the Advocate that the latter appears in the matter when it is listed'

In the instant case, the appeal was not pending in the High Court, the appeal was before the lower appellate court and it is a normal practice that in the lower appellate court the parties or their Pairokars are generally present _____ _ _The word 'listed' has been used in the aforesaid extract from the judgment of the Supreme Court In the Courts below there is no question of listing of an appeal Further, it should be seen that I am not sitting in an appeal It is an extraordinary jurisdiction which I am exercising under Art 226 of the Constitution of India, and in view of the law laid down by the Supreme Court in Manindra Land & Building Corporation Ltd v Bhutnath Banerjee. (AIR 1964 S C 1336), I think in these matters no interference is called for if the appellate court held that there was not sufficient reason for setting aside the order dismissing the appeal in default. No question of jurisdiction is involved in such matter Even if a different view was to

be taken from the one which was taken by the appellate court. I do not have the jurisdiction to interfere

6. So far as the Federal Court's decision is concerned, it should be seen that the matter was dealt with in the context of the review petition and it was held that there was a mistake apparent on the face of the record in respect of certain properties I do not think that this case has anything to do with a decision rendered by the appellate court while disposing of an application under S 5 of the Lim Act holding that the cause shown is not sufficient

7. This petition is accordingly dismissed but there will be no order as to costs

Petition dismissed

1981 ALL. L J. 1106

M P MEHROTRA, J

State of U P. Petitioner v 5th Addl District Judge and another, Respondents

Civil Misc Writ Petn No 8062 of 1980. D/- 6-7-1981

(A) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 3 (8) (as substituted by Act 18 of 1973) — Nature of lands — Determination by Appellate Court — Certain plots held to be grove on ground that trees planted thereon when fully grown would preclude land of said plots to be used primarily for any other purpose — Finding of fact — Cannot be questioned in writ petition — (Constitution of India, Art. 226). 1979 All L J 195, Foll. (Para 5)

(B) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 3 (8) (as substituted by Act 18 of 1973) — Grove land — Old grove existed before 24-1-1971 — Trees thereof, cut after 24-1-1971 — Replantation afterwards — Land is not grove land. 1979 All L J 311, Foll. 1978 All L J 124, Disting. (Paras 6, 7)

Cases Referred :	Chronological	Paras
1979 All L J 195		5
1979 All L J 311		6
1978 All L J 124		6

S N Gupta, for Petitioner; S N Verma, for Respondents

JW/JY/E232A/81/HS

ORDER :— This petition by the State arises out of the proceedings under the U P Imposition of Ceiling on Land Holdings Act, 1960

2. The facts, in brief, are these The opposite party No 2 Rang Bahadur was issued the notice under S 10 (2) of the Act and he filed objections They were decided by the Prescribed Authority, a true copy of whose order is Annexure 2 to the petition Thereafter, an appeal was filed and the same was initially dismissed by the appellate court by its judgment dated 27-4-1977 However, the tenure-holder came up in writ petition in this Court and the same was allowed and the appeal was sent back to the appellate court for a fresh decision The appeal, after remand, was heard by the appellate court and the same was allowed by the said Court by its judgment dated 7-5-1980, a true copy whereof is Annexure 9 to the petition The certified copy of the appellate court's judgment is also on the record

3. Now the State has come up in the instant writ petition and in support thereof, and in opposition, I have heard the learned counsel for the parties

4. The controversy is about certain land which was treated as grove by the appellate court The learned Standing Counsel contends that the plots in question should not have been treated as grove but should have been treated as irrigated land The appellate court dealt with the controversy in two parts Certain plots were held to be grove on the ground that the trees planted thereon, when fully grown, would preclude the land of the said plots or any considerable portion thereof to be used primarily for any other purpose The appellate court observed

"Thus the four plots cannot be taken to be irrigated land Rather these plots come within the definition of grove land The area recorded in the name of Rang Bahadur of these plots is 7 bighas 9 biswas and if for the purposes of ceiling it is converted into irrigated area, the appellant tenure-holder will get a benefit of an area of 4 Bighas 9 biswas 8 Biswansis which shall be excluded from his holding"

5. In my view, the learned Standing Counsel is not right in attacking the said finding of the appellate court The said finding is substantially a finding of fact and the learned counsel for the opposite Party No. 2 has placed reliance on my decision

reported in Ram Phal Singh v 4th Addl District Judge (1979 A L J 195) for contending that such a finding of fact cannot be questioned in a writ petition In my view this contention is correct

6 The appellate court dealt with certain other plots mentioned in para 11 of the appellate court's judgment and held that an old grove had existed on the land of the said plots, but the trees were cut by the tenure-holder after 24-1-1971 and fresh trees were planted thereon after obtaining the permission of the Gram Samaj concerned The appellate court observed

"Thus these trees no doubt have been planted after 24-1-1971 but if such a technical interpretation is given, it will create hardship to the tenure-holder"

In my view, the appellate court was wrong in the said interpretation The definition of grove in S 3(8) is clear and it is not permissible to a court to go in for the so-called equitable interpretation This specific controversy was examined and decided by my decision in Smt Jagwati Devi v State of U P (1979 A L J 311) In the said decision I observed (at p 312)

"If the old grove ceases to be a grove in view of the fact that old trees are felled and the land is converted into cultivatory land after 24th Jan 1971, then, in my opinion if new trees are planted in the place of the old trees and even if such new trees when fully grown will preclude the land or considerable portion thereof from being used primarily for any other purpose, still, in view of the fact that the new trees have been planted after 24th Jan 1971, the land cannot be treated as grove land in view of the aforesaid definition in the Ceiling Act The legislative injunction is that before a land can be treated as a grove land under the Ceiling law, the trees thereon must have been planted before Jan 24, 1971 The fact that there was an old grove on the said date and thereafter the grove was converted into cultivatory land on which fresh trees in the place of felled trees were planted, will not entitle the tenure-holder to claim that the plot should be treated as grove land under the said definition"

The learned counsel contended that there was a difference of opinion between the learned Judges of this Court inasmuch as N D Ojha, J in Sri Gajraj Pal Upadhya v State (1978 A L J 124) took a view contrary to the aforesaid view of mine In my view, this contention is not correct The said learned Judge laid down that the controversy as to whether certain land constituted a grove or not, would ordinarily be decided in view of the position on the relevant date, i e 8-6-1973 However, S 29 of the Act changed the position as a redetermination will have to be made if the ingredients of S 29 of the Act are present in a case That controversy has nothing to do with the controversy at hand, which is as to whether if there was an old grove before 24-1-1971 and the trees thereof are cut after 24-1-1971 and re-plantation takes place then can such land be treated as grove in the ceiling law

7. Accordingly, I partly allow this petition and quash the appellate judgment to the extent that in the same 9 plots mentioned in para 11 thereof measuring 8 Bighas 5 Biswas 11 Biswansis have been treated as grove The said plots shall not be treated as grove However, the learned counsel for the respondent No 2 is right in contending that the further controversy will still remain as to whether the said plots should be treated as irrigated or unirrigated, and the case is sent back to the appellate court for deciding the said controversy as to whether the said 9 plots measuring 8 Bighas 5 Biswas 11 Biswansis should be treated as irrigated or unirrigated land The surplus land shall be redetermined after deciding the said controversy in the case In the circumstances, there will be no order as to costs

Order accordingly

1981 ALL. L J 1107

(LUCKNOW BENCH)

T S MISRA, AND S C MATHUR JJ

M/s Kamlapat Moti Lal, Appellant v State of Uttar Pradesh and others, Respondents

First Appeal No 23 of 1969 D - 11-3-1981 *

(A) U P Sugarcane Cess Act (22 of 1956), Ss. 3, 10 — Recovery of cess — Assessment of cess is not condition precedent to recovery of cess

*Against judgment and decree of S A Abbasi, Addl Civil J Farrukhabad, D - 30-9-1968

IY IY/E74/81/VNP

The Cess Act and the Rules framed thereunder do not, require the Assessing Officer to make a formal order of assessment and then to proceed to collect the cess AIR 1979 S C 537, Rel on (Para 6)

(B) U. P. Sugarcane Cess Act (22 of 1956), S. 3 (as validated by Central Act (4 of 1961)) — Scope — Liability to cess arises prior to 3-2-1961 — Assessment made and cess imposed after 3-2-1961 due to failure of assessee to file return etc. in due time — Recovery of cess can be made under S. 3.

Section 3 was struck down by Supreme Court Subsequently it was validated by Central Act (4 of 1961) By virtue of validation Act the cess imposed, assessed or purported to have been assessed under Act before 3-2-1961 was validated Thus where the assessee though liable, failed to file his returns of cess and to deposit cess for a period 1-12-1960 to 2-2-1961 before 3-2-1961 and it was only on order of the Collector, passed after 3-2-1961, the assessee filed the returns, and State Government initiated recovery proceeding in 1967

Held, that the liability of assessee arose prior to 3-2-1961, therefore, it could not be said that the recovery of cess for abovesaid period could not be effected under validated S 3 after 3-2-1961 (Para 7)

Cases Referred :	Chronological	Paras
AIR 1979 S C 537		6
AIR 1961 S C 652		2

S K Srivastava, for Appellant, Chief Standing Counsel, for Respondents

T. S. MISRA, J. :— This appeal is directed against the judgement and decree dated 30-9-1969 passed by the Additional Civil Judge, Faizabad, in regular suit No 29 of 1969, whereby the suit was dismissed with costs. The plaintiff-appellant had filed the suit for a permanent injunction to restrain the defendants, respondents from realising and collecting a sum of Rs 2,63,684 92 P towards cane cess from the plaintiff

2. The plaintiff carries on business of manufacture and sale of sugar under the name and style of Kamlapat Moti Lal (Sugar Mills) at Moti Nagar district Faizabad It is not in dispute that the U P. Government had imposed cess not exceeding 4 annas per maund on the entry of sugarcane into the premises of a factory under the provisions of the U P. Sugarcane Cess Act, 1956, in short, the Cess Act In the case of Diamond Sugar Mills Ltd v State of Uttar Pradesh (AIR 1961 S C 652) the vires of the Cess Act was challenged and the Supreme Court struck down S 3 of the said Act which empowered the Governor to impose a cess on the entry of sugarcane into the premises of a sugar factory on the ground that it did not fall within Entry 52 of the State List The Central Government then promulgated an ordinance known as U P Sugar Cane Cess Validation Ordinance 1961, dated 31-1-1961 That Ordinance was replaced by U P Sugar Cane Cess (Validation) Act, 1961, passed by the Parliament By virtue of S 3 of the U P Sugar Cane Cess Validation Act, 1961, (hereinafter called the Validation Act) the command under which the cess would be deemed to have been imposed or recovered would be the command of the Parliament The validity of the Validation Act was also challenged but the Supreme Court has held the Validation Act valid

3. The plaintiff did not submit any returns of cess for the period 1-12-1960 to 2-2-1961 It is stated by the plaintiff in the plaint that the Collector, Faizabad, by his letter dated 1-3-1961, asked the plaintiff to file returns with respect to the said period and the same were submitted by the plaintiff on 11-3-1961 A demand for a sum of Rs 2,63,684 92 P on account of cane cess for the period 1-12-1960 to 2-2-1961 was accordingly raised and the plaintiff was called upon to pay the same The plaintiff then filed the suit which has given rise to this appeal asking for an injunction to restrain the defendants from realising the said amount as cane cess, on the ground inter alia that as the plaintiff had not submitted the returns for the period in question, there could be no assessment for that period by the assessing authority after 3-2-1961 and in the absence of an assessment order no recovery of any amount could be made In other words, the plaintiff had asserted that no cess could be realised which was not assessed before 3-2-1961 The defendants resisted the suit and disputed the aforsaid assertion made by the plaintiff The trial court repelling the contentions of the plaintiff dismissed the suit Aggrieved, the plaintiff has filed the instant appeal

4. The appellant urged that despite the Validation Act it was essential under the U P Sugarcane Cess Act to make an assessment of cess and unless it was done no recovery could be made with respect to any cess from the plaintiff pertaining to the period in

question The other point urged on behalf of the appellant was that under the Validation Act a datum line as 3-2-1961 has been fixed, hence not only the imposition of the cess but also the assessment thereof should have been made before 3-2-1961 and as no action was taken by the respondents to assess the cess with respect to the aforesaid period 1-12-1960 to 2-2-1961, at any time before 3-2-1961 the action taken in the year 1967 was illegal and no cess could be demanded from the plaintiff The third point urged was that the returns filed by the plaintiff on 11-3-1961 were not the returns in the eye of law because they were filed in compliance of the order of the District Magistrate, Faizabad and also because they were not accompanied by any treasury receipts showing payment of cess with respect to the period in question The fourth point urged on behalf of the appellant was that the assessment of cess was necessary because both the cess Act and the Validation Act are declaratory and not executory in nature and there could be no automatic assessment or imposition of cess It was submitted that the rules framed under the Cess Act make a provision for appeal which, according to the argument of the learned counsel for the appellant, was a clear pointer to the fact that the Cess and the Validation Act were declaratory and not executory No other point was urged or pressed on behalf of the appellant We shall now proceed to consider the points raised before us

5. The first and the fourth point urged by the learned counsel for the appellant may be taken up together As pointed out earlier the contention is that under the Cess Act and the rules framed thereunder it is necessary that before a demand is made there should be an assessment order assessing the Cess, and unless an assessment is made no recovery could be effected In order to appreciate this contention it would be appropriate to refer to the provisions of the Cess Act and the rules framed thereunder

6. Under S 3 of the Cess Act, 1956, the State Government may by notification in the Official Gazette impose a cess not exceeding four annas per maund on the entry of the cane into the premises of a factory for use, consumption or sale therein Sub-section (2) of S 3 provides that the cess imposed under sub-s (1) shall be payable by the owner of the factory and shall be paid on such date and at such place as may be prescribed Under sub-s (5) if any person is in default of payment of the cess the officer or authority empowered to collect the cess may direct that in addition to the amount of the arrears and interest a sum not exceeding 10 per cent thereof shall by way of penalty be recovered from the person liable to pay the cess Section 10 empowers the State Government to make rules for carrying out the provisions of the Act In exercise of that power the State Government framed rules called U P Sugarcane Cess Rules, 1956 Rule 3 requires the owner of a factory to maintain a correct account day to day in Form I or Form I-A as the case may be, of the cane which enters the premises of the Factory. Rule 4 requires that the amount due as cess on the quantity of sugarcane which enters the premises of a factory for use, consumption or sale therein during the first fortnight of each calendar month shall be deposited by the owner of the factory in the Government treasury by the twenty-second day of that month and the amount of cess similarly due for the remainder of that month shall be deposited in the Government treasury before the seventh day of the next following month Rule 5 requires the owner of a factory to submit to the Assessing Officer before the twenty-fifth day of each calendar month a return in Form II or Form II-A, as the case may be showing the quantity of cane that entered the premises of a factory during the first fortnight of that month and the amount of cess due under the Act and deposited by him under R 4 in respect of that cane together with the treasury receipt indicating the deposit A return is also required to be submitted in respect of the remainder of the calendar month before the tenth day of the next following month Sub-para (2) of R 5 requires the owner of a factory to send before the respective dates mentioned in sub-r (1), a copy of the relevant return referred to in that sub-rule to the Cane Commissioner and another copy to such other officer as the Cane Commissioner may specify in writing Under R 6 the Assessing Officer, on receipt of the returns submitted under R 5(1), is to ascertain that the amount of cess has been correctly stated in the return If the Assessing Officer finds that the cess has not been correctly stated in the return he shall, after giving the owner of the factory an opportunity to be heard, determine the correct amount of cess and inform the owner of such amount On receipt of the assessment report from the Assessing Officer the owner is required to deposit within a period of one week the balance amount, if any, in the treasury and inform the Assessing Officer. Sub-rule (4) of

Rule 6 provides for an appeal against the order of the Assessing Officer made under sub-r 12) of R 6 A revision may also be filed against the order of the Sub-Divisional Magistrate made under sub-r (4) Then before 15th day of the calendar month the Assessing Officer shall send to the Collecting Officer a statement in Form III showing the name of factory, the amount of cane cess due paid and the balance if any, remaining unpaid in respect of the month immediately preceding Rule 8 deals with imposition of penalty Rule 9 provides for giving of notice by the Collecting Officer to the owner of the factory demanding in Form IV within the specified period the arrears of cess with interest thereon and the amount of penalty if any Sub-section (2) of S 3 of the Cess Act makes it obligatory for the owner of the factory to pay the cess and R 3 aforesaid enjoins the owner of the factory to maintain a correct account in the prescribed form of the cane which enters the premises of the factory The amount due as cess on the quantity of the Sugarcane which enters the premises of a factory is required to be deposited by the owner of the factory under R 4 of the Rules That amount should be deposited by him in the Government treasury Under R 5 the owner of the factory is to submit a return showing the quantity of cane that entered the premises of the factory and the amount of cess due under the Act and deposited by the owner under R 4 in respect of that case The owner of the factory is also required to send the treasury receipt indicating that deposit The Assessing Officer who is an officer appointed by the State Government under sub-s (4) of S 3 of the Cess Act for the assessment of cess has then to find out whether the amount of cess mentioned in the return has been correctly stated therein and if he finds that the cess has not been correctly stated he shall give notice to the owner of the factory and after hearing him determine the correct amount of cess and inform of that amount of cess which the owner must deposit within the period stipulated The duty of the Assessing Officer therefore is to scrutinize the return submitted by the owner of the factory and to check whether the amount of cess mentioned in the return is correct or incorrect. He has to check the amount of cess deposited by the owner of the factory The assessing officer therefore has to see that the full amount of the cess has been credited in the treasury If he finds that discrepancies be, it is his duty to give a notice to the owner of the factory and after hearing him determine the correct amount The cess Act and the Rules do not therefore require the Assessing Officer to make a formal order of assessment and then to collect the cess Sub-rule (2) of Rule 6 relates to the quantity of the cane which has entered the factory premises and the amount of cess deposited in respect of it It is for this purpose that the return provides the details to be submitted by the owner of the factory and a duty is cast on the owner of the factory to deposit the cess leviable on the total quantity of the cane and to send receipt evidencing the deposit to the Collector The Cess Act and the Rules do not, therefore, require the Assessing Officer to make a formal order of assessment and then to proceed to collect the Cess In the view we take we find support from a decision of the Supreme Court in Bhopal Sugar Industries Ltd v State of Madhya Pradesh (AIR 1979 S C 537) The points 1 and 4 referred hereinabove lacking merits are therefore repelled

7 The next point urged by the learned counsel was that the Validating Act validates all actions taken before 3-2-1961 and therefore any action taken after 3-2-1961 demanding arrears of cess for the period in question was illegal We see no merit in this contention as well Section 3(1) of the Validation Act validates all cess imposed, assessed or purported to have been assessed/collected under any State Act before 3-2-1961 The cess in question was imposed prior to 3-2-1961 It was the duty of the plaintiff to deposit the cess with respect to the period 1-12-1960 to 2-2-1961 within the time prescribed in the Act and the Rules and also to submit return in the manner provided in the Rules The failure of the plaintiff to do so would not entitle it to contend that any demand made with respect to the cess for the said period was invalid The plaintiff was no doubt called upon by the Collector Faizabad to file the return vide letter dated 1-3-1961 and the plaintiff did file a return on 11-3-1961 This in fact he should have done within the period prescribed under the Act and the Rules. The failure to do so would have subjected the owner of the factory to payment of interest and penalty but it is wrong to say that no recovery with respect to the cess for the period 1-12-1960 to 2-2-1961 could be effected after 3-2-1961 Neither the Act nor the rules lay down any such limitation

8. The next contention of the petitioner was that the return filed on 11-3-1961 would not be said to be return in the eye of law

because it was not accompanied by the treasury receipt This submission has also no force The plaintiff had to file the return accompanied by the treasury receipt showing payment of the cess with respect to the period in question The plaintiff had not deposited any amount in the Government treasury as cess for the period 1-12-1960 to 2-2-1961 The question of filing a treasury receipt along with the return could not, therefore, arise

9 No other point was pressed

10. In the result the appeal fails and is dismissed

Appeal dismissed

1981 ALL. L. J. 1111

S J HYDER, J

Sheo Gopal Dubey and others, Appellants v Hari Shankar Gupta and others Respondents

Second Appeal No 2032 of 1972, D/- 11-9-1981 *

Custom (U. P.) — Custom of Zarichaharum is unreasonable and is not legally enforceable. AIR 1973 All. 162 (pt. A) held no longer good law per incuriam. (Constitution of India Art. 13; Evidence Act (1872), S. 13.)

A custom can only be held to be reasonable if it conforms to the existing notions of reasonableness The question of reasonableness has to be decided according to the notions of the society prevailing at the time when the question of reasonableness of the custom comes for decision before the court and not according to the notions which existed in a bygone age (Paras 29, 31)

Held that the custom of Haq Zarichaharum which entitled a Zamindar not only to receive one fourth of sale consideration of the land sold by a Raiyat but also of the superstructures which have been raised by the Raiyat at his own expenses was unreasonable Haq Zarichaharum, therefore, could not be claimed on the basis of a sale deed dated Aug 6, 1949 when the Zamindari System itself was in the throes of death and was gasping for breath AIR 1973 All 162 (pt A) held no longer good law per incuriam AIR 1955 All 59 (F B) AIR 1963 All 340, AIR 1928 Mad 299 (F B) and (1888) ILR 10 All 358 and 1894 A C 535 Rel on (Paras 26 35)

Cases Referred.	Chronological	Paras
AIR 1973 All 162		9, 10 27, 32
AIR 1963 All 340		28, 31
AIR 1955 All 59	1954 All L J 726 (F B)	6 7 9, 32
AIR 1953 All 607	1953 All L J 303	36
AIR 1928 Mad 299 (F B)		30
1894 A C 535	71 L T 489 63 L J Ch 908 Nordenfelt v Maxim Nordenfelt Co	34
(1888) I L R 10 All 358		31

S N Agarwal, for Appellants S K Tiwari, for Respondents

JUDGMENT :— Custom may be legally enforceable is beyond the pale of doubt When a custom is recorded in the Wajib-ul-arz or Dasturdehi prepared at the time of the settlement and has been enforced repeatedly by the courts of law, its existence cannot be doubted It is some times said that custom is based on the morality of the society and its convenience However, John Stuart Mill in the Introduction to his classical work On Liberty has stated —

"Wherever there is an ascendant class a large portion of the morality of the country emanates from its class interest and its feelings of class superiority

Later on in the said work, he has observed

"Despotism of custom may be the standing hindrance to human advancement

2. I shall proceed with the subject later Plaintiff Gauri Shankar Dubey, whose heirs are the appellants before this court, commenced the suit giving rise to this appeal early in the year 1950. He claimed a decree for the recovery of a sum of Rs 5,800/- against the defendants-respondents The suit was decreed by the trial court with interest pendente lite and future at the rate of 2½% per annum On an appeal preferred by the contesting defendants-respondents, the court of appeal reversed the decree of the trial court and dismissed the suit of the plaintiff The heirs of the plaintiff have now approached this court in second appeal

3. There is no dispute between the parties about the facts of the case Defendant No 1 was the owner of a house situate in plot

*Against judgment and decree of R C Verma, 2nd Addl Sessions J Allahabad

No 571 at village Pukhrayan, Mohalla Parag Datt Jhaulal, Pargana Bhognipur, district Kanpur He transferred the house to the contesting defendants-respondents for a sum of Rs 25,000/- by means of a sale deed dated Aug 6, 1949, which was registered on Aug 10, 1949 In the Wajibularz or Dasturdehi it is recorded that if any person in occupation of a house as a Raiyat transfers his house, one-fourth of the sale consideration shall be paid to the Zamindars The plaintiff was a Zamindar and original defendant No 1 is alleged to be a Raiyat It was on the basis of custom recorded in the Wajibularz that the plaintiff claimed a money decree for the amount mentioned above Village Pukhrayan, it is again admitted, had been raised to the status of a Town Area before the execution of the sale deed dated Aug 6, 1949

4. Defendant No 1 did not contest the suit The allegations made in the plaint were traversed by the vendees alone who have also opposed this second appeal The trial court relied on the entry in the Wajibularz or Dasturdehi It also took into account a number of decrees passed on the basis of the custom so recorded It was also of the view that the custom was not unreasonable and the fact that village Pukhrayan had been raised to the status of a Town Area did not make any difference and the plaintiff's claim was well founded The Court of Appeal came to the conclusion that the documents on record proved that the custom relied upon by the plaintiff had been consistently enforced by the courts including this court up to the year 1937 It was, however, of the opinion that since village Pukharayan had become a Town Area in the year 1948, plaintiff was not entitled to rely on the custom which applied only to the village. The court of appeal was also of the view that the custom relied upon by the plaintiff had become unreasonable and could not be enforced The correctness of the findings recorded by the court of appeal have been assailed before me by the learned counsel appearing for the appellants

5. In Halsbury's Law of England, 4th Edn Vol 12, the essential attributes of a valid custom are stated thus in para 406

"To be valid, a custom must have four essential attributes,

1. It must be immemorial,
2. It must be reasonable;
3. It must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect, and
4. It must have continued without interruption since its immemorial origin "

6. The debate in the instant case has primarily hinged on the second condition enumerated in the passage just quoted The first court of appeal, in support of the view taken by it on this aspect of the case, has relied on the Full Bench decision of this court in Ram Kishore Jaiswal v B Kavindra Narain, AIR 1955 All 59 In that case, Malik, C J speaking for the Full Bench of five Judges, observed as follows (at p 61)

"Before we deal with this question, we must point out that in our view the custom relied on is a most unreasonable custom under which the Zamindar can claim not only one-fourth share of the price of the Prajauti land but also a one-fourth share of the price of the building that may have been put up on the land by the Parjotdar and this he is entitled to get every time the house is sold What was the origin of this custom we do not know It may have some thing to do with the levy of 'Chauth' by the Mahrattas on the fall of the Mughal empire "

7. In the case of Ram Kishore Jaiswal (supra), the questions referred for the opinion of the Full Bench by a Division Bench of this court were formulated thus (at p 61)

"1 Having regard to the terms of the "Wajibularz" of 1853 relating to village Jaitpura, pargana Dihat, District Banaras, on the record of Suit No 291/43 of the Court of City Munsif of Banaras, are the plaintiffs as plot proprietors not entitled to 'Zar-i-chaharum' on the sale of houses situated on the land belonging to them?

2. If the plaintiffs as plot proprietors are entitled to 'Zar-i-Chaharum, does the right accrue only on voluntary or also on compulsory sales?"

8. Both the questions referred to the Full Bench were answered by it in the negative It is evident that the question of the reasonableness of the custom of Zari-Chaharum, relied upon by the plaintiff of that case, was not required to be determined by the Full Bench. Learned counsel for the appellants has contended that the said observations are in the nature of an obiter and cannot bind this court

9. On behalf of the appellants, my attention had been invited to a Single Judge decision of this Court in Lala Badri Prasad v Gauri Shankar AIR 1973 All 162. In that case also, the suit of the plaintiff was based on the custom of Zari-chaharum. I am informed that the plaintiff of that case was also the plaintiff in the suit giving rise to the present second appeal and that the said suit also was based on the Haq-Zari-Chaharum consequent on a sale of a house in village Pukharayan by a Rayat. In that case also, reliance was placed on the observations of the Full Bench in the case of Ram Kishore Jaiwal (AIR 1955 All 591 (supra). The learned Single Judge quoted the passage from the judgment extracted above and came to the conclusion that the said observations were in the nature of an obiter. The Single Judge was further of the opinion that the custom of Haq-Zari-Chaharum relied upon by the plaintiff of that case was reasonable. The decision in Lala Badri Prasad's case no doubt lends powerful support to the submission of the learned counsel for the appellants.

10. I have given my respectful consideration to the views expressed by the learned Single Judge in the case of Lala Badri Prasad (supra) and I am unable to share the opinion expressed by him. In this situation, I would have ordinarily referred the present second appeal for the consideration of a larger Bench. I, however, feel, myself relieved of this responsibility as, in my opinion the learned Single Judge has not considered the earlier decisions of this Court in reaching the conclusion arrived at by him.

11. Reverting to the observations of John Stuart Mill contained in the opening paragraph of this judgment, it may be pertinent to state that Mill along with his senior Jeremy Bentham were both exponents of a social system based on laissez faire. Like Adam Smith, who propounded the economic theory of laissez faire in his well known work "Wealth of Nations", Mill worked principally in the sphere of political science. He and Jeremy Bentham are considered to be the founders of the utilitarian school of thought and they stood by the doctrine of the greatest good of the greatest number.

12. C. K. Allen in his well celebrated book "Law of the Making," has supported the view taken by Mill to which, reference has already been made, in these words :

"The weaker members, who form the majority of society, accept these customs either because they are imposed by irresistible force, or because they suit, on the whole the general arrangements of society, which those in subordinate positions accept through vis inertiae or at least are powerless to repulse. This is very apparent in perhaps the most important body of custom which has ever existed in Europe-feudal custom."

13. C. K. Allen has devoted considerable learning in analysing the custom of Slavery. According to his views, the truth is that slavery was a custom based not upon the good of popular majority but of a ruling minority. He refers to the writing of such ancient philosophers as Plato and Aristotle and admits that they also supported the institutions of slavery. He condones the advocacy of the custom of slavery by these philosophers on the ground that they were after all the products of their own time. He also refers to the writings of Plato and Aristotle for the purpose of showing that the custom of slavery for which they stood was of a more liberal and human nature than was being practised at the time of their writings. Allen concludes by saying that ideally the minority which enforced the custom of slavery may be said to consist of the mental and moral aristocrats like Plato and Aristotle. He, however, concedes that actually this minority consisted of the property owning classes and it was they who kept it so long in existence for economic reasons which were characteristic of the ancient world but by no means peculiar to it. It has to be remembered that C. K. Allen is not a Marxist. He cannot be even accused of being a fellow traveller.

14. It will be of some interest to note that the views expressed by John Stuart Mill and Proof C. K. Allen, in so far as custom as a source of law, overlaps the Marxist theory about the concept of law. What was emphasised was that the essence of law and its origins and development cannot be understood if law is taken in isolation from economic and political life. States V. M. Chkhikvadze, in the book "The Soviet State and Law" (Progress Pubishers, Moscow), "It can be understood only as a product of economic and other social conditions. It is not law that creates society, but the other way round. Property relations do not exist because there are rules of Law defining property, but, on the contrary, these rules, in their historical origins and subsequent development, are a reflection of the relations produced by the economic system. The law can never rise above a society's socio-economic system."

15. In this Second Appeal, I am not concerned with the broader question as to the origin of law. The enquiry before me is limited to the question as to whether custom of Haq-Zar-Chaharum was based on the economic interest of the feudal class which, as I shall presently show, was the pre-eminent class in the social fabric of India during the colonial rule.

16. It has been established by researches carried on by eminent scholars in India and abroad that before the advent of the British Rule, the land system of India was based primarily on peasant proprietorship. The proprietary rights in the land vested in the tiller of the soil and the village community as a whole and no particular individual was the primary unit of the revenue system or of the agricultural organisation. This arrangement subsisted in India from ancient time and continued to be enforced during the period of the Muslim rulers. It has to be admitted that Muslim conquerors did not interfere with the indigenous land system to any substantial extent. The minor variations introduced related to the percentage of revenue payable to the State and other matters of detail. True it is that revenue collectors were appointed from time to time to realise revenue from the tillers of the soil and to pay the same to the Government. These revenue collectors were entitled to a certain percentage of the revenue realised by them. In this connection it is pertinent to note the following observation from the Report of the United provinces Zamindari Abolition Committee:

"It is true that other Governments had also realised rents through the agency of revenue farmers, but even in the worst periods of misrule their rights were strictly limited by the older prescriptive rights of the cultivators. No previous Government had made the mistake of assuming that the cultivator held his land on sufferance from the revenue farmer or that the latter had any right to demand more than the State's share of the produce. Proprietary rights had never before been conferred upon the collector of revenue to the loss and injury of the tiller of the soil."

17. The British Conquerors, for the first time, introduced into India the English landlord system in a modified form. The former revenue collectors and other persons of influence in the social fabric of India were conferred with proprietary rights in land which were taken away from the tillers of the soil. In the Zamindari Abolition Report, it is stated thus:

"Thus it was the British conqueror who created the landlords. He created them from petty chiefs and overlords, the tax-gatherers of the Mughal and Hindu emperors. He created them because they were convenient reactionary social base for establishing foreign rule over a rebellious peasantry and people."

18. The Zamindari Abolition Committee, Report after making a survey of the historical material having a bearing on the question, came to the conclusion that the foreign rulers by a series of measures continued to decrease the revenue payable by the landed aristocract while the burden on the tiller of the soil remained constant or even increased. The report says:

"It is a curious fact that the attention of the Government was directed mainly towards the convenience of the landed classes. A number of able administrators had from time to time pointed out that the policy followed resulted in the misery and degradation of millions of cultivators, their increasing poverty and the inefficiency of agriculture, and suggestions were made for giving them security of tenure and fixing their rents for the period of settlement. It is incredible but true that the only practical answer to these difficulties that was though of was greater leniency in the treatment of Zamindars on the assumption that if the Zamindars were prosperous and contented their tenants would also be well off, the Zamindars would be encouraged to clear away the jungle, bring waste land under cultivation and effect other improvements and that they would, in their own self interest, make fair bargains with the cultivators leaving them a sufficient margin of profit to provide both the means and the motive for efficient cultivation and improvement of land. This assumption which is manifestly wrong and which has been disproved at every stage by the whole course of economic history appears to have been the fundamental basis of British Revenue policy."

19. The passage quoted above from the report of the Zamindari Abolition Committee underlines two aspects of the matter. In the first place, the authors of the report point out that the revenue policy pursued by the British rulers was heavily loaded in favour of the Zamindars. The second assumption is that this policy was pursued in the hope that it would yield better dividends and promote agricultural development. The assumption made, if I may say so with respect, is clearly erroneous and runs counter to the earlier observations made in the report at p. 112 where it is stated that the Zamindari system was introduced by the foreign rulers in order to create a convenient reactionary social base for establishing foreign rule over a rebellious peasantry and people. The conclusion is

fortified from a passage in the speech of Lord William Bentinck who was Governor General of India from 1828 to 1835 The said speech is to be found in the book of Sir A L Kaith "Speeches and Documents on Indian Policy" 1750 to 1921 Vol I p 215

"If security was wanting against extensive tumult or revolution, I should say that the permanent Settlement, though a failure in many other respects and in most important essentials, has this great advantage at least, of having created a vast body of rich landed proprietors deeply interested in the continuance of the British Dominion and having complete comand over the mass of the people"

20. What has been stated by Lord William Bentinck with regard to the area permanently settled applies with full vigour even to other areas where Zamindari System had been introduced and settlements made with the Zamindars, ignoring the interest of the actual tillers of the soil

21. This alliance of British with landlordism constituted the landlords into an ascendant class in the words of John Sturat Mill The will of the feudal landlords was readily enforced by the British rulers It is therefore, not surprising that the Wajibularz or Dasturdehi contained recitals of a number of customs which generally speaking favoured the landlord and ran against the interest of the Raiyat The custom of Haq-Zari-Chaharum is one such custom which is in favour of the landlord and against the interest of the Raiyat

22. The colonial rulers saw to it that the feudal system introduced by them after the advent of their rule in India was founded on firm basis and mainly on the pattern of the feudal system in England and the continent of Europe The judges of the High Court, had to enforce the will of the law giver It is, therefore, not surprising that a large body of decided cases can be found in the law reports in which customs recorded in the Wajibularz or Dasturdehi were actually enforced

23. India became independent in 1947 The advent of independence unleashed force of rapid change The reactionary citadel of feudalism was the first to come under attack Just a year before independence, the U P Legislative Assembly passed the following resolution on Aug 8, 1946

"This assembly accepts the principle of the abolition of the Zamindari system in this province which involves intermediaries between the cultivator and the State and resolves that the right of such intermediaries should be acquired on payment of equitable compensation and that Government should appoint a committee to prepare a scheme for this purpose

24. The Committee appointed in pursuance of the resolution quoted above, submitted its report in July, 1948 On the basis of this report, a Bill was introduced in the United provinces Legislative Assembly on July 7, 1947 After some amendment, it was passed by the State Legislature on Jan 16, 1951 and it received the assent of the President on Jan 24 1951 This legislative measure is U P Zamindari Abolition and Land Reforms Act (U P Act No 1 of 1951) The Act provided for the abolition of the institution of Zamindari and it also introduced far reaching changes in the system of land tenure in the State

25. At this stage, it may be pointed out that the Act was not the result of a vendetta The fact that the institution of Zamindari was an anachronism and the Land system on which it was founded was an obstacle in the progress of the country has been founded by a large number of scholars belonging to different shades of opinion such as Professor Radhakamal Mukerjee, Professor K T Shah and Palma Datt It also receives support from the findings of a Commission appointed by the British Government known as the Floud Commission The Zamindari system was also rejected by the electors, in the General Election held to the U P Legislative Assembly in 1937 and again in 1946

26. Two questions, therefore, arise for decision In the first place I have to consider whether the custom of Haq-Zari-Chaharum, on which the plaintiff founded his claim for a decree in the present suit, is reasonable? The other question which requires consideration is whether Haq Zari Chaharum could be claimed on the basis of a sale deed dated Aug 6, 1949 when the Zamindari System itself was in the throes of death and was gasping for breath?

27 Since the two questions are interlinked, I will discuss them together The single Judge who decided the case of Lala Badri Prasad (AIR 1973 All 162) (supra) has held the custom to be valid on the ground that the reasonableness of the custom had to be judged in the light of the notions as they

existed at the time of the inception of the custom, and not according to the notions of the society which existed at the time when the suit in which reasonableness of the custom is called in question I must concede that the view taken by the learned Single Judge is in accordance with the decisions of the British Courts which have also been followed in some Indian decisions For reasons which I shall state presently, I am not inclined to agree with the view taken on this point in the case of Lala Badri Prasad (supra)

28. The well known Urdu poet Iqbal, whose birth anniversary celeberations were held in India a few years back, has rightly pointed out in one of his couplets that the only permanent feature of life is the law of change Human society is a living organism It changes with the passage of time Legal concepts like any other concepts in human society, are always changing according to the needs of the time They must conform to the ever changing requirements of the society and the courts of law cannot close their eyes to such changes In the case of Basav Hassan Raza Khan, AIR 1963 All 340, Dhawan, J has quoted a passage from Goathe's well known work 'Faust' which reads thus —

"Know the nature of science Laws and rights are transmitted like an eternal disease They trail from generation to generation, and move imperceptibly from place to place Reason becomes nonsense, beneficence calamity woe upto yout that you are a grandson"

29. I loathe the idea of deciding a case according to the notions which have become antiquated and are out of tune with the concept of modern society while deciding a question of reasonableness of a custom In my opinion, a custom can only be held to be reasonable if it conforms to the existing notions of reasonableness The view which I am taking is particularly in accord with the needs of a developing country

30. In the case of Mookka Kone v. Ammakutti Ammal, AIR 1928 Mad 299, Kumaraswami Sastri, J Speaking for the Full Bench, observed

"Indian courts are courts of law as well as of equity and they ought not to give effect to a custom which the growing consciousness of the community in which it is said to have prevailed is prepared to treat it as unsuited to modern conditions. . . . The judicial recognition of a custom which a community is prepared to jettison is neither necessary nor just"

31. The matter was considered by Dhawan, J in the case of Basav Hasan Raza Khan (AIR 1963 All 340) (supra) at length In that case the plaintiff had claimed a relief for mandatory injunction on the basis of custom of pardah Reliance was placed on his behalf to support the custom in question on the case of Gokul Prasad v Radho (1888) ILR 10 All 358 Dhawan, J relied on a number of decisions and came to the conclusion that in view of the changed social conditions prevailing in the country, the custom of purdah relied upon by the plaintiff of that case could not be enforced as it had become unreasonable As a result of the analysis of decided cases, it was held that the question of reasonableness had to be decided according to the notions of the society prevailing at the time when the question of reasonableness of the custom comes for decision before the court and not according to the notions which existed in a bygone age The trend of the modern decisions of the courts in this country is in accordance with this view

32. I have already held that the passage extracted from the judgment of the Full Bench in the case of Ram Kishore Jaiswal (AIR 1955 All 59) (supra) was obiter However, it is one thing to say that an obiter contained in the judgment of the Full Bench is not binding on a Single Judge It is quite another thing to regard an obiter as devoid of all persuasive force The learned Single Judge has adopted the latter course in the case of Lala Badri Prasad (AIR 1973 All 162) and has ignored the obiter in the case of Ram Kishore Jaiswal Even an obiter dicta of a distinguished Judge or Judges has the persuasive value Malik, C J with whose observation I am concerned in this second appeal, is undoubtedly one of the eminent Judges of this Court The view taken by him about reasonableness of the custom of Haq-Zari Chaharum is supported by four other Judges of this Court I feel it difficult to differ from this view expressed by him when the same accords with reason and common sense It is indeed difficult to justify the custom of Haq-Zari Chaharum which entitled a Zamindar not only to receive one fourth value of the land but also of the super-structures which have been raised by the Raiyat at his own expense

33. It is further to be remembered that village Pukhrayan is situate in the district of

Kanpur There is no evidence on record from which the distance of the village from the city of Kanpur may be worked out It cannot, however, be ignored that the city of Kanpur developed industrially to a considerable extent and has come to be regarded as the largest industrial city of the State The growth of industry in the city of Kanpur ipso facto has resulted in the growth of satellite townships As a result of the increased industrial activity, the prices of urban property has considerably multiplied The custom of Haq-Zari Chaharum came into existence at a time when the Raiyat by and large had thatched houses which were transferred by them for paltry amounts It was in this state of affairs that one-fourth of the sale proceeds was given to the Zamindar according to the custom In the result, he got hold of a paltry amount consequent on the transaction of sale In the changed situation indicated above, the property has been admittedly sold for a sum of Rs 25,000/- In my view, it would be higly unreasonable to give effect to the custom in the changed situation and permit the Zamindar not only the benefit of the price of the land but also a share in the price of super-structure

34. In so far as the English decisions on this point are concerned, it may be stated that they have no binding foce on the courts of this country Moreover, the courts in England have themselves held that in determining the question as to whether a contract is void on the ground that it is opposed to public policy, what has to be seen is the policy of the day and not the policy of an age, which has long vanished (see Nordenfelt v Maxim Nordenfelt Company*) It has to be remembered that the rejection of a proved custom on the ground that it is unreasonable is after all a particular application of the doctrine of public policy I do not find any consistency between the two sets of decisions rendered by the English Courts

35. In the result, I am of the opinion that the custom of Zarichaharum on the basis of which the suit giving rise to this second appeal was filed was unreasonable and was not legally enforceable when the suit was filed

36. There is another ground on which this second appeal must founder The contesting defendants-respondents had specifically pleaded in their written statement that their transferor was an absolute owner of the property conveyed by him to the contesting defendants-respondents Assuming for the sake of argument that the custom of Haq Zari Chaharum is a valid custom, it was necessary for the plaintiffs-appellants to prove, in the circumstances of the case, that the transferor of the contesting defendants respondents was his Raiyat He has led no evidence to prove this fact and there is no finding recorded by the trial court or by the court of first appeal that the transferor of the contesting defendants-respondents was Raiyat of the plaintiff Every one who resides in a village is not necessarily a Raiyat of a Zamindar The term 'Raiyat' has a narrow connotation It includes within its ambit only an agriculturist or a workman whose services are necessary to sustain the village economy In the absence of any material that the transferor of the contesting defendants-respondents fell under anyone of these categories, the custom of Haq Zari Chaharum could not be invoked by the plaintiffs-appellants In the case of Amba Sahai v Gopeshwar Babu Mehra, AIR 1953 All 607, a Division Bench of this Court (at p 607) has observed as under

"In an agricultural village, the Zamindar is the owner of every inch of the land If a resident is an agriculturist or is a workman whose services are needed in the interest of the village community, the presumption is that such a person occupies his house with the leave and licence of the Zamindar and is, therefore, a licensee But if the occupier of the house is neither an agriculturist nor a person such as described above, his occupation is not presumed to be by leave or licence He will then be deemed to be in occupation by adverse possesion"

37. Since the plaintiffs-appellants failed to prove the essential element which was necessary to be established to sustain their claim, the suit filed by them was not legally maintainable

38. The result is that this second appeal fails and is hereby dismissed There shall, however, be no order as to costs

Appeal dismissed.

*1894 A C 535

1981 ALL. L. J. 1118

R. M. SAHAI, J.

Smt. Bhagwati Devi and others, Petitioners v. Board of Revenue and others, Respondents

Writ Petn. No. 8975 of 1980, D/- 31-8-1981

(A) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 331 (3) (4) and 341 — Second appeal lies even against order passed on consent under S. 331 (3) — Bar contained in S. 96(3) of C. P. C. is not attracted. (Civil P. C. (1908), S. 96(3)).

S. 341 provides that the provisions of Code of Civil Procedure shall apply only if there is no specific provision in the Act itself. Under the Act a second appeal lies under Cl. (4) of S. 331 against a decree or final order passed in an appeal under sub-sec. (3). There being thus specific provision in the Act itself which is a self contained Code maintainability or otherwise of second appeal cannot be judged by reference to S. 96(3) of C. P. C. Accordingly second appeal would be maintainable even against order passed on consent. (Para 3)

(B) Constitution of India, Art. 226 — Writ Petition — Procedure — Objection as to maintainability of second appeal under U. P. Zamindari Abolition and Land Reforms Act against order of remand in first appeal not raised before Board of Revenue nor in writ petition — Same cannot be agitated in writ petition. (U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 331)

Where the question as to non-maintainability of second appeal against order of remand passed in first appeal, on the ground that it was not a final order was not raised before the Board of Revenue and also not made a subject-matter of challenge in the writ petition, it could not be allowed to be raised in the writ petition as it was not a case of inherent lack of jurisdiction. Revision under S. 333 lies before the Board of Revenue against any order passed by a subordinate Court. Even a first appeal against such order is competent. Thus, there is no inherent lack of jurisdiction. (Para 5)

Moreover, if the petitioner had raised this objection before the Board of Revenue, the respondent could have prayed for conversion of appeal into revision. As the respondent was prevented from availing this remedy the objection could not be entertained in writ petition. (Para 5)

(C) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 165, 156 and 157 — 'Sirdar' — Declaration of — Validity — Lessee of a tenant continuing in possession even under transferees — Absence of findings as to tenant or transferees from him being Bhumidhar not entitled to let out and lessee being in possession of less than 12.5 acres of land — Declaration of lessee as 'sirdar' is liable to be set aside. (Para 9)

Cases Referred	Chronological	Paras
AIR 1969 Mad 248		6
AIR 1964 Mys 147		6
AIR 1961 S C 794		4
AIR 1961 All 245 (F B)		4
AIR 1956 All 457	1956 All L J 679 (F B)	4
AIR 1923 All 603 (1)	21 All L J 447	6
(1896) ILR 20 Mad 152		6
(1894) ILR 16 All 252		6
(1886) ILR 9 All 147		6
(1884) ILR 7 All 136		6
(1882) All W N 104	ILR 9 All 29	6
(1881) All W N 146	ILR 3 All 675 (F B)	6

H. S. Joshi, for Petitioners; R. N. Bhalla, G. N. Varma, Standing Counsel, for Respondents.

ORDER :— In this petition directed against order of Board of Revenue whatever might have been the reason for the Board to decide the second appeal, directed against order of remand passed by the Additional Commissioner, on merits, its annoyance because the appellate court did not follow its direction as suggested by the Learned counsel for respondent or for reasons which cannot be brought on record as suggested by learned counsel for petitioners, it has provoked various shades of argument ranging from maintainability of appeal, the jurisdiction to decide a question of fact, deciding appeal on merits without hearing any argument on it illegality in deciding question which had not been decided by lower appellate court, to error apparent committed by the member while deciding the appeal on merits.

2. To consider whether the Board of Revenue had jurisdiction to entertain the second appeal or not, it may be mentioned that the suit filed by respondent under S. 229B of U. P. Z. A. Act I of 1951 (hereinafter referred as Act) was decreed by trial court on 19th April 1974. This order was set aside on 19th Aug. by the Additional

Commissioner against which opposite parties filed second appeal which was allowed and the Additional Commissioner was directed to decide the appeal on merits When the appeal was taken up on 4th March 1977 the U P Land Laws Amendment Act had come into force It abolished the tenure Sirdars since 28th Jan 1977 The Additional Commissioner therefore without deciding the appeal on merit as directed by the Board of Revenue, set aside the order of the trial court and remanded the case to trial court for fresh hearing after due opportunity to parties to amend their pleadings It was also observed that the order was set aside with consent of parties

3 The argument of non-maintainability of second appeal was founded both on nature of order passed by Additional Commissioner namely his failure to decide rights and liability of parties and the bar contained in S 96(3) of Civil Procedure Code against consent decree For the latter suffice it to say that S 341 of the Act itself provides that the provisions of Code of Civil Procedure shall apply only if there is no specific provision in the Act itself Under the Act a second appeal lies under cl 141 of S 333 against a decree or final order passed in an appeal under sub-sec (3) There being thus, specific provision in the Act itself which is a self contained Code maintainability or otherwise of second appeal cannot be judged by reference to S 96

4. As regards the first objection it cannot be disputed that a second appeal lies under the Act against a final order A final order has been held to be one which decides the right of parties finally and does not leave the original proceedings in the court below (see Jethanand v State of U P , AIR 1961 S C 794, Savitri Devi v Rajul Devi, AIR 1961 All 245 (F B) Mohd Mahmood Hasan v Govt of U P , AIR 1956 All 457) (F B)

5. Assuming that the order of Additional Commissioner was not a final order therefore second appeal was not maintainable, the petitioner cannot be permitted to raise it as it was never raised before the Board nor it has been made a subject matter of challenge in the petition There is no averment that it was raised before Board which failed to decide it The argument that it is a question of jurisdiction and can be raised at any stage cannot be accepted as it is not disputed that revision under S 333 of the Act lies against any order passed by a subordinate court Rather it was urged by the learned counsel for petitioners that a first appeal from order was maintainable It is not a case therefore of inherent lack of jurisdiction Moreover if the petitioner had objected the respondent could have prayed for conversion of appeal into revision As the opposite party was prevented from availing this remedy the objection cannot be entertained

6 On the jurisdiction to decide the appeal on merit a large number of decisions beginning from Badam v Imrat (1881) All W N 136, Sohan Lal v Azizunnisa (1884) ILR 7 All 136, Girdhari Lal v Crawford (1886) ILR 9 All 147, Ram Narain v Bhawandin (1882) All N 104 Kaluvaroya Pillai v Ganesa Pandithan, AIR 1969 Mad 248 New India Insurance Co Ltd v T K Nanjunda Setty and Sons, AIR 1964 Mys 147 were cited In Badam (supra) reported in (1881) ILR 3 All 675 (F B) also it was held by this court that in an appeal from order of remand the appellate court can examine not only the correctness of the impugned order but also whether the decision on preliminary point was correct or not When this was pressed in service in (1884) ILR 7 All 136 and the bench was asked to hear and decide the appeal on merits which arose out of remand order the bench declined to do so as it would amount to converting a second appellate court into a court of first appeal The bench did not hold there was no power In Hasan Ali v Siraj Husain (1894) ILR 16 All 252 it was held that it was competent for High Court in an appeal from remand to pass a decree dismissing the suit Similar view was taken in Sankaran v Raman Kutti (1896) ILR 20 Mad 152 In Mahadeo v Kalloo, AIR 1923 All 603 (1), the bench while hearing an appeal against order of remand decided the suit on merits

7. The powers for a second appellate court are contained in S 103 of the Code of Civil Procedure Before 1976 a second appellate court could on the evidence on record determine any issue of fact necessary for the disposal of appeal After 1976 the second appellate court may if the evidence on record is sufficient to determine any issue necessary for the disposal of the appeal which has not been determined by the lower appellate court or both by the Court of first instance or lower appellate court or which has been wrongly determined This section falls in the chapter relating to appeals from appellate decree but the same procedure and power is conferred on a court hearing appeal from final orders passed by the court below by virtue of S 108 of Civil Procedure Code So to say therefore that the Board had no power

to decide the question of fact in second appeal is not correct It is true that normally a second appellate court should not go beyond considering legality and propriety of the order of remand but the legislature has conferred necessary powers to decide even those questions which were not decided by the court below

8. Before examining the question whether any argument was advanced on merits and whether the learned counsel for petitioner was heard on it it is expedient to decide whether the decision of the Board that respondent acquired rights of Sirdar can be sustained in law as on the former there was a lot of controversy and there are allegations and counter allegations supported by affdavit Admittedly one Smt Punni was tenant The respondent No 1 claims to be her lessee The petitioners are transferees from one Chatter Sen, who in his turn had purchased from Saidullah who was the first transferee from Punni When petitioner purchased it from Chattar Sen a dispute arose and as there was apprehension of breach of peace the property was attached under S 145 Cr P C It was released in favour of petitioner This necessitated filing of suit under S 229B

9. The Board of Revenue found that the respondent became Sirdar under S 165 of the Act as he continued in possession since the land was let out by Smt Punni and the letting was continued even by transferees Even assuming it to be so it was not sufficient in law to hold that the lease was in contravention of Ss 156 and 157 of the Act and the lessee was not possessed of more than twelve and half acres In absence of any finding that Saidullah and Chatter were Bhumidhars who were not entitled to let out and the opposite party along with his family was not possessed of less than 12 5 acres the finding of Board cannot be maintained It was necessary for the Board to record finding on these vital aspects Saidullah may be advocate or Chattar Sen may be able bodied person But there has to be a finding in this regard

10. There has been an unpleasant dispute between learned counsel for parties whether the appeal was heard on merits or not Affidavits have been filed in this regard It has also been pointed out from the Board's order that it does not appear that the appellant or respondents anywhere raised any argument on merits In view of what has been stated in preceding paragraphs it is not worth going into this question at all

11. It having been found that finding recorded by Board of Revenue on merits cannot be maintained the question is what relief should be granted to petitioner By mere quashing of the order of Board of Revenue the order of Additional Commissioner is restored which obviously was erroneous This was not contested by petitioner even It is expedient therefore to quash the finding recorded by Board of Revenue on merits The finding that the Additional Commissioner's order was erroneous is maintained

12. In the result this petition succeeds and is allowed in part The order of Board of Revenue setting aside, judgment and decree of the lower appellate court is maintained But the order that plaintiff's suit stands decreed with costs all through and he is declared to be Sirdar now Bhumidhar with transferable rights, in possession of the disputed land and the judgment and decree of the trial court is hereby accordingly confirmed, is quashed. The Additional Commissioner shall now decide the appeal on merits It is made clear that any observation made on merits was to demonstrate the error in the order of Board The Additional Commissioner shall decide the appeal irrespective of any observation There shall be no order as to costs

Order accordingly

1981 ALL. L. J. 1120

S J HYDER, J

Anjuman Islamia. Appellant v Mohammad Khair Husain, Respondent

Second Appeal No 1726 of 1973, D/- 16-7-1981 *

Mohammadan Law — Waqf — Document purporting to be a memo of Waqf which has already been orally created or a document appointing Mutwallis — Not required to be registered. (Waqf Act (1954), S. 25); Registration Act (1908), S. 49).

There is a distinction between an instrument creating a Waqf and a document

*Against Judgment and decree of S P Srivastava, 1st Temp Civil and Sessions J Basti, Dt. 19-4-1973

HY/IY D621 N1/VCD

recording a transaction in the nature of Waqf which had taken place earlier by words of mouth Where the executant had specifically stated in the document that she had created a waqf of her properties, and the document did not say that the executant was creating a waqf in present through the instrumentality of the document itself, the document could be construed as a memo of waqf which had been orally created or a document appointing Mutwallis, and hence did not require registration AIR 1921 P C 105, AIR 1958 S C 532, AIR 1966 S C 337, AIR 1959 S C 620 Rel on (Paras 9, 17)

Cases Referred :	Chronological	Paras
AIR 1966 S C 337		15
AIR 1963 S C 985		8
AIR 1959 S C 620		16
AIR 1958 S C 532		14
AIR 1939 P C 185		8
AIR 1923 P C 44 (2)	50 Ind App 84	8
AIR 1922 P C 123 All L J 497	48 Ind App 302	1922 8
AIR 1921 P C 105 1920 All L J 1089	ILR (1920) 42 All 609	8

H I Ahmad, for Appellant, G P Mathur, for Respondent

JUDGMENT .— One Bhikhari was the owner of the house in dispute situate in Mohalla Kunjatola, Gandhinagar, Basti It is alleged by the plaintiff and has not been disputed by the defendant that Bhikhari gifted the house in favour of his wife Smt. Jamuna Plaintiff alleged that Smt Jamuna created a waqf of the house in dispute along with three other houses for charitable objects such as the maintenance of mosque and appointed the plaintiff Anjuman as its Mutwalli According to the plaintiff, defendant-respondent Khatir Hussain was a tenant of the house on behalf of the plaintiff Anjuman on payment of Rs 10/- per mensem Since the defendant-respondent No 1 had sub-let the house to the second defendant and he was in arrears of rent, a notice was served on him terminating his tenancy and also asking him to pay the arrears of rent which he did not do according to the plaintiff Anjuman, the defendant was liable to be evicted from the house in dispute The plaintiff also claimed a decree for arrears of rent and damages for use and occupation at the rate of Rs 10/- per mensem

2. The suit was contested by the defendant-respondent He denied that any Waqf had been created by Smt. Jamuna He claimed that Smt. Jamuna had gifted the said houses of the defendant by means of a gift deed dated Nov 3, 1946 He conceded that he was a tenant on behalf of Bhikhari and lived in that capacity in the house even after his death He conceded that he paid the rent to Smt Jamuna until she executed a gift in favour of the defendant on Nov 3, 1946

3. On the pleadings of the parties, the trial court framed appropriate issues It held in favour of the plaintiff on all material issues and accordingly decreed the plaintiff's claim However, the trial court held that the rent payable by the defendant was Rs 2/- per mensem and not Rs 10/- per mensem as alleged by the plaintiff The decree for arrears of rent and damages for use and occupation was passed on the basis of that finding

4. Feeling himself aggrieved by the decree of the trial court, the defendant preferred an appeal The court of appeal has come to the conclusion that the plaintiff has failed to prove his title to the house in dispute. It has further held that no relationship of landlord and tenant subsisted between the parties It upheld the gift relied upon by the defendant and was of the view that the occupation of the defendant over the house in dispute was in his capacity as owner and not as a tenant. In that view of the matter, the first court of appeal reversed the decree of the trial court and dismissed the suit of the plaintiff in its entirety The plaintiff has now approached this court by filing second appeal under S 100 of the Code of Civil Procedure Khatir Husain defendant has alone been impleaded as a respondent in this second appeal

5. There is an apparent inconsistency in the findings recorded by the court of first appeal It has been held by that court that the value of the house in dispute was more than Rs. 100/- at the time of the execution of the document dated Feb 9, 1947 which has been referred to in the judgment as Waqfnama. The court of appeal was of the view that the said document was required to be registered and could not be read in evidence in view of the mandatory provision of law enacted in S.49 of the Indian Registration Act. The document dated 3-11-1946 which has been upheld as a gift deed is also an unregistered document It is inscribed on two sheets impressed with two annas stamp each. If the value of the property was more than Rs. 100/- on the date of the execution of the Waqf Deed, it could not be less a few months

earlier The document which has been relied upon by the first court of appeal as conferring title on the plaintiff-appellant (defendant-respondent?) was also hit by S 49 of the Registration Act as it also required registration. I, therefore, set aside the finding of the lower Appellate Court that the defendant-respondent acquired title to the property in suit by virtue of the document dated Nov 13. 1946

6. The above finding recorded by me, however, is not determinative of the controversy between the parties which is to the effect as to whether the plaintiff-appellant is the landlord of the accommodation in dispute and the defendant-respondent was liable to pay rent to it It needs to be emphasised that the suit is not on the basis of title but on the basis of relationship of landlord and tenant allegedly subsisting between the parties according to the plaintiff-appellant The plaintiff-appellant can, therefore, succeed only if it is able to prove its own case It cannot take advantage of any weakness in the case of the defendant-respondent and said weakness is writ large on the record of the case and I have already referred to the same

7. To narrow down the controversy between the parties, it may again be emphasised that the defendant-respondent admits that he occupied the house in dispute as a tenant of Bhikari and thereafter remained in occupation as tenant of Smt Jamuna The plaintiff-appellant can only succeed if it is able to establish that it has stepped into the shoes of Smt Jamuna and has become entitled to realise the rent from the defendant-respondent If it does not succeed in proving this fact, the decree of the court of appeal has to be maintained

8. The law admits no doubt Waqf has been held to be a transfer of property A document which purports to create a Waqf must necessarily be registered If it is not so registered, it would not be admissible in evidence At the same time, it has been held in successive decisions of the Privy Council that property does not vest in Mutwalli and he is only a Manager. This proposition has also been reiterated by the Supreme Court. (See Vidya Varuthi v Balusami (1921) 48 Ind App 302 (AIR 1922 P C 123), Abdur Rahim v Narayan Das (1923) 50 Ind App 84 (AIR 1923 P C 44 (2)), Saadat Kamel Hanun v Attorney General, Palestine AIR 1939 P C 185 and Zainyar Jung Nawab v Director of Endowments (AIR 1963 S C 985) It is precisely for this reason that a trustee nama or a document appointing Mutwallis is not required to be registered This question arose for the decision of the Privy Council in the case of Muhammad Rustam Ali Khan v Mushtaq Hussain, ILR (1920) 42 All 609 (AIR 1921 P C 105) and Lord Buckmaster Speaking for Privy Council observed —

"A receiver and manager by virtue of his appointment has no estate in the property he is called upon to control, he possesses powers over it but not an interest in it, and the appointment of others in his place would by itself effect no transfer of ownership The same thing is, in their Lordships opinion, true of the trustees under this Deed They are, as the deed itself states, superintendents of the property and it is, therefore, in their Lordships' opinion outside the provisions of the Statute and registration was unnecessary"

9. An other proposition which also admits of no doubt is that a waqf may be orally created If it is so created, the Waqf would be valid The distinction between an instrument creating a Waqf and a document recording a transaction in the nature of waqf which had taken place earlier by words of mouth, is some times difficult to make out, but it is nevertheless a real distinction It is in this background that I shall proceed to examine the position arising in this case

10. It may be stated that after the death of Bhikari, one Sardan filed a suit for partition of all the four houses which had been left behind by the deceased Originally the defendant in the suit was that widow of the deceased Smt. Jamuna She contested the suit on the ground that the house in dispute had been gifted to her by her husband Bhikari long before his death, and that he had also transferred the remaining three houses in her favour by means of a gift deed. She denied that Sardan had any right to claim partition and separate possession of the share claimed by him During the pendency of the suit, Smt Jamuna died and thereafter the present appellant, namely, the Anjuman, and two other persons were substituted as legal representatives of the deceased Smt. Jamuna Eventually a compromise was arrived at between the plaintiff of that suit and the Anjuman It was agreed by means of that compromise that the Anjuman shall be the exclusive owner, by virtue of the Waqf of the house in dispute and it shall have only a share in the remaining three houses It is pertinent to state that in that case the stand taken by the Anjuman was that Waqf had been created

by Smt Jamuna orally and that it was subsequently recorded in the shape of a memorandum The defendant-respondent in the present second appeal was not a party to that suit or the compromise

11. The first court of appeal has rightly held that the compromise decree in the aforesaid suit would not operate as res judicata against the defandant-respondent It has, however, gone astray in holding that the documents of the said suit were wholly irrelevant and could not be taken into account The said documents were relevant evidence under S 13 of the Indian Evidence Act It was for the court of appeal to decide what value could be attached to the said documents

12. It is not in dispute that the Municipal number of the house in dispute is 130 Plaintiff-appellant has filed several extracts of the Municipal Assessment register in which house No 130 had been shown to be in the possession of the Anjuman The name of the defandant-respondent does not appear in any one of these documents

13. Now, the plaint of the suit giving rise to this second appeal is vague and does not indicate whether the document dated 9th Feb 1947 was a Waqfnama, a trustee-nama or a memo of oral Waqf which had taken place previously No doubt, M A Khair (PW1) has, in his deposition, referred to the said document as a Waqfnama However, PW1 was not present at the time of the execution of the said document and he had no personal knowledge about the same The question is whether the name given to the document by M A Khair is sufficient to come to the conclusion that it was a Waqfnama In my opinion the answer to this question must be in the negative.

14. In the case of Smt. Shanta Bai v. State of Bombay, AIR 1958 S C 532, their Lordships were considering a document which itself recited that it was a lease deed. Vivian Bose, J speaking for the court observed (at p 535 of AIR) —

"As I have said, the document called itself a "lease deed", but that is not conclusive because the true nature of a document cannot be disguised by lebelling it something else."

After making these observations, Vivian Bose, J examined the document clause by clause and ultimately held that it was not a deed of lease and it amounted to a licence coupled with a grant.

15. In Thayyil Mammo v Kattiath Ramunni AIR 1966 S C 337, the Supreme Court ignored the description of the document recited in it and construed that it was a document of a different nature than it purported to be

16. M A Khair was admittedly a layman He was not acquainted with the niceties of law No advantage could be given to the defendant-respondent merely because M A Khair in his testimony described the document dated Feb 9, 1947 as a Waqfnama. (See Trivemi Bai v Smt Lila Bai AIR 1959 S C 620)

17. I have gone through the document dated Feb 9. 1947 and, in my opinion, the document can be construed to be either as a memo of Waqf which had been orally created or a document appointing Mutwallis Smt Jamuna has specifically stated in the said document that she had created a Waqf of her properties "Waqf billah ker diya" The document does not say that the executant was creating a Waqf in present through the instrumentality of the document itself I am, therefore, of the opinion, that the document dated Feb 9, 1947 did not require registration and the view taken by the court of appeal on this point is incorrect and must be set aside

18. Learned counsel appearing for the defendant-respondent urged before me that Mutwallis of the Waqf had no right to enter into a compromise with Sardari in Original Suit No 193 of 1946 and to relinquish any share in three of the houses in favour of the plaintiff of that suit The dispute in this second appeal is relating to a different house which according to the said compromise was recognised as Waqf property and was to continue in possession of the plaintiff The argument advanced on behalf of the defendant-respondent is, therefore, wholly without any merit in so far as the house in dispute is concerned

19. It was further urged on behalf of the defendant-respondent that the plaintiff can still institute a fresh suit on the basis of title because the suit giving rise to this second appeal was only on the basis of tenancy This argument is also without substance and cannot be accepted Courts of law frown on multiplicity of litigation. A plaintiff can be driven to have recourse to the expedient of a second suit only where absolutely necessary.

We, in this country, have chosen the Anglo-Sexon system of jurisprudence It is not for this court to pronounce on the wisdom of the course adopted in this regard Suffice it to say that litigation under the present laws of procedure involves inordinate delay It is only an unscrupulous litigant who can take advantage of the delays involved in the procedure The court of law should, however, eschew, any possibility of delay occurring in the disposal of a controversy between two citizens of the country

20. Finally it may be stated that the court of appeal has held that the Anjuman was not a juristic person and as such it had no right to sue Assuming that the Anjuman is not a juristic person and the decision of the court of appeal on this question is correct, the point which has to be taken into account is that the suit has been filed through the instrumentality of the Mutwalli-cum-Secretary The defect in the frame of the suit, as pointed out by the court of appeal is, at best, a case of misdescription and was wholly insufficient to be made a ground for throwing out the plaintiff's claim

21. From the foregoing discussion, it is evident that the defendant-respondent came in possession of the house in dispute as a tenant of Bhikari. The gift deed relied upon by him was wholly fictitious and a fabricated document It was also unregistered The surrounding circumstances go to show that Smt. Jamuna created a Waqf of the house in dispute and appointed the Anjuman Islamia, Gandhi Nagar, Basti as the Mutwalli of the property The trial Court was, therefore, right in accepting the plaintiff's case with the modification with regard to the amount of rent claimed by the plaintiff-appellant

22. The result is that this second appeal succeeds and is hereby allowed The decree of the first court of appeal is set aside and that of the trial court is restored Plaintiff-appellant shall be entitled to its costs throughout.

Appeal allowed

1981 ALL. L. J. 1124

•A. N. VARMA, J

Raghubir, Applicant v Gulab Shanker Upadhya, Opposite Party

Civil Revn No 244 of 1980, D/- 26-8-1981 •

(A) Civil P. C. (5 of 1908), S. 115 — Revisional jurisdiction — Finding by appellate court that judgment debtor was neither a marginal farmer nor a small farmer under U. P. Debt Relief Act — Finding based on proper appreciation of evidence and not vitiated by any jurisdictional error — High Court cannot interfere with finding. AIR 1953 S C 23 Rel. on. (Paras 5, 8)

(B) Civil P. C. (5 of 1908), S. 115 — Question of fact — Judgment debtor's application u/s. 47 to set aside sale of mortgaged property dismissed — Revision application filed against order of dismissal — Claim by judgment-debtor that he had already paid certain sums of money to decree-holder — Held, whether a particular payment was made or not was a question of fact which could not be investigated in revision — Also the said question could not affect validity of sale. (Para 10)

(C) Civil P. C. (5 of 1908), S. 47, O. 21, Rr. 66 and 89 — Sale of mortgaged property — Notice served under O. 21, R. 66 but no attempt made by judgment-debtor to avoid sale under O. 21, R. 89 by depositing decretal amount within time — Held judgment-debtor having failed to act under O. 21, R. 89, it was not permissible for him to have sale set aside u/s. 47 on ground that he had already paid certain sums to decree-holder and was willing to pay balance. AIR 1981 S C 693 Refd. AIR 1972 All 350, 1968 All A W R (H C) 95 and AIR 1937 All 407 Distng. (Para 13)

Cases Referred :	Chronological	Paras
AIR 1981 S C 693		16
AIR 1972 All 350		15
1968 All W R (H C) 95		15
AIR 1953 S C 23	1953 All L J 101	8
AIR 1937 All 407	1937 All L J 288	15

V D Ojha, for Applicant, A S. Srivastava, for Respondent

•Against order of D C Srivastava Addl Dist J, Gyanpur, in execution case No. 13 of 1977

ORDER :— This is a judgment-debtor's application in revision u/s 115 of the Code of Civil Procedure It is directed against an order passed by the learned Additional District Judge, Gyanpur, Varanasi, dt 16-1-80 dismissing the objection of the applicant filed u/s 47 of the C P C

2. The relevant facts are that a preliminary decree for sale based upon a mortgage was passed for recovery of Rs 14,000/- odd against the applicant It was followed by a final decree for sale In pursuance thereof, the mortgaged property was put to auction and was sold on 11-4-1978 for a sum of Rs 9,700/- in favour of the decree-holder respondent, who had earlier obtained the requisite permission to bid at the auction

3. An objection was filed thereafter by the judgment-debtor u/s 47 of the C P C Broadly, the judgment-debtor raised the following objections —

1) The judgment-debtor had paid the decree-holder various sums of money amounting to Rs 3,500/- towards the debt in regard to which no adjustment was allowed either in the suit or in the preliminary or final decree,

2) The judgment-debtor was a landless agricultural labourer within the meaning of U P Debt Relief Act, 1977 Consequently, the execution proceedings were liable to be abated under that Act —

3) The property auctioned was valued at least at Rs 20,000/- The amount of Rs 9,700/- for which the property was sold was thus grossly inadequate and the sale was, therefore, liable to be set aside on that ground,

4) The applicant having paid to the decree-holder a sum of Rs. 3,500/- as mentioned above, he was ready and willing to pay the balance of the decretal amount The court should accept the balance and release the property from attachment and sale

4. Before me, however, counsel for the applicant submitted only the following points for my consideration —

5. The first contention raised in support of the revision was that the view of the court below that the applicant was barred by the principles of constructive res judicata or principles analogous thereto from claiming the benefit of the U P D R Act 1977 in execution proceedings, he having failed to claim that benefit before the passing of the decree in the suit, was manifestly unsustainable in law It was urged that S 4 of the aforesaid Act clearly envisaged or permitted the raising of the objection of the nature mentioned above, even if the same was not taken in the suit itself It does not seem necessary to express any opinion on this legal submission as I find that the court below also went into the merits of the objection of the appellant based on the U P D R Act, 1977 and rejected the same on the ground that the applicant was not either a marginal farmer or a small farmer within the meaning of the said Act. This finding of the appellate court is based upon a proper appreciation of the evidence on record and not being vitiated by any jurisdictional error, cannot be interfered with in a revision u/s 115 of the C P C

6. I shall next deal with the argument of the learned counsel in support of the plea that on the material on the record, it was clearly established that the applicant was neither a marginal farmer, nor a small farmer, nor even a landless agricultural labourer. I may add that the learned counsel for the applicant rightly made no attempt to submit that the applicant was a landless agricultural labourer, as admittedly the applicant has 1 11 0 Bighas of land

7. In regard to the claim of the applicant that he was a marginal or a small farmer, the court below has commented that the appellant was not sure himself whether he was a small farmer or a marginal farmer He had been changing his stand from time to time In his objection u/s 47 C P C, the Applicant claimed that he was a landless agricultural labourer In the course of arguments before the court below, however, he started with the claim that he was a marginal farmer, but subsequently began asserting that he was a small farmer For, either of these two things, it was essential for the appellant to prove that his principal source of livelihood was income from agricultural land or manual labour on such land The finding of the court below, however, is that the principal source of livelihood of the applicant is from a dairy business which he is carrying on jointly with his brother in Bombay Learned counsel for the applicant strongly criticised this finding and submitted that the same was based on no evidence, or was based on a misreading of the evidence on record

8. The first observation which I wish to make with regard to the aforesaid submission of the learned counsel for the applicant is that according to the settled view, in a Revision u/s 115 of the C P C, it is only jurisdictional error which could be corrected u/s 115 C P C In AIR 1953 S C 23, their Lordships of the Supreme Court laid down that it is not the errors committed by the court below in the judgments against which a revision is preferred, but an error only in the manner of arriving at that judgment which could be corrected u/s 115 C P C Keeping in view the limits of jurisdiction u/s 115 C P C therefore this Court could set aside the above finding of the court below only if it comes to the conclusion that the court below has committed some substantial error of jurisdiction or has exercised a jurisdiction which did not vest in it by law or has failed to exercise a jurisdiction so vested

9. Having given the matter a careful consideration, I have no manner of doubt that the decision of the court below that the appellant is neither a small farmer, nor a marginal farmer, is not vitiated by any such error which could be corrected u/s 115 C P C

10. Faced with the above clear legal position, learned counsel contended that the court below was not justified in referring to papers Nos 65 to 71 as showing that the business which was being carried on in Bombay was a joint business of the appellant and his brother Learned counsel invited my attention to these papers and submitted that in all those papers, the name of the applicant's brother Jagbir Sheo Kumar Yadav alone was shown Consequently, the court below was not justified in taking those papers into consideration in support of its conclusion that the business which was being carried on in Bombay was a joint business. I find no merit in this submission. Firstly, the argument is not one which touches upon the jurisdiction of the court below or which would indicate that the court below has committed some error of jurisdiction Secondly, I find that the conclusion of the court below is based not only on those papers but also on the testimony of the decree-holder's witnesses, Ram Adhar, Ram Shroman and Jai Shanker, all of whom deposed that the appellant was doing business in Bombay jointly with his brother and was deriving substantial income therefrom. The court below has believed the statements of the witnesses of the decree-holder. The conclusion of the court below being thus based on plenty of other evidence, including the admissions made by the appellant himself adverted to by the court below this Court would not be justified in interfering with the finding of the court below, in any view

11. The next submission of the learned counsel for the appellant was that the finding of the court below as regards the plea of the applicant that he had paid various sums of money amounting to Rs 3,500/- to the decree-holder, and that the same was liable to be adjusted, is unsustainable This finding is again based upon a proper appreciation of the evidence on record, and not being vitiated by any error of law, much less of jurisdiction, cannot be interfered with The court below has accepted some of the payments alleged to have been made by the appellant to the decree-holder and has observed that adjustment shall be allowed while final payment is being made to the decree-holder Whether a particular payment was made or not on the evidence on record is a question of fact which cannot be investigated in a revision Also the said question cannot affect the validity of the sale

12. The third and the last submission raised by the learned counsel for the appellant was that the court below committed an error of jurisdiction in holding that it had no power to accept the balance due upon the decree after making adjustment of Rs 3,500/- said to have been paid by the appellant to the decree-holder, and on that basis to set aside the sale

13. Having given the matter a careful thought, I find no substance in the above argument either I entirely agree with the court below and the learned counsel for the decree-holder-respondent that the stage for accepting the decretal amount and for setting aside the sale was long since over The legislature has made an express provision in O 21 R 89 enabling a person claiming an interest in the property sold, to have the sale set aside by depositing in court the sums of money mentioned in O 21 R 89 C P C The applicant had been duly served with the notice under O 21 R 66 C P C He had, therefore, prior knowledge of the sale If, therefore, the applicant was interested in avoiding the sale, he should have made the deposit contemplated under O. 21 R 89 C P C within the time stipulated therein and avoided the sale even after the auction Having failed to do that, it is not permissible

to the applicant to have the sale set aside on the ground mentioned above

14. Furthermore, the offer of the appellant to have the sale set aside by making the deposit was conditional and was based upon his insistence that he had already paid a sum of Rs 3,500/- to the decree-holder opposite party The appellant was claiming adjustment of this amount even in regard to his liability under the decree There was, therefore, no unconditional offer to pay up the entire decretal amount, much less other amounts which are required to be paid under O 21 R 89 C P C The court below hence was not wrong in refusing to set aside the sale on the alleged offer made by the applicant

15. I may dispose of the cases which were cited by the learned counsel for the appellant He referred to three decisions reported in —

(1) AIR 1972 All 350 (paragraphs 9, 10 and 11), (2) 1968 A W R (H C) 95, (3) AIR 1937 All 407

16. These cases are of little assistance What they lay down is that an objection as regards the saleability can be taken by a judgment-debtor in an objection u/s 47 of the C P C even if such an objection was not raised under O 21 R 89 C P C The proposition laid down in these cases is with respect, entirely unexceptionable However, it has no application to the facts of the present case Such objections as could be raised in execution proceedings have been considered by the court below and decided against the applicant The other objections were not objections relating to saleability of the property in question In my opinion, the case which is more apposite to the controversy is the one cited by the learned counsel for the respondent, namely, AIR 1981 S C 693

17. The decision of the court below is in accord with the above Supreme Court decision

18. No other point was urged in support of the revision In the result, the revision fails and is dismissed There shall be no order as to costs

Revision dismissed

1981 ALL. L. J. 1127

M N SHUKLA AND B C JAUHARI, JJ

Smt Girja Kumari, Petitioner v. The Regional Inspectress of Girls Schools and others, Respondents

Civil Misc Writ Petn. No 9325 of 1981, D/- 21-8-1981.

U. P. Intermediate Education Act (2 of 1921), S. 2(e) and S. 9(4) — Term 'regulation' u/s. 2(e) — By virtue of S. 9(4) and also S. 21 of U. P. Secondary Education (Amendment) Act, term 'regulation' includes regulations framed by State Government. (U. P. Secondary Education (Amendment) Act (26 of 1975), S. 21).

The regulations framed by the State Government fall within the ambit of S 2(e) by virtue of the provisions of S 9(4) as also by virtue of the provisions of S 21 of the U P Secondary Education (Amendment) Act, 1975 S 9(4) confers very wide powers on the State Government of modifying, rescinding or making any regulation in respect of any matter, whenever it considers it necessary or expedient to take immediate action This power of the State Government is further fortified by sub-sec (5) of S 9 which provides that no action taken by the State Government under sub-sec (4) shall be called in question Thus, the intention of the Legislature appears to have been to invest the State Government with large and coeval powers with the Board of making regulations and such regulations framed by the State Government would not be vitiated merely because the definition of the term 'regulation' in S 2(e) of the Principal Act may appear to be confined to regulations made by the Board. The matter has been lifted beyond the pale of controversy by the enactment of S 21 of the Amending Act 26 of 1975 S 21 opens with a non obstante clause and would obviously have an overriding effect and make it lawful for the State Government to make any regulation in respect of the matters, inter alia, contained in Chapter II despite anything to the contrary contained in the principal Act. Thus, S 21 of the Amending Act 26 of 1975 enlarges the scope of the statutory provisions of the original Act with respect to the framing of regulations. This large power culled from the two substantive provisions of the original and the amending Act read together destroys the limitation, if any, which

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IY/JY/E129/81/HR/RSK

flows from the definition of the term 'regulation' in S 2(e) of the Act As a consequence of the amending Act it is manifest that the regulation making power conferred by the statute embraces within its scope regulations framed by the State Government also (Paras 6, 7)

Held, Regulation 11 occurring in Chapter 2 of the Regulations was framed after the enactment of U P Act No 26 of 1975 Thus, the argument that the said regulation exceeded the scope of the Act and was, therefore, ultra vires could not be sustained (Para 7)

A N Tripathi, for Petitioner

M. N. SHUKLA, J.:— The petitioner Smt. Girja Kumari and one Smt Asha Singh applied for the post of C T Grade teacher for teaching Geography, Mathematics and English in the Shyam Sunder Bahka Inter College, Ballia in response to an advertisement which appeared in some local newspapers As a result of the selection made by the Selection Committee constituted for the purpose both applicants mentioned above were selected Smt Asha Singh was placed at the top of the list The petitioner secured the second position in order of merit The petitioner, however, submitted a representation to the Regional Inspectress of Girls Schools (respondent No 1) alleging that Smt Asha Singh was not eligible for appointment as she did not satisfy the required qualifications and hence the petitioner was entitled to be appointed to the post advertised. On this representation the Regional Inspectress of Girls Schools passed the order dt. 4th Dec 1980 whereby she annulled the entire selection, inter alia, on the ground that there were certain irregularities in the procedure relating to the advertisement and the combination of subjects required for fulfilling the qualifications prescribed for the post. By an irony of fate the petitioner became the victim of her own representation In the hope of having her rival excluded the petitioner landed herself in a strange predicament Because of the annulment of the entire selection as per order dt. 4th Dec , 1980 her own chance of appointment to the post receded. It is this order which has been impugned in this writ petition

2. In order to attack the legality of the annulment order Sri A. N Tripathi learned counsel for the petitioner challenged the validity of the relevant provisions of law, namely, Regulation 11 occurring in Chapter II of the Regulations framed under the U P Intermediate Education Act (hereinafter referred to as the Act) The Regulation reads,

"11 (1) It shall be the duty of the Experts attending selection of head of institution or teacher to scrutinise all papers concerning selection and in particular to examine that the candidates called for interview have been rightly called as per provisions of the Act and the regulation and that no candidate has been deprived of the opportunity of interview which rightly should have gone to him They should furnish a certificate to this effect in the proceedings of the selection as proposed in the statement in Appendix 'C' In case they feel that a candidate has been deprived of the legitimate opportunity of interview as a result of any error or omission they shall inform the Inspector with full details of the case If the Inspector is satisfied that the proceedings of the interview have been vitiated thereby he shall declare the proceedings of the interview null and void and shall pass orders for holding of selection again in such cases The orders of the Inspector in this regard shall be final and binding on all concerned

2 All applications, papers and registers relating to selection shall be preserved by the Management till such period as may be prescribed by the Director and shall be furnished to the Inspector, Regional Deputy Director of Education or the Director as and when the same may be summoned "

3. The above Regulation, in fact the entire Chapter, II of the Regulations as it stood earlier was substituted by Notification No Ma-3183/XV-7-76-2 (18)-75, published in U P Gazette Extraordinary, dt 7th July, 1976 Consequent upon the amendment the Regulation runs as quoted above. The regulation making power is contained in Ss. 9 and 15 of the Act. S. 9 confers the power on the State Government and sub-sec (4) runs as follows —

"9 (4) Whenever, in the opinion of the State Government, it is necessary or expedient to take immediate action, it may, without making any reference to the Board under the foregoing provisions, pass such order or to take such other action consistent with the provisions of this Act as it deems necessary, and in particular, may by such order modify or rescind or make any regulation in respect of any matter and shall forthwith inform the Board accordingly "

4. On the other hand, S 15 of the Act confers power on the Board of High School and Intermediate Education (hereinafter referred to as the Board) for making regulation for the purpose of carrying into effect the provisions of the Act generally and in particular with respect to certain items which are set out in sub-sec (2) and need not be enumerated here S 2 is the definitive section and according to cl (e) "regulation" means regulations made by the Board under this Act

5. The petitioner's argument rather technical though ingenious is that the statutory definition of 'regulation' is exhaustive and a regulation which does not fall within its ambit will not be deemed to be a regulation in the eye of law It was submitted that in these circumstances the regulations made by the State Government were ultra vires the Act It was rightly pointed out that the amended regulations contained in Chapter II of the Regulations as they stand at present were framed by the State Government The contention was that a regulation which exceeded the scope of the provisions of the statute itself must be struck down as ultra vires This argument, however, completely overlooks the provisions of another statute which brings the regulations framed by the State Government also within the statutory ambit The U P Secondary Education (Amendment) Act, 1975 (U P Act No. 26 of 1975) enacted on 18th Aug., 1975 contains the following provisions in S 21

"21 Notwithstanding anything contained in any of the principal Act referred to in Chapters II and III it shall be lawful for the State Government to make, within one year from the commencement of this Act, regulations in respect of the matters contained in Chapter II, or as the case may be, rules in respect of the matter contained in Chapter III, and every regulation or rule so made by the State Government shall continue to remain in force, until it is duly amended or rescinded under the Principal Act as amended by this Act"

6. The above section opens with a non obstante clause and would obviously have an overriding effect and make it lawful for the State Government to make any regulation in respect of the matters, inter alia, contained in Chapter II despite anything to the contrary contained in the principal Act Thus, S 21 of the amending Act 26 of 1975 enlarges the scope of the statutory provisions of the original Act with respect to the framing of regulations This large power culled from the two substantive provisions of the original and the amending Act read together destroys the limitation, if any, which, it was argued, flowed from the definition of the term 'regulation' in S 2 (e) of the Act As a consequence of the amending Act it is manifest that the regulation making power conferred by the statute embraces within its scope regulations framed by the State Government also

7. However, even without the aid of the amending Act we were inclined to hold that the argument was too technical to be accepted and in substance the power of making regulations could be inferred by necessary implication as vesting in the State Government as well In our opinion S 9 (4) confers very wide powers on the State Government of modifying, rescinding or making any regulation in respect of any matter, whenever it considers it necessary or expedient to take immediate action This power of the State Government is further fortified by sub-sec (5) of S 9 which provides that no action taken by the State Government under sub-sec (4) shall be called in question Thus, the intention of the Legislature appears to have been to invest the State Government with large and coeval powers with the Board of making regulations and such regulations framed by the State Government would not be vitiated merely because the definition of the term 'regulation' in the principal Act may appear to confined to regulations made by the Board It is trite that an attempt should always be made to gather the real intention of the Legislature and unless some inference is positively repugnant to the language of the statute its real intent and substance must determine the interpretation However, it seems no longer necessary to take recourse to these canons of interpretation because the matter has been lifted beyond the pale of controversy by enacting S 21 of the Amending Act 26 of 1975 It would be evident from the dates to which we have already referred that the impugned regulation was framed after the enactment of U P. Act No 26 of 1975 Thus, the argument that the said regulation exceeds the scope of the Act and is therefore, ultra vires cannot be sustained

8. Even otherwise the argument on which the attack on the validity of regulation is founded appears to be like a double-edged sword which cuts at the very root of the petitioner's case. If Regulation 11 were struck

down, the petitioner would also become ineligible for appointment to the post The matter of selection is governed by the provisions of S 16-E of the Act The provisions of sub-secs (6), (7) and (9) of S 16-E are relevant in this regard and are reproduced below —

"16-E (6) The selection committee shall prepare a list containing in order of preference the names as far as practicable of three candidates for each post found by it to be suitable for appointment and shall communicate its recommendations together with such list to the Committee of Management.

(7) Subject to the provisions of sub-sec (8) the Committee of Management shall on receipt of the recommendations of the Selection Committee under sub-sec (6) first offer appointment to the candidate given the first preference by the Selection Committee, and on his failure to join the post, the candidate next to him in the list prepared by the Selection Committee under this section, and on the failure of such candidate also, to the last candidate specified in such list

(8) .

(9) Where no candidate approved by the Selection Committee for appointment is available a fresh selection shall be held in the manner laid down in the Section "

9. The selection of Smt Asha Singh fell through only on the basis that the entire selection was annulled If the selection had not been annulled, the contingency of offering the post to the petitioner would not arise because admittedly Smt Asha Singh had secured the first place in order of merit whereas the petitioner stood second Sub-sec (7) of S 16-E envisages that the first offer of the appointment will be made to the candidate to whom the first prefereñce was given by the Selection Committee and on his or her failure to join the candidate next to him or her in the list prepared by the selection committee would be entitled to the appointment. Therefore, if the annulment itself is challenged, the possibility of the petitioner securing the appointment would cease to exist. In this context it may be noted that Smt. Asha Singh had filed a writ petition in this Court, being writ petition No. 414 of 1980, challenging the annulment of the selection made by the Selection Committee but the writ petition was rejected by an order of this Court dt 10-8-1981. Thus, this Court did not choose to interfere with the selection of the candidates made in the instant case from which it follows that the candidate who stood first would still be available for appointment

10. No other point was pressed before us In the result, this writ petition fails and is dismissed 'in limine'

Petition dismissed

1981 ALL. L. J. 1130

M P MEHROTRA, J

Darshan Singh, Petitioner v State of U P and others, Respondents

Civil Misc Writ Petn No 9261 of 1980, D/- 13-8-1981

(A) Constitution of India, Art. 226 — New plea — Proceedings under U. P. Imposition of Ceiling on Land Holdings Act, (1 of 1961) — Objection by petitioner that notice issued u/s. 10 (2) subsequent to amendment of Act was illegal — Plea neither raised before Prescribed Authority nor before appellate court — Plea cannot be entertained. (Para 4)

(B) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 12 — Ceiling proceedings — Principles of res judicata — Finding by Prescribed Authority that entire land was unirrigated — Finding cannot be disturbed in subsequent ceiling proceedings — Similarly, finding in respect of surplus area cannot be altered in subsequent ceiling proceedings. (Civil P. C. (1908), S. 11) Writ No. 3073 of 1978, 21-9-1979 (All) (DB) Refd. (Paras 4, 5)

Cases Referred : Chronological Paras

(1979) Writ No 3073 of 1978, D/- 21-9-1979, (All) Krishna Kumar v State 5

1978 All L J 1197 5

Narain Singh, for Petitioner, Standing Counsel, for Respondents

ORDER :— This petition arises out of the proceedings under the U P. Imposition of Ceiling on Land Holdings Act The facts, in brief, are these

2. The petitioner was issued a notice u/s. 10 (2) of the Act and he filed objections. This was the first notice issued u/s. 10 (2)

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The objections were decided by the Prescribed Authority by his order dt 31-12-74, a true copy whereof is annexure 'A' to the petition

3. It seems that subsequently after the amendment of the Act, a fresh notice was issued u/s 10 (2) and the objections were filed and they were decided by the Prescribed Authority by an order dt 18-2-77 An appeal was filed against the said order and the same was allowed and the order of the Prescribed Authority was set aside and the case was remanded for a fresh determination The Prescribed Authority then decided the case on 17-10-78 and a true copy of the order of the Prescribed Authority is annexure 'B' to the petition Thereafter two cross-appeals were filed, one by the State and the other by the tenure-holder Both the appeals were decided by the appellate court by its judgment dt 22-5-80, a true copy whereof is annexure 'C' to the petition A certified copy of the judgment is also on the record Now the petitioner has come up in the instant petition and in support thereof, I have heard the learned counsel for the petitioner In opposition, the Learned Standing Counsel has made his submissions

4. Learned Counsel for the petitioner contended that the subsequent notice issued was illegal in law In my view, this contention cannot be raised at this stage No such contention was raised before the Prescribed Authority and there is no discussion about the same in the order of the Prescribed Authority Further, the same was not pressed before the appellate court and at this stage it will not be proper and just to allow this contention to be raised However, another contention was raised and it finds place in the judgment of the Prescribed Authority It may be somewhat similar to the contention which has been pressed before me by the Learned counsel for the petitioner but in fact, it is a separate contention The point is that an earlier finding recorded in the earlier ceiling proceedings must be held to be binding in the subsequent ceiling proceedings, unless due to change in the ceiling law, subsequently brought about, a fresh finding is necessitated It should be seen that before the Prescribed Authority an issue was framed as to whether the earlier finding would operate as res judicata or not The Prescribed Authority has stated that no submission was made on the said point. However, that is a different matter but the contention undoubtedly was raised that earlier findings made in the earlier ceiling proceedings should operate as res judicata in the subsequent ceiling proceedings This aspect assumes importance in view of the contention of the Learned Counsel for the petitioner that in the earlier ceiling proceedings the entire land was treated as unirrigated and there was no justification for giving a fresh finding in the subsequent ceiling proceedings It should be seen that it is not a case where the State might have taken a stand that after the earlier ceiling proceedings were over, fresh source of irrigation came into existence attacting S 29 of the Act. This is not the State's case. While going thro' the earlier order of the Prescribed Authority (Annexure A) I find that even then on behalf of the State a point had been made that there was boring in the petitioner's holding and the land was being irrigated from such source However, after taking into consideration the entire evidence on record, the Prescribed Authority held that the entire land was unirrigated It was not open to the ceiling authorities in the subsequent ceiling proceedings to render a contrary finding on the basis of the Naib Tehsildar's statement. In this view of the matter, I accept the contention of the Learned counsel for the petitioner that the impugned appellate judgment dt 22-5-80 is bad in law So also the order of the Prescribed Authority dt 17-10-80 is bad in law

5. The other contention of the Learned counsel for the petitioner must also be accepted that the benefit which the petitioner had got in the earlier ceiling proceedings in respect of one adult son and the number of members of the family could also not be changed in the subsequent ceiling proceedings. It should be seen that in the earlier ceiling proceeding such benefit to the maximum extent of six hectares of land was extended to the tenure-holder and he was entitled to get the same benefit of additional land in the subsequent ceiling proceedings also In this connection a reference may be made to a Division Bench pronouncement in Krishna Kumar v State (Writ No 3073/78) decided on 21-9-1979 which affirmed the Single Judge pronouncement in Ram Lal v State (1978 All L J 1197) Therefore, when the subsequent ceiling proceedings took place, the position was that whatever land was liable to be declared as surplus under the ceiling law had already been declared as surplus and no further surplus land was to be declared in the subsequent ceiling proceedings.

6. This petition accordingly succeeds and the judgment of the appellate court dt 22-5-80 and the order of the Prescribed Authority dt 17-10-80 are hereby quashed and the subsequent notice issued u/s 10 (2) of the Act will stand discharged In the circumstances, there will be no order as to costs

Petition allowed

1981 ALL. L. J. 1132

(LUCKNOW BENCH)

HARI SWARUP AND MAHAVIR SINGH, JJ

Ravi Dutt Sharma, Petitioner v Modern Vocational Intermediate College, Lucknow and others, Opposite Parties

Writ Petn No 272 of 1973, D/- 3-3-1981

(A) U P. Intermediate Education Act (2 of 1921), S. 16 (g) (3) — Applicability — Applies even to probationary techers, 1968 All L J 1127 Rel. on. (Para 5)

(B) U. P. Intermediate Education Act (2 of 1921),S. 16 (g) (3) — Section is mandatory — Notice of termination issued without prior approval of District Inspector of Schools is void ab initio and cannot be validated.

(Para 6)

(C) Constitution of India, Art. 226 — Writ Petition — Maintainability — Committee of management of Intermediate College issuing termination notice without prior approval of District Inspector of Schools required by S. 16 (g) (3), U. P. Intermediate Education Act — Held, since committee had failed to perform legal obligation imposed upon it, writ petition against it was maintainable, even though it was not a statutory body. (U. P. Intermediate Education Act (2 of 1921), S. 16 (g) (3).) 1977 All L J 951 (F B) Rel. on. 1980 All L J 1070 (S C) and AIR 1976 S C 888 Disting. (Paras 9, 10)

Cases Referred : Chronological Paras

1980 All L J 1070 AIR 1981 S C 122 8
1977 All L J 951 AIR 1977 All 539 (F B) 9
AIR 1976 S C 888 1976 Lab I C 376 8
1968 All L J 1127 5

MAHAVIR SINGH, J. :— The petitioner was appointed a Commerce Teacher in the Modern Vocational Intermediate College, opposite party No 1 He joined the said college on 1-8-1971 (According to the petitioner he joined actually on 31-7-71 but was made to mention so under the pressure of the Principal) Anyway it makes no difference for the disposal of this case

2. The petitioner was put on probation of one year The management, however, terminated his services by its order dt 18-6-72 as according to the management his work and conduct during the probationary period was not satisfactory The order was, however, received by the petitioner on 3-7-72 No approval of the District Inspector of Schools was taken before serving this termination order

3. The petitioner then filed a representation before the District Inspector of Schools The District Inspector of Schools accepted the case of the petitioner that the order of termination of his services was illegal as his prior approval was not obtained as required u/s 16 (g) (3) of the Intermediate Education Act The Managing Committee of the college then filed an appeal before the Deputy Director of Education against this order of the Inspector The Deputy Director of Education passed an order on 31-10-72 allowing the appeal in part While he agreed with the District Inspector of Schools that the notice of termination of service of the petitioner was illegal as no prior approval was taken from him by the management, he held that on the facts and circumstances of the case it appeared that the management was right in its view about unsatisfactory conduct of the petitioner during the probationary period and so he accorded his approval to the termination of service with effect from that date, and held that the services of the petitioner would be deemed to be terminated with effect from the date of his order, i e 31-10-72 He further directed that the pay for three months would be payable by the management from its own fund in view of the irregularities committed by it by serving the termination order without getting prior approval

4. The petitioner has thus come to this court In this writ petition, he contends that the Deputy Director of Education has wholly exceeded his jurisdiction in according post-facto approval and that in any case his services cannot be terminated on the same notice which was held also by him to be illegal and a fresh notice was required.

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5. The learned counsel for the opposite parties initially contends that the view, both of the District Inspector of Schools as well as of the Deputy Director of Education was wrong, that a prior approval was needed for terminating the services of the petitioner during the period of probation It was contended that s 16(g)(3) of the U P I E Act did not apply to the case of a probationer It applies only to those teachers who are in regular service after completing their probationary period This objection, however, has no force It was held by this court in M B Bareilly v B K Mehrotra (1968 All L J 1127) that the provision of this Sub-clause would apply even to a probationer We find ourselves in agreement with this view of this Court

6. It was then contended that the approval after all had been granted by the Deputy Director of Education and it makes no difference whether it was granted after or before and that the requirement of prior approval is only directory and not mandatory This contention is also not correct The provisions of s 16(g)(3) of the U P I E Act are not directory but mandatory A notice suffering from non-compliance of this provision is void ab initio and, therefore, it cannot be validated By according sanction afterwards a fresh notice has to be issued for termination of service The Deputy Director of Education was thus wholly wrong in ordering termination of the services of the petitioner from the date of his order i e 31st October, 1972

7. The question is then as to what is the relief that can be granted to the petitioner The petitioner not only prayed for quashing of these orders but he also prayed for a writ of mandamus directing the opposite parties to treat the petitioner in service as a confirmed teacher

8. Learned counsel for the opposite parties contends that the college is a private educational institution and not a public body or a statutory authority and even if the services of the petitioner have been wrongly terminated, the petitioner cannot claim re-instatement or even a declaration that he may be deemed to be continuing in service He referred for this to Srimati J Tiwari v. Smt. Jwala Devi Vidya Mandir (AIR 1981 S C 122) (1980 All L J 1070) and Executive Committee of Vaish Degree College v. Laxmi Narain (AIR 1976 S C 888)

9. These cases are, however, distinguishable inasmuch as they are suits u/s. 34 of the Specific Relief Act. The present is a case arising under the writ jurisdiction of the High Court. It has been held by a Full Bench of this Court in Afey Ahmad Abdi v District Inspector of Schools, Allahabad (1977 L L J 249) (1977 All L J 951) that though the committee of management of Intermediate college is not a statutory body, nevertheless a writ petition filed against it is maintainable, if such petition is for enforcement or performance of any legal obligations or duties imposed on such committee by a statute

10. In the present case the committee of management was required to perform the legal obligation imposed upon it by s 16(g)(3) of the U P I E Act, 1921

11. However, in the present case, it is not necessary for us to proceed further in this respect as the learned counsel for the petitioner has stated that he does not want to press for the prayer (b) about a writ of mandamus for directing opposite parties to treat him as continuing in service as a teacher as for that he may seek relief separately if necessary He has confined the prayer to the quashing of the orders passed by the management and the Deputy Director of Education

12. Accordingly we allow the writ petition in part only and quash the orders dt 1-7-72 (Annexure-2) and dt 30-10-72 (Annexure-8) The petitioner will get costs of this petition from the respondents

Petition partly allowed.

1981 ALL. L. J. 1133

M P MEHROTRA, J

Sahab Lal Singh, Petitioner v 2nd Additional District Judge and others, Respondents.

Civil Misc Writ Petn. No.8941 of 1980, D/-10-8-1981

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 12A — Sale deeds ignored u/s. 5 (6) — Whether lands covered by such deeds can be declared as surplus.

The intention of the legislature in enacting S. 12A (d) is that the transfer deeds ignored u/s. 5 (6) of the Act for the purposes of ceiling law should still subsist, if it be possible, so far as the parties are concerned, namely,

transferor and transferees However, if it be not possible, then the lands covered by such deeds or part thereof can be declared as surplus (Para 2)

In the instant case, held no objection could be taken to the Prescribed Authority's decision if he thought that it was possible to carry out the legislative intention and not to include the lands of the said sale deeds in the surplus area of the tenure-holder 1978 All L J 776 Disting (Para 2)

Cases Referred :	Chronological	Paras
1978 All L J 776		2

Najahat Husain Khan, for Petitioner

ORDER :— This petition arises out of the proceedings under the U P. Imposition of Ceiling on Land Holdings Act The facts, in brief, are these

2. The petitioner's father Ram Roop Singh was the tenure-holder and the notice u/s 10 (2) of the Act was issued to him but was served on the petitioner as during this period the tenure-holder died Usual proceedings took place and they have become final. In this petition the petitioner raises only one controversy and that is in respect of choice u/s 12-A of the Act His grievance is that two sale deeds executed after 24-1-71 and before 8-6-73 were ignored u/s 5 (6) but the lands covered by the said sale deeds were refused to be included in the surplus land of the tenure-holder The Prescribed Authority purported to act under cl. (d) of S 12-A and the learned counsel states that the said authority was wrong in thinking that no discretion was left to the Prescribed Authority in the said matter For this purpose he placed reliance on Nakchhed Singh v State of U P (1978 All L J 776) I have looked into the said decision but in my view it does not apply to the facts of the instant case The correct legislative intention is that the transfer deeds ignored u/s. 5 (6) of the Act for the purposes of ceiling law should still subsist so far as the parties concerned, namely, transferor and transferees are concerned as far as possible However, if it be not possible, then the lands covered by such deeds or part thereof can be declared as surplus. In the instant case, no objection can be taken to the Prescribed Authority's decision if he thought that it was possible to carry out the legislative intention and not to include the lands of the said sale deeds in the surplus area of the tenure-holder.

3. This petition fails and is dismissed, but there will be no order as to costs

Petition dismissed

1981 ALL. L. J. 1134

: AIR 1981 Supreme Court 1960

(From Allahabad)*

V D TULZAPURKAR AND A VARADARAJAN, JJ

Civil Appeals Nos 1725-26 of 1973, D/- 25-8-1981

Richpal Singh and another, Appellants v Desh Raj Singh and others, Respondents

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 21(1)(h), 157(1), 3(26) — Land leased by disabled person — His successor-in-interest who was landholder on date of vesting also disabled person — Tenant remains Asami and does not become Sirdar — Landholder who had let out need not continue to live on date of vesting provided his heir was also a disabled person. 1970 All L J 476, Overruled. (U. P. Tenancy Act (17 of 1939), S. 3(11).

Certain land was leased by a widow who was sirdar and a "disabled person" for five years in 1945 She died and her interest was inherited by the heir who was also a "disabled person" Thus where the land-holder on the date of letting was a disabled person and the landholder who succeeded was also a disabled person on 9-4-1946 (the date mentioned in S 157) and on 1-7-1952 (the date immediately preceding the date of vesting), the lease would fall under S 21(1)(h) and the tenants would be Asamis and not Sirdars. It is not necessary that the landholder who originally let out the land should not only be a disabled person on both the dates mentioned in sub-clause (a) of Cl (h) of S 21(1) (being the date of letting as also April 9, 1946) but the same landlord should continue to live on the date immediately preceding the date of vesting (which is 1-7-1952 under the Act) It cannot be said that the identity of the land-holder must remain unchanged up to the date of vesting Nor can it be said that protection is granted to the particular person who leased out the land.

*Special Appeals Nos. 424 and 425 of 1971, D/- 27-10-1972 (All.)

The expression 'landholder occurring in S 21(1)(h) must mean a person to whom rent is payable and by fiction would include his predecessor-in-interest Read in this light there would be no question of adding the word predecessor-in-interest of the landholder in S 21(1)(h) as that would be implicit in the term 'land-holder' on account of the deeming provision of S 3(1) read with S 3(11) of the U P Tenancy Act (1939) 1970 All L J 476, Overruled, 1981 All L J 484, Approved (Paras 4 and 8 to 12)

Cases Referred : Chronological Paras

1981 All L J 484 1981 All W C 213 13
1970 All L J 476 1, 2, 4, 5, 11, 13

M/s P N Lekhi, M K Garg and V K Jain, Advocates, for Appellants, Mr A P S Chauhan and Mr C K Ratnaparkhi, Advocates, for Respondents

TULZAPURKAR, J.:— These appeals by certificate granted by the Allahabad High Court raise the following substantial question of law of general importance which needs to be decided by this Court —

"Whether the view taken by the Full Bench in Smt Maya v Raja Dulaji (1970 All L J 476) that the lessor/landlord should not only be disabled person on the relevant dates, but that he should continue to live on the date immediately preceding the date of vesting, within the meaning of Cl. (h) of Section 21(1) of the U P Zamindari Abolition and Land Reforms Act, represents a correct construction of Cl (h) of S 21(1) of the Act?"

2. The facts giving rise to the aforesaid question may be stated One Smt Ram Kali, widow of Tikam Singh, was the land-holder of the plots (agricultural land) in dispute situated in villages Agaota and Khaiya Khera in District Bulandshahr (U P) On June 14, 1945 Smt Ram Kali who was a sirdar and a 'disabled person' falling within S. 157(1) of the U. P Zamindari Abolition and Land Reforms Act, 1950 (hereinafter called "the Act") executed a registered deed of lease for a period of 5 years in favour of Uttam Singh and Murli Singh (the predecessor-in-title of the respondents) but before the expiry of the period of 5 years she died in August, 1945 and Dan Sahai (her husband's real brother and predecessor-in-title of the appellants) inherited her interest. Dan Sahai was also a 'disabled person' within the meaning of Section 157(1) of the Act. It seems that after the expiry of the period of the registered lease Uttam Singh and Murli Singh continued to hold the lands as tenants from year to year under Dan Sahai In consolidation proceedings a question arose whether Uttam Singh and Murli Singh, who were lessees under Smt Ram Kali and Dan Sahai, acquired the status of Sirdars or they remained Asamis of the plots in dispute The case of Dan Sahai was that they were Asamis and not Adhivasis entitled to be treated as Sirdars under S 240-B of the Act and that depended upon whether as tenants or occupants of the plots in dispute their case fell within the provisions of S 21(1)(h) of the Act. The contention of Dan Sahai was that since Smt Ram Kali was a disabled person on the date of letting and since he who succeeded her was also a disabled person on April 9, 1946, the lease in favour of Uttam Singh and Murli Singh would fall within S 21(1)(h) and as such Uttam Singh and Murli Singh shall be deemed to be Asamis On the other hand the contention on behalf of Uttam Singh and Murli Singh was that the land-holder should not only be a disabled person on both the dates mentioned in sub-cl. (a) of Cl. (h) of S 21(1) (being the date of letting as also April 9, 1946) but the same landlord should continue to live on the date immediately preceding the date of vesting (which is 1-7-1952 under the Act) and since in the instant case the same landlord who had let out the plots and who was disabled person on the date of letting had not continued to live on the date immediately preceding the date of vesting S 21(1)(h) was totally inapplicable and, therefore, they were entitled to be treated as Sirdars. The Division Bench of the Allahabad High Court in Special Appeals Nos. 424-425 of 1971 accepted the contention raised by counsel on behalf of Uttam Singh and Murli Singh (the respondents' predecessors) relying on the view taken by the Full Bench in Smt. Maya v Raja Dulaji (1970 All L J 476) and decided the appeals in their favour by holding that they were not Asamis but had become Sirdars.

3. At the outset it may be stated that it was not disputed either in the lower Courts or before us that both Smt. Ram Kali as well as Shri Dan Sahai who succeeded to her interest in the plots after her death were disabled persons under S 157(1) of the Act. In fact it was accepted by both the sides that on the date of letting (being 14th June, 1945) Smt. Ram Kali, the then land-holder was a disabled person and on 9th April, 1946 (being the other relevant date under sub-clause (a) of Cl. (h) of S. 21(1)) Dan Sahai, the then

landholder, was a disabled person who continued to be the landholder up to the date of vesting and the question is whether in such a case the occupation of the plots by Uttam Singh and Murli Singh under the lease from both of them would fall within the provision of Section 21(1)(h) of the Act

4. The relevant provision runs thus

"21 (1) Notwithstanding anything contained in this Act, every person who, on the date immediately preceding the date of vesting, occupied or held land as —

(h) a tenant of sir land referred to in sub-clause (a) of Cl (i) of the explanation under Sec 16, a sub-tenant referred to in sub-clause (ii) of Cl (a) of Section 20 or an occupant referred to in sub-clause (i) of the said section where the landholder or if there are more than one landholders, all of them were person or persons belonging —

(a) if the land was let out or occupied prior to the ninth day of April, 1946, both on the date of letting or occupation, as the case may be, and on the ninth day of April, 1946, and

(b) if the land was let out or occupied on or after the ninth day of April, 1946, on the date of letting or occupation, to any one or more of the classes mentioned in sub-sec (1) of Section 157, shall be deemed to be an Asami thereof"

In other words, S 21(1)(h) provides that every person occupying or holding land in any one of the capacities mentioned in Cl. (h) on the date immediately preceding 1-7-1952 shall be deemed to be an Asami thereof notwithstanding anything contained in the Act, if the landholder or if there are more than one all of them were disabled persons within the meaning of S 157(1), both on the date of letting as well as on April 9, 1946 where the letting has taken place prior to April 9, 1946, or were disabled persons on the date of letting if the letting has occurred after April 9, 1946

In the instant case it is not disputed that Uttam Singh and Murli Singh were on the date immediately preceding the date of vesting holding or occupying the plots in question in one or the other capacity mentioned in Cl. (h), secondly, since the letting was prior to April 9, 1946 sub-clause (a) of Cl (h) is attracted and it is also not disputed that on the date of letting the then landholder (Smt. Ram Kali) was a disabled person and on April 9, 1946 the then landholder Dan Sahai, who succeeded her, was also a disabled person under S 157(1) of the Act Incidentally Dan Sahai continued to be the landholder on the date immediately preceding 1-7-1952 On these facts it seems to us clear that all the requirements of S 21(1)(h) could be said to have been satisfied but the Division Bench relying upon the Full Bench decision in Smt Maya v Raja Dulaji (1970 All L J 476) (supra) held that Uttam Singh and Murli Singh were not Asamis and had become Sirdars because Section 21(1)(h) was not attracted inasmuch as in their view it was a requirement of that provision that not merely should the landholder be a disabled person on both the dates mentioned in sub-clause (a) of Cl (h) but the same landholder should continue to be landholder on the date immediately preceding the date of vesting (i e the identity of the disabled landholder or landholders on both the dates and the landholder or landholders seeking the benefit or protection of the provision on the date immediately preceding 1-7-1952 must remain unchanged) and this requirement was not satisfied in this case The question is whether on true construction of the provision such a requirement can be read into the said provision?

5. In Smt Maya v Raja Dulaji (1970 All L J 476) (supra) the facts were that the disputed plots belonged to one Bijain and were inherited on his death by his widow Smt Lakshmi and when Smt Lakshmi died her minor unmarried daughter Kumari Maya became the landholder Her elder sister Saheb Kunwar acting as her guardian executed a registered lease of the plots in favour of the plaintiffs (Ram Charan and others) on 15-10-1947 for a period of five years (a case falling under sub-clause (b) of Cl (h)) Later on Maya was also married to her sister's husband Thakurdas who was admitted to the holding as co-tenant with Maya, with the consent of the Zamindar in the year 1948. Thus on the date of vesting (1-7-1952) both Maya (who was still minor and disabled person) as well as her husband Thakurdas were the landholders of the plots in question The lessee-plaintiffs filed a suit in the year 1954 for a declaration that they had become Adhivasis of the land on the coming into force of the U. P Z A & L R Act and had subsequently acquired Sirdari rights on the passing of the U P. Act XX of 1954 The suit was decreed by both the Courts below and hence Maya Defendant preferred a second appeal to the High Court. The question raised for determination was

whether for the purposes of Section 21(1)(h) the disability of the landholders who were in existence on the date of vesting was material or the disability of the landholders who let out the land was a deciding factor? The Court noticed that Section 21(1)(h) had been introduced in the Act for the first time by U P Act XVI of 1953 with retrospective effect from July 1, 1952 and was later on amended by U P Act XX of 1954 and has thereafter continued in its present form Section 21(1)(h), as originally enacted, in express terms required that "the landholder or if there are more than one landholder all of them were person or persons belonging, both on the date of letting and on the date immediately preceding the date of vesting, to any one or more of the classes mentioned in sub-section (2) of S 10 or Cl (viii) of sub-section (1) of S 157" As a result of the amendment made by Act XX of 1954 the words "both on the date of letting and on the date immediately preceding the date of vesting" were omitted In other words, by the amendment the requirement that disability of the landholder should subsist on the date immediately preceding the date of vesting was deleted The Full Bench accepted the position that for purposes of S. 21(1)(h), in its present form, the disability of the landholder need not continue or subsist on the date immediately preceding the date of vesting and might cease on or before the date of vesting but took the view that in the case before it there were two landholders on the date immediately preceding the date of vesting, namely, Smt Maya and her husband Thakurdas, that a new body of "landholders" had come into existence subsequent to the date of letting and that all of them were not landholders, who had let out the land as disabled persons and, therefore, the plaintiffs became Adhivasis and the defendants were not entitled to the benefit of Section 21(1)(h) of the Act. In other words, the Full Bench has been of the view that for purposes of S 21(1)(h) it is necessary that the landholders on the date immediately preceding the date of vesting must be the same persons as those who let out the land and suffered from disability on the date of letting, and also on April 9, 1946 in case the letting was before that date In other words, the identity of landholder or landholders must remain unchanged up to the date of vesting

6. For reading such a requirement into the provision the Full Bench has given two reasons : (a) that such a requirement arises on construction of certain words used in Cl (h) (vide para 17 of the Judgment) and (b) that the protection given to a disabled landholder was intended to be a personal protection granted to the very individual who let out the land as a disabled person and this was warranted by a historical survey of parallel provisions contained in the preceding Tenancy Laws in U P (vide Para 19) According to the Full Bench the crucial words used in Cl (h) are "where the landholder or if there are more than one landholder all of them were person or persons belonging' to any one or more of the classes of disabled persons under S 157 (1) and the Full Bench has reasoned "the word 'are' and the word 'them' together with the word 'were' in the aforementioned phrase clearly show that the intention of the Legislature was that on the date of vesting the 'landholder' should be the very person who was the landholder on the relevant dates, to earn the benefit of Cl. (h) of S 21 (1)" The Court observed that S 21 (1) (h) could bear the interpretation suggested by counsel for Smt. Maya only if the words 'or their predecessor-in-interest' were added before the words "all of them" The court has further stated that historical survey of the parallel provisions contained in the preceding Tenancy Laws showed that the protection given to a disabled person had always been in the nature of a personal protection granted to the very individual who let out the land as a disabled landholder and the protection ceased to be available when the identity or personality of that landholder is changed and in that behalf reliance was placed on certain provisions of the Agra Tenancy Act, 1926 and U P Tenancy Act, 1939 In our view neither reason holds good for sustaining the literal construction placed upon the provision by the Full Bench

7. It is true that Cl (h) contains the phrase "where the landholder or if there are more than one landholder, all of them were person or persons belonging' to any one or more of the classes mentioned in Section 157 (1), but for arriving at the correct interpretation of this crucial phrase it is necessary to have regard to the definition of 'landholder' and the provisions of S 157 of the Act with which S 21 (1) (h) is interconnected

8. Under S 3 (26) of the Act, the definition of 'landholder' as given in the U. P Tenancy Act, 1939 has been adopted since the expression is not defined in the Act That expression has been defined in S. 3 (11) of the U. P. Tenancy Act, 1939 thus

' "Landholder" means the person to whom rent is or, but for a contract express or implied would be, payable '

This definition must be read in light of Section 3 (1) of that Act which runs thus

' All words and expressions used to denote the possessor of any right, title or interest in land, whether the same be proprietary or otherwise, shall be deemed to include the predecessors and successors in right, title or interest of such person "

In other words, the expression 'landholder' who obviously is a possessor of interest in land under S 3 (11) means a person to whom rent is payable, and under S 3 (1) by legal fiction it shall include his predecessor-in-interest as also successor-in-interest to whom the rent was or is payable It is such definition that will have to be read in the U P Z A & L R Act wherever that expression occurs It is thus obvious that the expression 'landholder' occurring in Section 21 (1) (h) must mean a person to whom rent is payable and by fiction would include his predecessor-in-interest Read in this light there would be no question of adding the word predecessor-in-interest of the landholder in S 21 (1) (h) as that would be implicit in the term 'landholder' on account of the deeming provision of S. 3 (1) read with Section 3 (11) of the Tenancy Act, 1939 It does appear that this aspect of the matter was not brought to the notice of the Full Bench when it construed the concerned crucial phrase Moreover after the amendment effected by Act XX of 1954 the thrust of Cl. (h) is on the landholder or landholders being disabled persons on the material dates only

9. Further S 157 (1) permits leases by disabled persons and says that a Bhumidar or an Asami holding land in lieu of maintenance allowance under S 11, who is a disabled person falling under any of the Cls (a) to (g), may let the whole or any part of his holding, and the proviso thereto is very important which runs thus

"Provided that in the case of a holding held jointly by more persons than one, but one or more of them but not all are subject to the disabilities mentioned in Cls. (a) to (g), the person or persons may let out his or their share in the holding."

And sub-section (2) provides that where any share of a holding has been let out under the aforesaid proviso the Court may on an application of the Asami or the tenure-holder, as the case may be, determine the share of the lessor in the holding and partition the same Having regard to the aforesaid proviso under which even in the case of a joint holding a lease of his share by a disabled landholder is permissible and the same is liable to be separated by a partition it is obvious that the expression "all of them" must refer to all such landholders who were disabled landholders on the material dates When under the proviso to S 157 (1) a lease of his share by a disabled landholder in joint holding (held along with a non-disabled person) is expressly permitted and under S 157 (2) the Court has to determine such share of the disabled lessor and partition the same on an application being made in that behalf, it is difficult to accept that the Legislature intended to deprive the protection of Section 21 (1) (h) to such disabled landholder simply because on the date immediately preceding the date of vesting such landholder comes to hold the land jointly with some other non-disabled landholder In other words on the facts found in the Full Bench case when on the date of letting the entire holding belonged to Smt Maya who was a disabled person and on the date of vesting she along with her husband Thakurdas (a non-disabled person) became joint holder, could Smt Maya at any rate to the extent of her share in the joint holding be denied the benefit of S 21 (1) (h) notwithstanding the proviso to S 157 (1) and S 157 (2) being in the Statute? The answer is obviously in the negative In fact in view of the fact that on the material date (being the date of letting) the entire holding belonged to Smt Maya (the disabled person, and having regard to the deeming provision which has to be read in the definition of 'landholder' and having regard to the thrust of the amended Cl (h) which does not require that the successor-in-interest be a disabled person on the date of vesting, the benefit of S 21 (1) (h) should have been extended or made available in respect of the entire holding In other words, on true construction of the crucial phrase occurring in Cl. (h) it is not possible to read into the provision the additional requirement, namely, that the identity of the landholder or landholders must remain unchanged up to the date of vesting

10. Coming to the second reason the Full Bench has observed (after a historical survey of parallel provisions of the Agra Tenancy Act, 1926 and U P. Tenancy Act, 1939 supported the conclusion that protection was granted only to the very individual who let out the land as a disabled landholder and the

protection ceased when the identity of the personality of that landholder changed and in that behalf reference was made to S 29 (6) and (7) of the former Act and S 4! (2) of the latter Act Now apart from the fact that the scheme of the U P Z A and L R Act is different from these two earlier enactments, a careful analysis of the two provisions in the earlier enactments will clearly show that in each of the provisions express words had been used conferring personal rights on the individuals concerned which is not the case with Section 21 (1) (h) of the Act

11. Having regard to the above discussion we are of the opinion that the view taken by the Full Bench of Allahabad High Court in Smt Maya v Raja Dulaji (1970 All L J 476) (supra) does not represent the correct construction of S 21 (1) (h) of the Act On true construction of the said provision in our view, the benefit thereof would be available to the landholder on the date of vesting, if the same landholder or his predecessor existing on the material dates was a person or persons belonging to one or more of the classes mentioned in Section 157 (1) of the Act

12. Since in the instant case, which falls under sub-clause (a) of Cl (h), on the date of actual letting Smt Ram Kali was a disabled person and since on the next material date, namely, April 9, 1946 Dan Sahai (successor-in-interest of Smt Ram Kali) was also a disabled person, the landholder on the date of vesting, who incidentally happened to be Dan Sahai, would be entitled to the benefit of S 21 (1) (h) and the respondents (successors of Uttam Singh and Murli Singh) would remain Asamis and cannot be said to have become Sirdars

13. We might mention that after the arguments in these appeals were concluded and our judgment was ready for pronouncement we were informed that in a later case Dwarika Singh v Dy Director of Consolidation, 1981 All WC 213 1981 All L J 484, a larger Bench of 5-Judges of the Allahabad High Court has, by majority, overruled the view taken in Smt Maya's case (1970 All L J 476)

14. In the result the appeals are allowed, the orders of the Division Bench in Special Appeals Nos. 424-425 of 1971 are set aside and for reasons given by us above, the decision of the learned single Judge dated May 10, 1971 is restored.

15 We direct that each party will bear its own costs

Appeals allowed

1981 ALL. L. J. 1139

(SUPREME COURT)

(From Allahabad)

S MURTZA FAZAL ALI AND A VARADARAJAN, JJ

Civil Appeal No 922 of 1981, D/- 19-2-1981

Smt Kamlesh Kumari, Appellant v State of U P and others, Respondents

Constitution of India, Art. 133 — Appeal in ceiling matter — Prescribed authority erroneously not excluding land said to have been transferred from surplus area — Judgment of High court and Prescribed Authority set aside — Case remanded to prescribed authority to decide case according to S. 12A Proviso (d) of the U. P. Ceiling Act — (U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961) S. 12A, Proviso (d)).

(Para 1)

S. M. FAZAL ALI, J. :— The short point taken by Mr Ashok Sen in support of the petition is that even assuming that the finding of the Prescribed Authority that the transfer was not bona fide is correct, the Prescribed Authority was in error in not excluding the land said to have been transferred from the surplus area. The land which was the subject matter of transfer was covered by plot No 460 The contention is well founded and must prevail. In these circumstances, we set aside the judgment of the High Court and that of the Prescribed Authority and remit the case to the Prescribed Authority to decide the surplus land in accordance with S 12A (d) of the Act by excluding the area which was the subject of transfer as far as possible

2. The appeal is disposed of accordingly

Order accordingly.

IY/JY/E450/81/SSG

1981 ALL. L. J. 1140

M P MEHROTRA. J

Talewar Singh (deceased by L Rsi. Petitioner v State of U P and others. Respondents

Civil Misc Writ Petn No 7621 of 1978. D/- 25-8-1981

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 5 (6), Proviso — Transfer of land after 24-1-1971 — Appellate Court not taking into consideration cl. (b) of Proviso to S. 5 and holding sale deed as bound to be ignored in law without any exception whatsoever — Order of Appellate Court, held illegal. (Para 3)

Cases Referred : Chronological Paras

(1980) Civil Misc Writ Petn No 2768 of 1978. D/- 28-1-1980. (All) Attar Singh v State 3

1978 All L J 1343 3

Girdhar Malviya for Petitioner. Standing Counsel, for Respondents

ORDER :— This petition arises out of this. The petitioner was treated as the tenure-holder and a notice under S 10 (2) of the Act was issued. He filed objections and they were decided by the Prescribed Authority by his order dated 27-3-1976, a true copy of which is Annexure 3 to the writ petition. Thereafter an appeal was filed and the same was decided by the appellate court by its judgment dated 31-5-1978, a true copy of which is Annexure 4 to the petition

2. Feeling aggrieved, the petitioner has now come up in the instant writ petition and in support thereof, I have heard the learned counsel for the petitioner and in opposition, the learned Standing Counsel has made his submissions.

3. The learned counsel contended that the sale-deed dated 1-4-1972 executed by the wife of the petitioner should have been accepted and should not have been ignored It is obvious that this controversy was not considered by the Prescribed Authority or by the appellate court with reference to the provisions contained in Cl. (b) of the proviso to S 5 (6) of the Act. It is true that the transfers after 24-1-1971 are bound to be ignored under S. 5 (6) of the Act but in view of the cl. (b) of the proviso to S. 5 (6) of the Act, such transfers, which are proved to the satisfaction of the Prescribed Authority to be in good faith and for adequate consideration and under an irrevocable instrument not being a Benami transaction for immediate or deferred benefit of the tenure-holder or other members of his family, have to be accepted From the impugned orders, it is obvious that neither the Prescribed Authority nor the appellate court took into consideration cl (b) of the proviso and thought that the sale deed was bound to be ignored in law without any exception whatsoever This view is undoubtedly erroneous From the order of the appellate court, it seems that a contention was raised before the said court that S 5 (6) of the Act is confined only to transfers effected by a tenure-holder and not by his wife This contention was rightly repelled by the appellate court, and in this connection, a reference may be made to the pronouncement of this Court reported in Attar Singh v State, (Civil Misc Writ Petn No 2768 of 1978 decided on 28-1-1980) and Trilok Singh v State (1978 All L J 1343) However, the appellate court was wrong in not adverting to clause (b) of the proviso to S 5 (6) of the Act while deciding the said controversy

4. This petition is accordingly allowed and the judgment of the appellate court dated 31-5-1978 (Annexure 5) and the order of the Prescribed Authority dated 27-3-1976 (Annexure 3) to the petition are hereby quashed so far as the controversy about the aforesaid sale deed dated 1-4-1972 is concerned The Prescribed Authority is directed to reconsider the sale deed in the light of the provisions contained in clause (b) of the proviso to S 5 (6) of the Act, on the basis of the material and evidence on the record No other controversy shall be allowed to be raised before the Prescribed Authority or before the appellate court in case an apeal is filed against the order of the Prescribed Authority to be passed hereafter The surplus land shall be redetermined in the light of the fresh decision of the authorities below in respect of the said controversy In the circumstances, there will be no order as to the costs.

Petition allowed.

1981 ALL. L. J. 1141

K. N. MISRA, J

Jairam and another, Petitioners v Asstt Director of Consolidation, Jaunpur and others, Respondents

Civil Misc Writ No 4186 of 1981, D/- 21-8-1981

(A) U. P. Consolidation of Holdings Act (5 of 1954), S. 12 — U. P. Consolidation of Holdings Rules (1954), Rr. 25, 30 — Mutation cases — Registration in Chronological Order in a Misilband Register in C. H. Form 7 is necessary — R. 30 does not absolve the Assistant Consolidation Officer from duty and responsibility of maintaining record in Misilband register of all mutation cases.

(Para 4)

(B) U. P. Consolidation of Holdings Act (5 of 1954), S. 12 — U. P. Consolidation of Holdings Rules (1954), Rr. 25, 25A, 30 — Mutation — Two sets of claimants aplying for mutation before Assistant Consolidation Officer in respect of same land — Consolidation Officer deciding only one case under R. 25A — Held that the order was per se without jurisdiction and aggrieved party had every right to file appeal against that order.

(Para 4)

Suresh Kumar Srivastava, for Petitioners

ORDER :— This writ petition is directed against the impugned orders passed by the Assistant Director of Consolidation and Assistant Settlement Officer, (C), Jaunpur

2. Briefly stated the facts of the case are — that Ram Lakhan Pathak, opp party No 3 was the bhumidhar of the land in question He is said to have executed a sale deed dated 10-1-1972 in favour of Dharam Raj and Manik Raj, opp parties Nos 4 and 5 who, on the basis of the aforesaid sale deed, applied for the mutation under S 12 of the U P Consolidation of Holdings Act, before the Assistant Consolidation Officer The petitioners, Jairam and Rajdev also claimed to have purchased the same land in question from opp party No 3, Ram Lakhan Pathak, through another sale deed dated 12-8-1977 They filed objection under S 12 of the said Act before the Asstt Consolidation Officer. The Asstt. Consolidation Officer is said to have passed an order of mutation in favour of the petitioners on 8-2-1979 But no order of mutation was passed nor any action was taken by him on the earlier mutation application filed by opp parties Nos 4 and 5 When the opp parties Nos 4 and 5 came to know about the aforesaid mutation order, they applied to the Asstt. Consolidation Officer for passing mutation order, in their favour, on their mutation application This was rejected by the Asstt Consolidation Officer, vide his order dt 19-3-79 saying that since he has already passed the mutation order in respect of the same land in question, hence he cannot pass an order on the mutation application filed by opp parties Nos 4 & 5 He, however, directed them to file an appeal against the said order before the Settlement Officer (C) Thereafter the opp parties Nos 4 and 5 filed two appeals one appeal was directed against the mutation order dt 8-2-79 passed by the Asstt. Consolidation officer in favour of the petitioners and another appeal was directed against the order dt 19-3-79 by which the Asstt Consolidation Officer rejected the application of the opp parties Nos 4 and 5 Both these appeals were heard together by the Assistant Settlement Officer (C) and the same were allowed by him vide order dt. 13-8-79 awarding Rs 20/- as costs to the petitioners and the case was remanded to the court of Asstt. Consolidation Officer for a fresh decision on merits. Against this order the petitioners had filed two revisions before the Dy Director of Consolidation under Sec 48 of the Act, which were heard by Asstt. Director of Consolidation, opp party No 1 and the same were dismissed on 13th Oct 80 and the order passed by the Settlement Officer (C) was maintained It is against these two orders the petitioners have preferred this writ petition

3. The learned counsel for the petitioners contended that since the opp parties Nos 4 and 5 were not parties to their case, hence no appeal could be filed by them against the order dt 8-2-79 and the Asstt Settlement Officer (C), opp party No 2, therefore, acted illegally in allowing the appeal and remanding the case to the Consolidation Officer on merits. So far as the appeal filed against the order dt. 19-3-79 was concerned, the learned counsel for the petitioners has not challenged its maintainability before me His contention is that since the appeal was not maintainable against the order of mutation dt 8-2-79 passed in favour of the petitioners, hence the remand orders passed by the S O (C) is illegal and without jurisdiction I do not find any merit in this submission

4. It is not disputed that mutation application was filed u/s 12 of the said Act by the opp parties Nos 4 & 5 before the Asstt. Consolidation Officer on 6-3-1976 and that the petitioners had also filed a mutation application subsequently on 17-9-77 In view of this fact, two mutation applications, in respect of the same property, were pending before the Asstt Consolidation Officer who is said to have decided the case of the petitioners by his order dt 8-2-79 Rule 25 of the U P Consolidation of Holdings Rules (hereinafter referred to as the Rules) provides that

"Cases relating to each of the two categories mentioned in clause (e) of sub-rule (2) shall be entered in chronological order in a Misalband register in C H Form 7 to be maintained by each Asstt Consolidation Officer"

In view of this provision the Asstt Consolidation Officer should have entered both the mutation applications in Misalband register which were relating to same land pending before him Learned counsel for the petitioners has submitted that the provisions contained in Rule 25 do not apply to mutation case filed under Sec 12 and they need not be entered in Misalband register He referred to Rule 30 of the Rules which provides that —

"The form in which the matters mentioned in Sec 12 of the Act may be raised before the Asstt. Consolidation Officer shall be in C H Form 6-C" and

"The procedure laid down in rules 25-A to 27 and 29 shall mutatis mutandis, be followed in deciding matters raised before the Asstt Consolidation Officer under Sec 12"

Referring to this rule, he has submitted that the Asstt Consolidation Officer was not required to record in the chronological order both the aforesaid applications under Sec 12 of the Act filed before him because Rule 25 has not been referred in Rule 30 of the Rules I do not find any substance in this argument Rule 25 provides the procedure to be followed by the Asstt Consolidation Officer in maintaining the record of all the cases in Misalband Register in C H Form 7 which are filed before him. No case can be kept by him without entering the Misalband Register, be it a mutation case or any other type of case. In the mutation case also rights and title are claimed by the objector in the land and the case filed before the Asstt. Consolidation Officer has got to be entered in Misalband Register as required under Rule 25. The said rule provides that the cases of one specified nature should be registered in chronological order in a Misalband register in C H Form 7 and that register has to be maintained by the Assistant Consolidation Officer This being so the Assistant Consolidation Officer should have entered both these cases in C H Form 7 and he should have dealt with those cases together relating to same land The Rule 30 does not absolve the Assistant Consolidation Officer from the duty and responsibility of maintaining record in Misalband Register of all the mutation cases filed before him The learned counsel further argued that since the opp parties Nos 4 and 5 were not the parties to the case, hence they could not file appeal against the order dt. 8-2-79 I do not find any merit in this submission It is not disputed that the application under Sec 12 of the Act, for mutation, was filed earlier by the opp parties Nos 4 and 5 which was pending before the Asstt Consolidation Officer since prior to the filing of the mutation application, by the petitioner The Assistant Consolidation Officer has been conferred jurisdiction to decide the case under the U P Consolidation of Holdings Act when it is an undisputed case But he has no jurisdiction to decide the case when the case is disputed one The petitioners had also filed mutation application in respect of that very land before the Asstt Consolidation Officer Therefore, both the parties were contending to be entitled to the mutation in respect of the same land on the basis of the sale deeds which, they asserted to be valid entitling them to get their names mutated In this view of the matter it cannot be said that the petitioners were not contending parties in the case before the Asstt Consolidation Officer claiming mutation in respect of same land There were two applications pending before the Asstt Consolidation Officer The Assistant Consolidation Officer had no jurisdiction to pass orders in either of them as two sets of claimants had applied for mutation before him in respect of same land He could not proceed to decide only one case under Rule 25A of the Rules as he has done in this case The order passed by the Asstt Consolidation Officer was, therefore, per se without jurisdiction and the opp parties Nos 4 and 5 had every right to file appeal against that order The Asstt Consolidation Officer, on being apprised of this position, passed an order dated 8-2-79 directing the opp parties Nos. 4 and 5 to file appeal against that order He had rightly done so He could not pass a second mutation order unless earlier mutation order was set aside The

opp parties Nos 4 and 5 who had applied for mutation before the Asstt Consolidation Officer and which was pending, were thus entitled to challenge the mutation order dated 8-2-79 and the opp party No 2, the Assistant Settlement Officer (C) had rightly allowed the appeal filed by opp parties Nos 4 and 5 by allowing costs of Rs 20/- which is said to have been received by the counsel for the petitioners. In this view of the matter the petitioners were not entitled to challenge the orders passed by the opp party No 2 Dy Director of Consolidation has taken into consideration all the arguments advanced on behalf of the petitioners Thus, I do not find any infirmity in the impugned orders passed by the opp parties Nos 1 & 2 nor they suffer from any error of fact, law or jurisdiction This writ petition is devoid of merit and is accordingly, dismissed in limine

Petition dismissed

1981 ALL. L. J. 1143

M P MEHROTRA, J

Rishipal, Petitioner v State of U P and others, Respondents

Civil Misc Writ Petn No 8333 of 1980 D/- 17-8-1981

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 4A — Question whether land was irrigated or unirrigated — Determination with reference to three categories of S. 4A — Land falling in first category — Nature and composition of soil need not be looked into — It is required to be done only in respect of third category. 1979 All L J 25 and 1978 All L J 728 Rel. on.

(Para 5)

Cases Referred :	Chronological	Paras
1979 All L J 25	1978 All W C 577	4, 5
1978 All L J 728	1978 All W C 492	4, 5

R K Jain, for Petitioner, Standing Counsel, for Respondents

ORDER :— This petition arises out of the proceedings under the U P Imposition of Ceiling on Land Holdings Act

2. The facts, in brief, are these· The petitioner is the tenure-holder and the notice u/s. 10(2) of the Act was issued to him. He filed objections and they were decided by the Prescribed Authority by his order dt 31-5-1976, a true copy of which is Annexure 3 to the petition Thereafter, an appeal was filed and the same was dismissed by the appellate court on 12-4-1977 by a judgment, whose true copy is Annexure 4 to the petition Thereafter, the petitioner came up to this court and the petition filed by him was allowed in part by a Learned Judge of this Court by his judgment dt. 15-12-1978, a true copy of which is Annexure 5 to the petition The case was remanded to the appellate court for redeciding the controversy as to whether the plots Nos 2498 to 2500 should be treated as irrigated or unirrigated. The appellants court, thereafter, held that the said plots were irrigated by its judgment dt 22-5-1980, a true copy of which is Annexure 6 to the petition

3. Now the petitioner has again come to this Court in the instant writ petition and in support thereof, I have heard Sri R K Jain, Learned counsel for the petitioner

4. The Learned counsel contended that the decision of the appellate court is not in accordance with the remand order which was passed by this Court Further, reliance has been placed on the Division Bench pronouncement in Jaswant Singh v State, (1978 All W C 577) (1979 All L J 25) and a single Judge pronouncement in J N Bansal v State of U P., (1978 All W C 492) (para 13) (1978 All L J 728, para 10) It should be seen that in the earlier order (Annexure 4) which was passed by the appellate court the discussion was on the basis of the third category of S 4A The relevant observation was

"The Learned counsel for the appellant has conceded that the aforesaid plots were in the effective command area of the canal, but since the said plots were at higher level, water could not reach there "

A reference was further made to C H Form 5. When the matter came up to this court, it was observed that the determination had to be made with reference to three categories of S 4A and not with reference to C H Form 5 Thereafter, it was observed that the appellate court seemed to have decided the controversy under the 3rd category and in the said reference it was laid down that before the 3rd category could be applicable, its requirements had to be satisfied. Here it may be observed that at the earlier stage, the appellate court had made an observation to this effect,

No Khasra of the relevant year has been filed to show that there existed no source of irrigation and that only single crop was raised

In the background of the said observation, this Court decided the writ petition When the matter travelled back to the appellate court as a result of the judgment passed in the earlier writ petition, the appellate court observed

"Learned Advocate for the appellant has today produced the relevant extracts of Khasras for the years 1378F to 1380F A perusal of these documents on record would bear out that land comprising all the said three plots was irrigated in all the three years and two crops were raised The entire land was further shown to have been irrigated from a canal in all these three years"

5. Under these circumstances, it cannot be said that the appellate court acted contrary to the remand order passed by this court No Khasras have been annexed to the writ petition to show that the observation made by the appellate court was wrong So far as the case law, on which reliance has been placed, is concerned, it should be seen that in the Division Bench pronouncement in Jaswant Singh's case (1979 All L J 25) (supra) it was only laid down that it was mandatory for the authorities to look into records mentioned in S 4A of the Act However, it is not necessary that in every order passed by the Prescribed Authority or by the appellate court, there should be a recital that the map has been perused So far as the learned single Judge's pronouncement reported in J N Bansal's case (1978 All L J 728) (supra) is concerned, the observation was made with reference to the III category of S 4A In the instant case, the first category of S 4A of the Act is applicable In my view, as I have held that the first category was found to be applicable in the instant case, therefore, there was no question of discussing the nature and composition of the soil which has to be done under the IIIrd category

6. This petition accordingly fails and is dismissed but there will be no order as to costs.

Petition dismissed

1981 ALL. L. J. 1144

M P MEHROTRA, J

State of U P, Petitioner v. 1st Additional District Judge and another, Respondents

Civil Misc Writ Petn No 5221 of 1980, D/- 17-8-1981

(A) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 13A — Plea for reduction in consolidation proceedings rejected by appellate court — Plea cannot be reargued before appellate court by way of an application u/s. 13A. (Paras 3, 4)

(B) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 9(2), Proviso — Notice under proviso to S. 9(2) is only permissive and not mandatory — No objection can be taken if such notice is not issued. (Para 3)

(C) Constitution of India, Art. 226 — New plea — Proceedings under U. P. Imposition of Ceiling on Land Holdings Act — Plea that no notice was issued under proviso to S. 9(2) not raised before Prescribed Authority or in appeal or in subsequent application filed u/s. 13A — Plea cannot be raised in writ petition. (Para 3)

Cases Referred :	Chronological	Paras
1979 All L J 1259		4
AIR 1977 NOC 354	1977 All W C 318	3, 4

Standing Counsel, for Petitioner, R R K Trivedi, for Respondents

ORDER :— This petition arises out of the proceedings under the U P Imposition of Ceiling on Land Holdings Act The facts, in brief, are these

2. The petitioner is the State before me The respondent No 2 was treated as the tenure-holder and she filed objections They were decided by the Prescribed Authority by an earlier order, which is alleged to have been passed in June, 1974 However, no copy of the said order is annexed to the petition We are not really concerned with the same It seems that after the Amendment of the ceiling law, a fresh notice was issued and objections were filed A true copy of the said objections is annexure 1 to the petition The Prescribed Authority disposed of the said objections by his order dt 17-7-1976, a true copy whereof is annexure 2 to the petition 31 bighas, 18 biswas and 3 biswansis of

unirrigated land equivalent to 23 bighas, 15 biswas and 6 biswansis of irrigated land was declared as surplus Thereafter the said tenure-holder filed an appeal and the same was allowed in part and it was directed that "plot No 1221 measuring 1 bigha from the holding of the appellant" shall be excluded The Prescribed Authority thereafter carried out the directions contained in the remand order and passed his order dt 12-1-1979, a true copy whereof is an texure 4 to the petition Thereafter the tenure-holder filed an appeal and the same was dismissed by the appellate court on 28-2-1979, a true copy whereof is annexure 10 to the petition Thereafter the tenure-holder moved an application u/s 13A, a true copy whereof is annexure 5 to the petition The said application was rejected by the Prescribed Authority by its order dt 30-1-1979 Thereafter the tenure-holder filed an appeal and the same was allowed by the appellate court by its judgment dt 12-2-1980 a true copy whereof is annexure 7 to the petition A certified copy of the same is also on the record

3. Now the State has come up in the instant petition and in support thereof, I have heard the learned Standing Counsel In opposition, I have heard Sri R R K Trivedi, learned counsel for respondent No 2, who is the tenure-holder On behalf of the State it has been contended that the Prescribed Authority was justified in rejecting the application u/s 13A A contention was sought to be canvassed in the proceedings u/s 13A, which had already been negatived by the appellate court in its judgment dt 28-2-1979 This contention seems to me to be correct Whether the appellate court was right or wrong on 28-2-79 in rejecting the contention placed on behalf of the tenure-holder as to the applicability of the law laid down by this court in Jhandoo v State of U P (1977 All W C 318) (AIR 1977 NOC 354), there can be little doubt that once the contention had been rejected by the appellate court in the said judgment dt 28-2-1979, it was not permissible to the tenure-holder to raise the same contention again by taking recourse to Sec 13A The appellate court by its impugned judgment was almost setting aside the earlier judgment passed by the appellate court on 28-2-79 and this was not permissible in law In this view of the matter it is really not necessary to go into many questions and controversies which Sri Trivedi sought to place before me However, I shall notice the contentions for the sake of completeness Learned counsel contended that no Notice u/s 9(2) was issued to the tenure-holder I shall like to say that this contention is not open to the tenure-holder in view of the fact that in the proceedings u/s 13A it was never raised However, such a point had been raised in the objections which had been filed by the tenure-holder on 6-11-1975 As stated above, a true copy of those objections is annexure 1 to the petition From para 10 of the said objections it seems that the tenure-holder was raising a grievance that no notice u/s. 9(2) of the Act was given to her in accordance with the proviso to the said sub-section because she spoke of a notice addressed to the tenure-holder The objection in para No 10 cannot be construed as an objection that there was absence of a general notice u/s. 9(2) The notice under the proviso to S. 9(2) is permissive and not mandatory This proviso was added by the U P Ordinance No 31 of 1975, which was subsequently replaced by U P Act No 20 of 1976 and in the context of the provisions contained in the said Ordinance it was open to the prescribed (sic) from the tenure-holder by issuing a notice seeking information If no such notice under the proviso was issued then no objection can be taken However all this discussion, I must observe is rather academic and unnecessary because the said objection was never pressed before the Prescribed Authority as is clear from the Prescribed Authority's order dt 17-7-76 (Annexure 2 to the petition) and thereafter in appeal was filed against the said order of the Prescribed Authority but again no such objection was taken and the remand order dt 12-11-76 was a final order which directed that the surplus land was to be calculated after excluding plot No 1221 from the holding of the tenure-holder In the subsequent proceedings also, whether those which took place before the Prescribed Authority after the remand or in the appeal against the order which was passed by the Prescribed Authority after remand, or in the proceedings u/s 13A, no such contention was even raised and, therefore, it is not open to Sri Trivedi to seek to raise the said contention in this petition

4. Learned counsel also wanted to contend that the reduction in the consolidation proceedings should have been taken note of by the Prescribed Authority in view of the law laid down by the Division Bench in Satyapal v State (1979 All L J 1259), which had approved the single Judge pronouncement in Jhandoo v State (1977 All

W C 318) (AIR 1977 NOC 354) Again, this contention is not acceptable because, as I have stated above, the contention about the reduction in the consolidation proceedings stood rejected by the appellate court and the same point which had been rejected by the appellate court could not be reargued before the appellate court by way of an application u/s 13A Learned counsel wanted to say that the reduction in the area was the result of, not only on account of the sale deed which had been accepted in the consolidation proceedings and which had not been accepted in the ceiling proceedings, but that reduction was due to some other factors also It should be seen that this position was never taken up before the Prescribed Authority in the proceedings u/s 13A So far as the sale deed was concerned, which was dt 17-3-1975, it was very correctly ignored by the ceiling authorities and the fact that it was acceptable to the consolidation authorities could have no significance for the adjudication by the ceiling authorities

This petition is accordingly allowed and the impugned judgment dt 12-2-1980 is hereby quashed In the circumstances, the parties will bear their own costs

Petition allowed

1981 ALL. L. J. 1146

M. P. MEHROTRA, J

Sheo Nath Singh and others, Petitioners v State of U. P. and others, Respondents

Civil Misc. Writ Petn. No. 9077 of 1980. D/- 13-8-1981

(A) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 3 (17) — 'Co-tenure-holder' — Land formerly ancestral Sir and Khudkasht in hands of tenure-holder before date of vesting — Land declared Bhumidhari after abolition of Zamindari — Sons of tenure-holder shall be deemed to be co-tenure-holders — There is no requirement that, to be declared as co-tenure-holders, a suit for partition should have been filed or that sons should have had their names recorded in such land before 8-6-73.(Para 3)

(B) Constitution of India, Art. 226 — Writ jurisdiction — Sale deed executed by tenure-holder on 29-10-71 in favour of her sons — Benefit of cl. (b) of proviso to S. 5 (6), U. P. Imposition of Ceiling on Land Holdings Act, not extended to sale deed — Sound reasons given by authorities under Act for not extending benefit — No interference under Art. 226. (U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961) S. 5 (6) Proviso cl. (b)). (Para 4)

Virendra Singh, for Petitioners. Rishi Ram, for Respondents

ORDER :— This petition arises out of the proceedings under the U. P. Imposition of Ceiling on Land Holdings Act

2. The facts, in brief, are these The notice u/s 10 (2) of the Act was issued to the petitioner No 1 Sheonath Singh It is said that subsequently a notice was issued to his wife Smt Kalawati and to Kedar Nath and Ram Nath, the two sons of Smt Kalawati Kedarnath is dead and he is being represented by the petitioners Nos 3 & 4 The Prescribed Authority disposed of the objections by his order dt 29-10-1979 and a true copy of the same is Annexure 1 to the petition Thereafter, two appeals were filed and both of them were decided by the appellate court by a common judgment dt 14-8-1980 The appeals were partly allowed Now the petitioners have come up in the instant writ petition and in support of the same, I have heard Sri Rishi Ram, learned counsel for the petitioners In opposition, the learned Standing Counsel has made his submissions

3. Two contentions were raised before me Firstly, it was contended that some land was formerly ancestral Sir and Khudkasht in the hands of the petitioner No 1 Therefore, the two sons of the petitioner No 1 were equal co-tenure-holders along with their father in such land which became Bhumidhari after the abolition of Zamindari The appellate court rejected the claim on the ground that as no revenue suit had been brought for partition of the respective shares in the said land, therefore, the petitioner No. 1 alone should in law be held to be the sole tenure-holder of such land The further reason was given that as the father alone stood recorded on 8-6-1973 in respect of such land, therefore, he alone could be treated as the sole tenure-holder I hold that this view is entirely wrong In several decisions of this court, it has been laid down that if some land was ancestral Sir and Khudkasht in the hands of a tenure-holder before the date of vesting and if his sons were in existence on the date

of vesting, then the sons will be deemed to be co-tenure-holders in such land along with their father after such land became Bhumidhari after the abolition of Zamindari, and further the fact that only the name of the father stood recorded over such land did not mean that the sons did not have their vested shares in such land It was not at all necessary that a partition suit should have been filed or that the sons should have got their names recorded over their respective shares in such land before 8-6-1973 Accordingly, I accept this contention of the learned counsel for the petitioner

4. The learned counsel next contended that a sale deed was wrongly ignored by the authorities below In my view, this contention lacks merits The sale deed was executed on 29th Oct 1971 and it was executed in favour of her sons The authorities below have given good reasons why the same could not be accepted and therefore, the benefit of cl. (b) of the proviso to S 5 (6) of the Act was not extended in respect of such deed of transfer No interference is called for in the said finding

5. Accordingly, this petition is allowed and the judgment of the appellate court is hereby quashed to the extent that under point No 2 in the said judgment the controversy about the shares of the sons along with their father in the land which was claimed to be ancestral Sir and Khudkasht before the date of vesting was discussed and decided The appellate court shall reconsider the said controversy and decide whether any, and if so, to what extent, the land included in the holding of the petitioner No 1 as the tenure-holder was, before the date of vesting, Sir and Khudkasht and if so, whether it was ancestral in his hands It will further be decided whether the two sons of the said tenure-holder, namely, Ram Nath and Kedarnath were in existence on 1st July, 1952 If it be found that some land was formerly ancestral Sir and Khudkasht in the hands of the petitioner No 1 and that his two sons, or any one of them were or was in existence on 1st July, 1952, then each of the sons will have equal share in such land along with his father, and the same shall be excluded from the holding of the petitioner No 1 The ceiling area and the surplus land shall be redetermined thereafter It is made clear that no other controversy shall be allowed to be raised before the appellate court hereafter In the circumstances of the case, there will be no order as to costs

Petition allowed

1981 ALL. L. J. 1147

M P MEHROTRA, J

Basdeo, Petitioner v 1st Additional Distt Judge, Shahjahanpur and others, Respondents

Civil Misc Writ Petn No 9154 of 1980, D/- 11-8-1981

(A) U. P. Imposition of Ceiling on Land Holdings Rules (1961), R. 3 — Applicability — Khasras for 1378 and 1379 fasils not prepared but Khasra for 1380 fasli prepared — Held ceiling authorities were not required to look into Khasra entries preceding 1378 fasli and by virtue of S. 4A of the Act were justified in deciding case solely on basis of Khasra entries of 1380 fasli. (Para 4)

(B) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), Ss. 13 and 38 — Appeal — Objection not raised before Prescribed Authority canvassed before appellate court — It is in discretion of appellate court to allow or not to allow objection and High Court cannot interfere with discretion under Art. 226, Constitution of India. (Constitution of India, Art. 226).

The appeal u/s 13 is directed against the order of the Prescribed Authority and, therefore, the appellate order is also confined to the controversies which have been dealt with by the Prescribed Authority However, the appellate Court may also in its discretion allow a point to be canvassed even though it was not canvassed before the Prescribed Authority This follows from the fact that the appellate Court u/s. 38 of the Act has all the powes and privileges of a civil court and has to follow the procedure laid down in the Civil Procedure Code for the hearing and disposal of the appeals However, the matter rests in the discretion of the appellate court and due to the limited ambit of the jurisdiction under Art 226 of the Constitution, the High Court cannot interfere with the exercise of discretion. (Para 5)

Cases Referred : Chronological Paras

1980 Rev Dec (SOC) 11 3

IY/JY/E180/81/HR/RSK

Ramendra Asthana, for Petitioner
Standing Counsel, for Respondents

ORDER :— This petition arises out of the proceedings under the U P Imposition of Ceiling on Land Holdings Act The facts in brief are these —

2. The petitioner was issued the notice u/s 10 (2) of the Act and he filed objections They were decided by the Prescribed Authority by his order dt 6-7-76 a true copy whereof is annexure 1 to the petition Thereafter an appeal was filed and the same was partly allowed by the appellate Court by its judgment dt 9-2-77 a true copy whereof is annexure 2 to the petition Thereafter the Prescribed Authority recalculated the surplus land in accordance with the appellate Court's judgment and a true copy of the order of the Prescribed Authority dt 9-2-79 is annexure 3 to the petition A certified copy of the said order is also on the record Thereafter this petition has been filed seeking the quashing of the appellate judgment dt 9-2-77 and the order passed by the Prescribed Authority on 9-2-79 A learned Single Judge of this Court had been pleased to condone the delay in filing of this petition by his order dt 15-1-81 and, therefore, the said aspect of the matter need now be gone into

3. Sri R Asthana, learned counsel for the petitioner contended that when Khasras for 1378 and 1379 Faslis had not been prepared then the Khasras preceding the said fasli years should have been looked into and for the said purpose he placed reliance on Fakher Uddin Khan v State of U P (1980 Rev Dec (SOC) 10) In the said case the ceiling Authorities had looked into the Khasra 1381 fasli and this court emphasized that in a situation like this khasras of the fasli years prior to 1378 fasli should have also been looked into and not of 1381 fasli alone R 3 of the U P Imposition of Ceilmg on Land Holdings Rules, 1961 lays down as follows

"In areas where due to consolidation operations or record operations or any other reason no khasras were prepared during the years mentioned in S 4A the Prescribed Authority while examining other records may also examine available Khasras for the three last years preceding the year in which the Khasra was not prepared "

4. The aforesaid rule clearly lays down that when due to consolidation operations or record operations or any other reason no Khasras were prepared for the years mentioned in S 4A i.e. for 1378, 1379 and 1380 fasls, then while examining other records the Prescribed Authority may also examine available khasras for the latest three years preceding the year in which the Khasra was not prepared It should be seen in the instant case that the Khasra for 1350 (1380) fasli was prepared and, therefore, the authorities below were justified in deciding the case on the basis of khasra entries of 1380 fasli It should be appreciated that S 4A clearly lays down that if in any of the three fasli years, namely 1378, 1379 and 1380 fasli, the requirements laid down in the said section stood fulfilled then the land would be treated as irrigated Moreover, the grievance which has been canvassed before me seems to lack a basis in the sense tha the appellate Court, relying upon the Khasra entry, treated plot No 83 of Village Murua Pamar to be unirrigated and granted relief to the petitioner on that basis In fact the petitioner succeeded in the appellate court and I cannot understand why he is raising a grievance against the judgment of the appellate Court on this ground This contention is accordingly rejected

5. Learned counsel next contended that the appellate Court was not justified in not allowing an objection to be raised before it even though it had not been raised before the Prescribed Authority It should be seen that u/s 12 of the Act the Prescribed Authority has to deal with the objections filed u/s 10 (2) or u/s 11 (2) or because of an appellate order u/s 13 Therefore, unless an objection had been raised in any of the aforesaid manners, the Prescribed Authority was not expected to deal with such an objection Of course the Prescribed Authority may in his descretion allow a tenure-holder to raise an objection even though it was not originally raised u/s 10 (2) The appeal u/s 13 is directed against the order of the Prescribed Authority and, therefore, the appellate order is also confined to the controversies which have been dealt with by the Prescribed Authority However, the appellate Court may also in its discretion allow a point to be canvassed even though it was not canvassed before the Prescribed Authority This follows from the fact that the appellate Court u/s 38 of the Act has all the powers and privileges of a civil court and has to follow the procedure laid down in the Civil Procedure Code for the hearing and disposal of the appeals However, the matter rests in the discretion of the authorities below and within the limited ambit of the jurisdiction under Art 226 of the Constitution, no interference is called for in the impugned orders

6. This petition fails and is dismissed but there will be no order as to costs

Petition dismissed

1981 ALL. L. J. 1149

R. R. RASTOGI, J

State of U. P. Petitioner v. 7th Addl District & Sessions Judge, Allahabad and others, Respondents

Civil Misc. Writ Petn. No. 1005 of 1980, D/- 21-5-1981

(A) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 5 (1), Expln. I — Land transferred by tenure-holder prior to 24-1-71 — Ceiling authorities can examine whether sale deed was a fictitious or collusive transaction.

In regard to transfers made by a tenure-holder prior to 24th of Jan 1971, Explanations I and II of sub-sec (1) authorise the ceiling authorities to examine as to whether they were fictitious or collusive transactions Explanation I says that in determining the ceiling area applicable to a tenure-holder, all land held by him in his own right, whether in his own name or ostensibly in the name of any other person, shall be taken into account. In other words, for the purposes of sub-sec (1) it is not only the land held by the tenure-holder in his own right and in his own name which is to be considered for determining the ceiling area applicable to him, but the land held ostensibly by him in the name of any other person shall also be considered In other words, this provision empowers the Prescribed Authority to find out as to whether or not there is any land ostensibly held by the tenure-holder on the appointed date in the name of any other person 1979 All L J NOC 76 and 1979 All W C 187 Rel. on. (Para 4)

(B) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 5 (1), Expln. II — Presumption under — Land transferred by tenure-holder prior to 24-1-71 but names of transferees entered in revenue records after that date to exclusion of tenure-holder — Presumption is that tenure-holder continued to hold land and that she so held it in names of transferees — Presumption may be rebutted by transferor and transferees showing that actual possession was transferred to transferees. 1979 All L J 515 Rel. on. (Paras 4, 5)

Cases Referred : Chronological Paras

1979 All L J 515 1979 Rev Dec (SOC) 22 2, 6
1979 All L J NOC 76 ILR (1979 2 All 43 7
1979 All W C 187 7
1978 All L J 1394 1979 All L R (SOC) 20 2

Standing Counsel for Petitioner

ORDER :— The State of Uttar Pradesh has filed this writ petition under Art 226 of the Constitution Smt Ram Dani, respondent No 2, was served with a notice u/s 10 (2) of the U P Imposition of Ceiling on Land Holdings Act She filed an objection to that notice in which she, inter alia, contended that she had made a transfer of 82 Bighas and odd of her land in favour of her son Rudra Nath and wives of her remaining four sons on 29-5-1970 for a consideration of Rs 18,000/- and that she had transferred possession of the same to them and the land transferred could not be treated as a part of her holding The transferees also filed similar objections before the Prescribed Authority The Prescribed Authority being of the opinion that Explanation II to sub-sec (1) of S 5 of the Act was applicable to the case, held that Smt Ram Dani was the actual owner of the land alleged to have been transferred and the entry of the names of the transferees in the revenue records was merely fictitious Accordingly, this contention was rejected and by an order dt. 31st Mar, 1979, 82 Bigha and odd was declared as surplus

2. Smt Ram Dani filed an appeal against that decision The VII Additional District Judge, Allahabad, relying on two decisions of this Court in Mamraj Singh v State of U P. (1979 All L R (SOC) 20) (1978 All L J 1394) and Akhtar Sultan Begum v Prescribed Authority (1979 Rev. Dec (SOC) 22) (1979 All L J 515) held that the Prescribed Authority could not have embarked on an enquiry whether the sale deed was a sham or benami transaction. The appellate court has also observed that on the basis of this sale deed mutation was made on 10-8-1972 and that was due to the fact that in this village consolidation proceedings had been going on It has also observed that Smt Ram Dani is an old lady and it was expected that the transferees must have been in cultivatory possession of the land transferred. For these reasons, the appellate court accepted the aforesaid transfer and found that there was

no surplus land with the tenure-holder and hence discharged the notice This judgment and order dt 7-9-1979 forms the subject matter of challenge in the present writ petition

3. Respondent No 2 has not put in appearance in the case Learned Standing Counsel took me through the judgment of the Prescribed Authority and the appellate court and contended that both. Explanations I and II to sub-sec (1) of S 5 were applicable to this case and, therefore, the view taken by the Prescribed Authority was absolutely correct and the learned appellate court was not justified in taking a contrary view After considering his contention I find that the matter needs reconsideration

4. As noted above, the sale deed was executed on 29-5-1970, Mutation on the basis of this sale deed was made on 10-8-1972 At that time consolidation proceedings were going on in this village and it may be that on that account, this delay was caused in passing the order for mutation of the names of the transferees Anyhow, the question is as to whether the ceiling authorities can examine as to whether a transfer deed executed before the 24th of Jan 1971 was sham, fictitious or collusive transaction Explanations I and II to sub-s (1) of S 5 may be noted Sub-s (1) provides that as on the 8th of June, 1973 no tenure-holder shall be entitled to hold in the aggregate throughout Uttar Pradesh, any land in excess of ceiling area applicable to him Sub-s (6) of this section says that in determining the ceiling area applicable to a tenure-holder any transfer of land made after the 24th day of January, 1971 which, but for the transfer, would have been declared surplus under this Act, shall be ignored and not be taken into account There is, however, a proviso to this sub-section which saves transfers in favour of any person including Government referred to in sub-sec (2) and a transfer in respect of which it is proved to the satisfaction of the Prescribed Authority that it was made in good faith, that it was for adequate consideration, that it was made under an irrevocable instrument and it was not a benami transaction and that there was no benefit immediate or deferred reserved for the tenure-holder or any other member of his family In regard to transfers made by a tenure-holder, prior to 24th of January, 1971, Explanations I and II of sub-sec (1) authorise the ceiling authorities to examine as to whether they were fictitious or collusive transactions Explanation I says that in determining the ceiling area applicable to a tenure-holder, all land held by him in his own right, whether in his own name or ostensibly in the name of any other person, shall be taken into account In other words, for the purposes of sub-sec (1) it is not only the land held by the tenure-holder in his own right and in his own name which is to be considered for determining the ceiling area applicable to him, but the land held ostensibly by him in the name of any other person shall also be considered In other words, this provision empowers the Prescribed Authority to find out as to whether or not there is any land ostensibly held by the tenure-holder on the appointed date in the name of any other person Explanation II enacts a rule of evidence and says that if on or before Jan 24, 1971 any land was held by a person who continues to be in its actual cultivatory possession and the name of any other person is entered in the annual register after such date either in addition to or to the exclusion of the former and whether on the basis of a deed of transfer or licence or on the basis of a decree, it shall be presumed, unless contrary is proved to the satisfaction of the Prescribed Authority, that the first mentioned person continues to hold the land and that it is so held by him ostensibly in the name of the second mentioned person

5. In the present case the sale deed was made before Jan 24, 1971 but the names of the transferees were entered in the revenue records after that date to the exclusion of the tenure-holder There would be a presumption that the tenure-holder held the land and that she so held it ostensibly in the names of the transferees This is, however, a rebuttable presumption The tenure-holder and the transferees can rebut it by saying that after the transfer, possession was actually transferred to the transferees and the land after the transfer was not ostensibly held by the transferor What is necessary is as to whether after the transfer, the transferor continued in actual cultivatory possession or not and on the transferor and transferees showing that actual possession was transferred to the transferees, this presumption can be rebutted

6. In Akhtar Sultan Begum v Prescribed Authority (1979 All L J 515) same view was taken and it was observed that the principle applicable to a transfer made before Jan. 24, 1971 is slightly different from that what is

embodied in the proviso to S 5(6) This principle has been set out in Explanation II to sub-section (1) of S 5 and it suggests that a transfer will be vulnerable only if it was an ostensible transfer That would be so if the transfer was never acted upon and not otherwise Whether a transfer has been acted upon or not is a question of fact depending upon the circumstances of the case With regard to Explanation II it was observed that it enacts a rule of evidence and the presumption which it incorporates is a rebuttable presumption

7. The learned Standing Counsel has invited my attention to another decision of a Bench of this Court in Brij Bhushan Rathi v State of U P (1979 All L J NOC 76) in which it was held that ceiling authorities can examine whether transfer deed executed or a decree passed prior to 24th Jan 1971 was sham, fictitious or collusive transaction In Yadunath v State, 1979 All W C 187 as well the same view has been taken.

8. In view of above discussion, the petition succeeds and is allowed and the impugned order of the appellate court dt 7-9-1979 is quashed and it is directed to dispose of the appeal afresh according to law There will be no order as to costs

Petition allowed

1981 ALL. L. J. 1151

R M SAHAI, J

Karan Singh, Petitioner v 4th Additional District and Sessions Judge, Saharanpur and others, Respondents

Civil Misc Writ Petn No 2694 of 1980 D/- 9-1-1981

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 4A — Growing of sugarcane crops can give rise to presumption of two crops only — Assured source of irrigation cannot be presumed.

The growing of sugarcane crops gives rise to presumption of two crops only It could not further be presumed from this that there must have been assured source of irrigation. There is no warrant for this presumption. A tenure holder may irrigate his land by a private well or by any other source But that would not render the land irrigated under S 4A A private source of irrigation must be as defined in S 3(4) (Para 4)

V Singh, for Petitioner, Standing Counsel, for Respondents.

ORDER :— On 24-11-78 a direction was issued by this court in Civil Misc Writ 2539/77 to appellate authority to decide the appeal u/s 13 of U P Imposition of Ceiling on Land Holdings Act and find if plots Nos 71 and 170 and 121 were unirrigated within Sec 4A of the Act, after affording opportunity to tenure-holder to file certified copies of relevant khasra extract

2. From Khasras extract filed after remand the appellate authority found that no major portion of land sugar cane crop was grown in either of the years and in some years two crops were also grown over plot No 71 He further found that as all the land was shown to have been irrigated none of the plots could be treated to be unirrigated For source of irrigation he placed reliance on entry in CLH Form V which according to him bore out that entire area of plots Nos. 121 and 170 was irrigated and there existed source of irrigation in all the three relevant years He further presumed that as sugarcane and paddy crops were grown there existed an assured source of irrigation

3. In order to treat land as irrigated Sec 4A lays down two requirements, one that two crops should have been grown in respective years mentioned in sub-clauses (1) and (2) and in third the class and composition of soil should be such that it is capable of growing the crops in an agricultural year and second, that there should be source of irrigation in the manner described in various clauses. In absence of any, the requirement of the section would not be complete and the land cannot be treated as irrigated

4. The finding that two crops were grown may be assumed to be correct as it is based either on entries in Khasra or on legal fiction contained in Explanation III to S 4A But that was not sufficient to render the land irrigated. The appellate authority misunderstood the law completely It was not a matter of assumption. The growing of sugarcane crops gives rise to presumption of two crops only It could not further be presumed from this that there must have been assured source of irrigation. There was no warrant for this presumption A tenure-holder may irrigate his land by a private well

or by any other source But that would not render the land irrigated under section 4A A private source of irrigation must be as defined in S 3(4) The appellate authority further committed error in relying on CLH Form 5 This form relates to misilband register It appears he intended to refer to CLH Form 3 but by mistake he has written CLH Form V But that form by itself was not sufficient, for this finding It was necessary for him to find if irrigation mentioned in CLH Form was from any of the sources as provided in law

5. Before parting with this case it may be observed that the Additional District Judge while deciding the appeal observed as under

"It will not be out of place to mention that the tenure holder appellant did not raise a plea in his objections before the Prescribed Authority that the said three plots Nos 71, 170 and 121 were unirrigated It was for this reason that the matter was not taken up on merit by the Prescribed Authority It is surprising that the tenure-holder was permitted to raise an altogether new plea for the first time in appeal"

The surprise expressed by him was unwarranted He was deciding the appeal in pursuance of direction issued by this court While doing so he committed impropriety in making these observations as the order passed by his predecessor was substituted by the order of this court and his observation amounted to casting indirect aspersion on this court

6. In the result this petition succeeds and is allowed The orders passed by appellate authority and Prescribed Authority are quashed. The Prescribed Authority is directed to redetermine whether these three plots had any source of irrigation as contemplated in Section 4A of the Act The other findings have become final and shall not be reopened The petitioner shall be entitled to costs

Petition allowed

1981 ALL. L. J. 1152 (1)

= AIR 1981 Supreme Court 2008 (2)

(From Allahabad)

S MURTAZA FAZAL ALI AND
A VARADARAJAN, JJ

Criminal Appeal No 73 of 1981, D/- 28-1-1981.

Shahzade, Appellant v State of Uttar Pradesh, Respondent.

Constitution of India, Art. 136 — Appeal to Supreme Court — Interference with exercise of discretion — Accused 77 years old convicted under Section 452, I. P. C. and sentenced to 4 years R I. — Sentence reduced to 6 months R. I. and made concurrent with sentence under Section 323 read with S. 34, I. P. C. in view of old age. (Penal Code (1860), S. 452). (Para 2)

JUDGMENT :— In this appeal. Special leave granted was confined to the question of sentence only

2. Having heard the learned counsel for the parties and having gone through the judgments of the Courts below, we find that in the peculiar circumstances of this case and having regard to the very old age of the appellant Shahzade, who is more than 77 years of age, there is some room for reduction in the sentence We, therefore, reduce the sentence of the appellant under Section 452 from four years to six months' rigorous imprisonment and make it concurrent with the sentence awarded under Section 323 read with Section 34, I P C

3. With this modification in the sentence, the appeal is dismissed

Appeal dismissed

1981 ALL. L. J. 1152 (2)

= AIR 1981 Supreme Court 2008 (3)

(From Allahabad)

R S SARKARIA AND
E S VENKATARAMIAH, JJ

Civil Appeal No 27 of 1981, D/- 15-1-1981

Fahimuddin and others, Appellants v State of U P and another, Respondents

Criminal P. C. (2 of 1974), S. 320(2), (5) — Accused convicted under Ss. 324, 325, I. P. C. — Parties requesting Supreme Court to allow composition of offences — Parties also filing composition deed in High Court — Permission to composition granted. Judgment of Allahabad High Court, Reversed. (Penal Code (1860), Ss. 324, 325). (Para 1)

JUDGMENT :— Special leave granted After carefully perusing the record, we find that the offence disclosed against the appellants is one under Section 324 read

with Section 325 of the Indian Penal Code These offences are compoundable with the permission of the Court. The parties have made a request that they should be allowed to compound the case and they have also filed a composition deed in the High Court In view of this, the permission to compound the offence is granted and in consequence the appeal is allowed and the appellants are acquitted of the charges levelled against them.

Appeal allowed

1981 ALL. L. J. 1153 (1)

= AIR 1981 Supreme Court 2009 (2)

(From Allahabad)

P N BHAGWATI AND BAHARUL ISLAM, JJ

Criminal Appeals Nos 35-37 of 1981, D/- 9-1-1981

Chakareshwar Nath Jain, Appellant v State of Uttar Pradesh, Respondent

Criminal P. C. (2 of 1974), Ss. 401 and 309 — Procedure — Adjournment — High Court adjourning all cases of particular Advocate for particular period — Hearing of revision application in which that Advocate was appearing for appellants on starting day of such period — Ex parte order passed by High Court in disposing such revision application — Invalid. Decision of Allahabad High Court, Reversed. (Para 2)

JUDGMENT :— It appears from para 7 of the petition for Special Leave which has not been controverted on behalf of the respondent, that the learned Chief Justice of the Allahabad High Court had adjourned the cases in which Mr S N Aggarwal was appearing as advocate for the period 29th May, 1978 to 9th July, 1978 and, therefore, he was under the impression that his cases would not be taken up for hearing on any day during this period Unfortunately, due to some oversight the revision application of the appellant in which Mr S. N Aggarwal was appearing as advocate was taken up for hearing on 29th May, 1978 and despite the absence of Mr S. N Aggarwal, it was heard ex parte and dismissed on merits. It is obvious that the revision application should not have been taken up for hearing on 29th May, 1978 when the learned Chief Justice had adjourned the cases of Mr S N Aggarwal and had directed that they should not be placed for hearing during the period 29th May, 1978 to 9th July, 1978 The order disposing of the revision application of the appellant ex parte must, therefore, be set aside and the revision application must be remanded to the High Court for disposal according to law

2. We accordingly allow the appeal, set aside the order passed by the High Court dismissing the revision application of the appellant and direct that the revision application may be heard by the High Court in accordance with law, after giving opportunity to the appellant of being heard. It would be preferable if the revision application is heard by a learned Judge other than the one who disposed of the revision application

3. The bail already granted will continue for a period of three weeks within which it will be open to the appellant to apply for bail to the High Court

Appeal allowed

1981 ALL. L. J. 1153 (2)

M M GUPTA, J

Surendra Pal Singh, Appellant v. State, Respondent

Criminal Appeals Nos. 11 and 40 of 1981, D/- 31-8-1981

(A) Penal Code (45 of 1860), Ss. 161 and 165-A — Prevention of Corruption Act (1947), S. 5(2) — Conviction of Sanitary and Food Inspector under — Accepting of illegal gratification in lieu of not taking sample of an edible article sold by hotel owner alleged — Hotel owner being an accomplice his testimony could not be relied on without corroboration — (Evidence Act (1872), Ss. 3, 133).

The Court as a matter of prudence does not place reliance on the testimony of an accomplice unless his testimony is corroborated on material particulars by other circumstantial evidence or by direct evidence (Para 10)

Where the Sanitary and Food Inspector and the vaccinator working under him were

convicted under S 161 I P C and S 5(2) of Prev of Food Adulteration Act on the ground that the vaccinator had accepted illegal gratification from the hotel owner on behalf of the Sanitary and Food Inspector

Held, that the position of the hotel owner was that of an accomplice and as such his testimony to the effect that Sanitary and Food Inspector had come to him earlier and had demanded illegal gratification and further that the money was paid to the vaccinator for being given to the Sanitary Inspector could not be relied upon in absence of any corroboration In absence of any other independent witness to show that the Sanitary Inspector had himself authorised the vaccinator for accepting the money on his behalf the Sanitary and Food Inspector was entitled to get the benefit of doubt

(Paras 10, 15, 17)

(B) Criminal P. C. (2 of 1974), S. 164 — Recording of confessional statement — Mode of — Record must show that there was no police officer present in court room before recording of confessional statement.

(Para 10)

(C) Penal Code (45 of 1860), S. 161 — Prevention of Corruption Act (1947), S. 5(2) — Offence under — Proof — Evidence of officer who laid trap — Reliance can be placed without corroboration — (Evidence Act (1872), Ss. 3, 133).

There is no rule of prudence which requires that the evidence of officer who laid trap should be treated on the same footing as evidence of accomplice and there should be insistence on corroboration The testimony of the officers who had laid the trap would have to be judged on their merits and they will not be treated as interested witnesses merely because they are interested in the successful prosecution of the case AIR 1980 S C 873, Followed (Para 11)

(D) Penal Code (45 of 1860), S. 161 — Prevention of Corruption Act (1947), S. 5(2) — Vaccinator accepting illegal gratification for being given to Sanitary and Food Inspector — Is guilty of offences under both sections.

(Paras 14, 15)

(E) Penal Code (45 of 1860), S. 161 — Prevention of Corruption Act (1947), S. 5(2) — Sentence — Vaccinator accepting illegal gratification on behalf of Food Inspector — Sentence of 3 years' R. I. reduced to one year R. I. (Para 18)

Cases Referred . Chronological Paras

AIR 1980 S C 873 1980 Cri L J 564 11

Pt Mohan Chandra, for Appellant, Addl Govt Advocate, for Respondent

JUDGMENT :— These appeals have been preferred by Dharambir and Surendra Pal Singh who were convicted under S 161 I P C and under S 5(2) of the Prevention of Corruption Act Under the former section they have been sentenced to undergo rigorous imprisonment for three years while under the latter section they have been sentenced to undergo rigorous imprisonment for three years and a fine of Rs 500/-

2. According to the prosecution case, Sri Surendra Pal Singh was the Sanitary and Food Inspector in Ghaziabad district Moradanagar was in his circle At Moradanagar Bus Stand Jagdish Chandra Sharma was running a Shudha Bhojnalya Surendra Pal Singh used to visit Moradnagar and in the course of his visits to the shop of Jagdish Chandra Sharma he used to threaten him to take a sample and he also threatend him that if he paid him Rs 200/- the sample would not be taken and he would be able to run his hotel in peace Jagdish Chandra Sharma showed some repugnance against the act of giving the illegal gratification to Surendra Pal Singh appellant He, therefore, moved an application on 8th Oct 1977 before the Superintendent of Police (Vigilance) Meerut informing him of the intentions of Surendra Pal Singh appellant in asking for the illegal gratification The Superintendent of Police (Vigilance) gave directions to Om Prakash Tyagi and Sri Dharam Pal (Vigilance) Inspectors to lay a trap for the arrest of Surendra Pal Singh appellant

3. On 12th Oct 1977 at about 1 P M Dharambir appeallant who was Vaccinator serving under the appellant Surendra Pal Singh, went to the shop of Jagdish Chandra Sharma and asked him to pay Rs 200/- for being paid to Surendra Pal Singh appellant. in lieu of the fact that Sri Surendra Pal Singh would not take a sample of any edible article sold by him Jagdish Chandra Sharma, however, insisted that if he has to pay any illegal gratification he will pay it to Sri Surendra Pal Singh direct Thereafter Om Prakash Tyagi along with other witnesses went to Jagdish Chandra Sharma who provided the currency notes of Rs 200/- They consisted of one currency note of Rs. 100/- denomination and five currency notes of Rs 20/- denomination These

currency notes were initialled by Sri Om Prakash Tyagi and they were treated with phenolphthalein powder They were handed over back to Jagdish Chandra Sharma after their memo was prepared Sri Om Prakash Tyagi and other members of his party took their seat on a side bench at the shop of Jagdish Chandra Sharma They were served with tea and other edibles At about 3-30 P M Dharambir came to the shop of Jagdish Chandra Sharma He was told by Dharambir appellant that Surendra Pal Singh had sent him and wanted the appellant to make the payment to him When Jagdish Chandra Sharma again insisted that he would pay the money to Surendra Pal Singh appellant he told him that he need not worry about it as the money would safely reach Surendra Pal Singh and he was acting under his direction Thereafter the aforementioned currency notes of Rs 200/- were handed over to Dharambir who kept them in his pocket Soon after the money passed in the hands of Dharambir appellant and he had put them in his pocket Sri Om Prakash Tyagi and other members of his party immediately arrested Dharambir appellant On search being taken the currency notes treated with phenolphthalein powder and bearing the initials of Om Prakash Tyagi were recovered The hands of Dharambir appellant were got washed with sodium carbonate solution The solution turned pink The shirt of Dharambir was also taken into possession A recovery memo witnessed by the witnesses was duly prepared Dharambir was taken into custody and along with the sealed property of the case he was taken to Police Station Moradnagar where Om Prakash Tyagi lodged the report at 6-15 P M on 12-10-1977

4. The investigation of the case was entrusted to Sri Jagdish Lal Chawla, Inspector Vigilance, under the orders of the Superintendent of Police He recorded the statements of Dharampal Singh Inspector Vigilance and of Sri Om Prakash Tyagi on 18-10-1977 He recorded the statement of Jagdish Chandra Sharma on 19-10-1977 The other witnesses were also examined on the same date He inspected the scene of occurrence and prepared the site plan. The statement of Dharambir appellant was got recorded under S 164 Cr P. C before a Magistrate. The statement of some witnesses were also recorded under S. 164 Cr P C Sanction for the prosecution of Dharambir appellant was accorded, by the District Magistrate and by the Administration of Nagarpalika, Ghaziabad The Director, Medical Health, accorded sanction for the prosecution of Surendrapal appellant After the sanctions for their prosecution were obtained charge-sheet was submitted against the two appellants in the court of the Special Judge, Ghaziabad

5. Surendra Pal Singh appellant denied that he had ever threatened Jagdish Chandra Sharma to pay him illegal gratification in lieu of his not taking the sample of edible articles sold by him. He has also denied that he had sent Dharambir to take Rs 200/- from him for that purpose He further stated that Jagdish Chandra Sharma got himself converted as a Muslim and runs a Hotel This was objected to by the Hindus He is, therefore, inimical to him

6. Dharambir Singh appellant denied the prosecution allegations He denied having gone to the shop of Jagdish Chandra Sharma to take from him a sum of Rs. 200/- towards illegal gratification on behalf of Surendra Pal Singh appellant He, however, stated that the currency notes were forcibly put in his pocket He wanted to throw them away but the Vigilance people caught hold of his hands He, however, admitted the fact of his hands being washed with sodium carbonate solution and of the solution turning pink On the date of occurrence he was present in front of the shop of Jagdish Chandra Sharma Somebody called him He got down from his bicycle He was called by Jagdish Chandra Sharma and as he was approaching him the currency notes were forcibly put in his pocket and he was told to give them to Surendra Pal Singh appellant He took out the currency notes and told him to give them to Surendra Pal Singh appellant In the mean time he was caught hold by the Vigilance Officers He made a statement before a Magistrate under temptation given by the Vigilance Officers who promised to get him released

7. The prosecution in support of its case examined Jagdish Chandra Sharma P W 6, P W 5 Om Prakash Tyagi and P W 7 Dharam Pal Singh P W 9 K N Singh is the Magistrate who had recorded the confession of Dharambir appellant Besides these witnesses the prosecution in support of its case examined P W 1 Onkar Singh, P W 2 Nooruddin, P W. 3 Ghanshyam Pandey and P. W 4 Dalip Singh These witnesses, however, did not support the prosecution case P W. 10 Suresh Chandra was the Constable who has proved the Signature of

the Head moharrir who had received the written report, lodged by Sri Om Prakash Tyagi at Police Station Moradnagar P W 11 Chaman Lal was the Officer-in-charge of Nagarpalika Ghaziabad who had given sanction for the prosecution of the appellant Dharambir Singh On 9-8-1977 P W 8 Jagdish Lal Chawla Inspector Vigilance had conducted the investigation Appellant Dharambir Singh also examined one Padam Singh in his defence

8. The learned Special Judge relied on the testimony of the prosecution witnesses P W 6 Jagdish Chandra Sharma, P W 5 Om Prakash Tyagi and P W 7 Dharampal Singh and convicted and sentenced the appellants as stated above He, however, did not place any reliance on the testimony of P W 1 Onkar Singh, P W 2 Nooruddin, P W 3 Ghanshyam Pandey and P W 4 Dalip Singh He did not find the defence witness a reliable witness

9. The learned counsel for the appellant has assailed the findings of the learned Special Judge and has contended that on the evidence on record the prosecution has not been able to establish its case beyond all reasonable doubt against the appellants

10. Sri Jagdish Chandra Sharma P W 6 claims that he was running a Hotel at the Bus Station of Moradnagar He claimed that about three years before his statement was recorded in Court Surendra Pal Singh appellant who was a Sanitary Inspector — he is also a Food Inspector — had come to him and had asked him if he had taken the licence for running the Hotel He told him that he had taken the licence but if that was at all required he would obtain it Surendra Pal Singh appellant, however, told him that he should also pay him some gratification towards his expenses as the samples of food were being taken He also told him that after payment of gratification he would be at liberty to do whatever he liked Surendra Pal Singh appellant again came to him 15 or 20 days after and enquired from him, "Dimag Theek Hua" The witness told him that he would not pay him any illegal gratification. Thereafter on 8th Oct 1977 the appellant Surendra Pal Singh met at the Doctor's shop which was adjacent to his Hotel. Surendra Pal Singh appellant asked him to extend his electricity to the shop of the Doctor Thereafter appellant Surendra Pal Singh accompanied by another person came to his Hotel. Then he asked the appellant to settle the amount that he will have to pay to him. Another person who had accompanied Surendra Pal Singh appellant from the shop of the Doctor told him that he might pay Rs 500/- to Surendra Pal Singh appellant. The witness then replied that he was not in a position to pay him so much money Appellant Surendra Pal Singh thereafter agreed to accept Rs 200/- only The witness, however, told him that he would pay the sum of Rs 200/- to him after 12th Oct 1977 as he would be able to realise all his dues by that date Thereafter in consultation with one Sri Garg who was his partner he got prepared an application Ex Ka-19 dated 8th Oct 1977 and gave it to the Vigilance Authorities He had told them that 12th Oct 1977 was the date fixed for taking the bribe by Surendra Pal Singh appellant So far as these facts are concerned Jagdish Chandra Sharma is the sole witness who speaks about them No other witness corroborates him This witness is a bribe giver The giving of the bribe is also an offence under S 165-A of the I P C Thus, both bribe giver and the bribe taker are equally liable in the matter of giving and accepting of the illegal gratification The position of Jagdish Chandra Sharma P W 6 is that of an accomplice The court as a matter of prudence does not place reliance on the testimony of an accomplice unless his testimony is corroborated on material particulars by other circumstantial evidence or by direct evidence Dharambir appellant had made a confession which was recorded by P W 9 K N Singh That confession could have provided material for corroboration against appellant Surendra Pal Singh However that confession too has been retracted However, for good and adequate reasons the learned Special Judge has not held that confession to be reliable It was recorded by a Magistrate who had not the faintest idea of how a confession should be recorded Although the Magistrate was not expected to know the facts of the case before recording the statement but he went on putting facts in questions and obtained answers of them from appellant Dharambir Singh Either the recorded confession or his statement does not show that there was no Police Officer present in the Court Room before he recorded the confessional statement The learned Special Judge was, therefore, fully justified in ignoring that confession

11. Jagdish Chand Sharma P W 6 claims that after he had moved an application before the Superintendent of Police Vigilance Sri Om Prakash Tyagi P W 5 and P W 7 Dharam Pal Singh who were the Inspectors

of the Vigilance Department were entrusted with the task of laying the trap On 12th Oct 1977 he had informed that Surendra Pal Singh appellant would come to accept the illegal gratification on that day On that day at about 12 or 1 in the day Dharambir appellant came to his shop and told him that Surendra Pal Singh appellant had sent him and had asked him to pay him Rs 200/- which he would take to Surendra Pal Singh appellant The witness alone claims that he had promised to pay the sum of Rs 200/- to Surendra Pal Singh appellant and he would pay the money to him The Vigilance Inspectors had not come till then Dharambir Singh appellant thereafter went away The Vigilance Inspectors thereafter came to him and enquired from him the facts He gave him the entire facts, and also produced before them a one hundred rupee note and five currency notes of Rs 20/- each They prepared their memo and obtained his signature on them The currency notes were treated with phenolphthalein powder after they were initialled by them The memo was duly witnessed by the witnesses also Another document of returning those currency notes to them (Ex Ka-20) was prepared and thereafter those currency notes were given to him He was told that those very currency notes were to be given in illegal gratification whenever it was demanded from him These currency notes were initialled by those two Vigilance Inspectors, and thereafter they were returned to him Thereafter the Vigilance Inspectors and the witnesses took their seats in his Hotel and they started taking tea and other edibles After some time Dharambir appellant who was a Vaccinator again came to him and told him that he was sent by Surendrapal Singh appellant and he asked him to give him the money otherwise Surendra Pal Singh would himself come and take the sample He might have to repent for it later on

The witness, however, told him that he would give the money to Surendra Pal Singh and not to him Thereafter the appellant again told him, "APP BEPHIKAR RAHEN MAIN UNHI KO RUPAYE DUNGA" The witness then gave the currency notes to Dharambir appellant They were the same currency notes which were given to him in this supurdgi by the Vigilance Inspectors. As Dharambir appellant put those currency notes in his pocket he was apprehended by the Vigilance Inspectors. They searched him and recovered the money After recovery its memo was prepared The hands of Dharambir appellant were got washed with sodium bicarbonate solution and the solution after washing of the hands of the appellant and of the witness were kept in separate bottles which were also sealed The solution had turned pink The appellant Dharambir was arrested and was taken into custody and the currency notes were duly sealed The manner in which the appellant Dharambir was arrested after he accepted the money from Jagdish Chandra Sharma is amply supported and corroborated by the testimony of Om Prakash Tyagi P W 5 and P W 7 Dharam Pal Singh Both these witnesses were Vigilance Inspectors and they were authorised to lay the trap Both these witnesses corroborated the statements of Jagdish Chandra Sharma P W 6 in all particulars about the manner in which they laid the trap and arrested and apprehended appellant Dharambir and recovered from his possession the currency notes which were treated with phenolphthalein powder The hands of the appellant were got washed with sodium carbonate solution which turned pink It is very often contended that reliance should not be placed on the trap witnesses as they are interested in the success of the prosecution of the accused The answer to this contention is found in a number of cases decided by the Supreme Court and other Courts It has been emphasized that there was no rule of prudence which has crystallised into a rule of law, nor indeed into any rule of prudence, which requires that the evidence of such officer should be treated on the same footing as evidence of accomplice and there should be insistence on corroboration This was the view categorically expressed by the Supreme Court. in Hazari Lal v. State (Delhi Administration) 1980 Cri L J 564 (AIR 1980 S C 873) Thus, the testimony of these officers who had laid the trap would have to be judged on their merits and they will not be treated as interested witnesses merely because they are interested in the successful prosecution of the case It may, however, be mentioned that there may be such cases where the very what (sic) of the testimony of such trap witnesses may require corroboration but it will have to depend on the facts and circumstances of each particular case So far as this case is concerned I do not think that there was any such circumstances which require independent corroboration of these two witnesses I have gone through their statements I have no reason to doubt their statements that they arrested the appellant

after he had accepted the sum of Rs 200 from Jagdish Chandra Sharma

12. The appellant Dharambir has, however, stated that when he was passing in front of the shop of Jagdish Chand Sharma he was called by him and he forcibly had put the currency notes in question in his pocket for giving them to Surendra Pal Singh appellant but as he tried to take out the money and return it to Jagdish Chandra Sharma he was put under arrest by the Vigilance Inspector Appellant Dharambir has examined in his defence one Padam Singh He states that he was working as an employee at the shop of Jagdish Chandra Sharma P W 6 He further states that as Dharambir appellant was passing in front of his shop Jagdish Chandra Sharma called him on which the appellant Dharambir came inside the Hotel Jagdish Chandra Sharma put the money in his pocket and told him to give them to Surendra Pal Singh appellant Appellant Dharambir, however, took out the money and told him to give them himself to Surendra Pal Singh appellant From his cross-examination it appears that eight days after the occurrence he had left services of Jagdish Chandra Sharma This witness has further stated in cross-examination that the Police Inspectors did not get the hands of the appellant Dharambir washed with any solution However, the appellant Dharambir himself has admitted that his hands were got washed with sodium carbonate, and it had turned pink He did not even tell the Inspectors after the arrest of the appellant Dharambir that he was being falsely implicated His conduct on the facts stated above go to show that he was not present at the shop of Jagdish Chandra Sharma at the time the appellant Dharambir was arrested The Learned Special Judge was, therefore, fully justified in descarding the testimony of the defence witness

13. From the evidence discussed above I have come to the conclusion that the prosecution has been able to prove successfully beyond all reasonable doubt that appellant Dharambir had come to the shop of Jagdish Chandra Sharma P W 6 at about 3 P.M. on 12-10-1977 and had accepted a sum of Rs. 200/- from him on behalf of Surendra Pal Singh appellant after stating that Surendra Pal Singh had sent him to take the money and he had also told him after Jagdish Chandra Sharma, refused to give him money that if the money was not paid Surendra Pal Singh appellant would come and take the sample

14. The contention that has now been raised is that appellant Dharambir himself had not taken the money in his own name but had taken the money in the name of Surendra Pal Singh appellant He had no right to issue the licence In such circumstance the offence under S 161 I P C or under S 5(1)(d) of the Prevention of Corruption Act cannot be said to have been made out S 161 I P C runs as below

"Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or for forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Central or any State Government or Parliament or the Legislature of any State, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both"

There is no doubt the fact that the appellant Dharambir himself was a public servant being a Vaccinator, an employee under Nagar Palika Ghaziabad and in this case it is established beyond all reasonable doubt that he had accepted illegal gratification for Surendra Pal Singh Sanitary Food Inspector He would, therefore, be clearly liable under S 161 I P C

15. Section 5(1)(d), Prevention of Corruption Act, (deals with) Criminal misconduct which runs as follows —

"5(1) A public servant is said to commit the offence of criminal misconduct

(a) . . .

(b) . . . .

(c) . . . .

x x x x x

(d) if, he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage,

x x x x x

Shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years, and shall also be liable to fine,

Provided that the Court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year

Thus, Dharambir appellant would be guilty of criminal misconduct if he accepted the illegal gratification on behalf of Surendra Pal Singh appellant

Thus, there is no doubt that appellant Dharambir is clearly guilty of the offences under S 161 I P C and of criminal misconduct under S 5(1)(d) of the Prevention of Corruption Act punishable under S 5(2) of the Prevention of Corruption Act

16. However, so far as Surendra Pal Singh appellant is concerned, I have already found that the only evidence against him is uncorroborated testimony of Jagdish Chandra Sharma P W 6 who is in the position of an accomplice There is no other independent witness to show that he had himself authorised Dharambir appellant for accepting the money on his behalf

17. In such circumstances he will be entitled to get the benefit of doubt

18. The Learned counsel for the appellant Dharambir has also contended that the sentences imposed against him in the circumstances of the case are severe After giving a careful thought to it, I am also of the view that the sentences imposed are severe The sentences of the appellant Dharambir shall be reduced to rigorous imprisonment for one year under S 5(2) of the Prevention of Corruption Act and to rigorous imprisonment for one year under S 161 I P C

19. Criminal Appeal No 11 of 1981 is hereby allowed The conviction and sentences imposed against Surendra Pal Singh appellant are hereby set aside. The appellant is on bail He need not surrender His bail bonds are cancelled and sureties stand discharged

20. Criminal Appeal No 40 of 1981 filed by Dharambir is partly allowed The conviction of the appellant under S 161 I P C and S 5(2) of the Prevention of Corruption Act are hereby maintained, but his sentences under both the sections are reduced to rigorous imprisonment for one year under each count. The sentence of fine imposed against the appellant under S. 5(2) of the Prevention of Corruption Act is hereby set aside The appellant is on bail. He shall be taken into custody to serve out his sentences The sentences shall run concurrently

Order accordingly

1981 I ALL. L. J. 1159

SATISH CHANDRA, C J AND
RAJA RAM RASTOGI, J

Raja Ram Jaiswal and another, Petitioners
v State of Uttar Pradesh and another, Respondents

Civil Misc Writ Petn No 3241 of 1980, D/- 25-8-1981

(A) Constitution of India, Art. 226 — Premature writ — Application for grant of licence to exhibit cinema films — Matter referred by District Magistrate to State Government and back on several occasions on technical pleas — Evidence indicating that both authorities not keen in disposing application on merits — Though matter remanded by State Government to District Magistrate plea of writ petition being premature, therefore, not entertained. (U. P. Cinemas (Regulations) Act (3 of 1956), S s. 5, 6; Cinematograph Act (1952), S . 12).

(Para 19)

(B) U. P. Cinemas (Regulations) Act (3 of 1956), S s. 5, 6 — Exhibition of Cinema films — Grant of licence — Refusal on ground of apprehension of breach of peace and order and on ground of public interest. (Cinematograph Act (1952), S . 12 (2)).

A licence cannot generally be revoked or cancelled on the ground of apprehension of breach of peace On that ground a licence can be suspended temporarily under S 6 Danger to breach of peace is never a permanent phase It is a passing or transient feature in the life of a city Section 6 gives specific power to suspend a licence temporarily on the ground that there is likelihood of breach of peace On such a ground a licence cannot be cancelled or revoked Even if it be assumed that breach of peace can conceivably be a ground for cancellation or revocation then the apprehension of breach of peace must be established to be of such a widespread and permanent nature which cannot be dealt with under S 6 by suspension of a licence Keeping in view the object of the Act, it is clear that the question that a licence should be refused on the ground that there was

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likelihood of breach of peace would arise in the rarest of the rare cases, if at all The public interest for purposes of granting the licence confines itself to the interest of the public of the town or of the locality

(Paras 22, 23, 24)

Where a person was given permission to construct a cinema hall and the same is done as per requirements of the provisions of the Act and the Rules and the question of public interest was examined at that stage, the grant of licence for exhibiting cinema films could not be refused on ground of public interest When the aspect of public interest was already examined at the time of giving permission of constructing the hall and the owner had invested a large sum, he acquires a sort of right to the grant of permission

(Paras 25, 27)

(C) U. P. Cinematograph Rules (1951), R. 3(3) — Rule prescribing completion of construction of Cinema hall within certain time limit — Directory and not mandatory.

(Para 29)

(D) U. P. Cinemas (Regulations) Act (3 of 1956), S. 5(2) — Exhibition of Cinema films — Grant of licence — District Magistrate can impose conditions and restrictions.

(Para 30)

Cases Referred :	Chronological	Paras
AIR 1981 Andh Pra 191		24
(1979) Writ Petn No 3171 of 1975, D/- 7-12-1979 (All)		5
1967 All L J 703		27

R K Agrawal, for Petitioners, Standing Counsel, for Respondents

SATISH CHANDRA, C. J.— This writ petition is primarily directed against the order of the State Government of February 15, 1980, allowing the petitioner's appeal but remanding the matter to the District Magistrate, Allahabad, for consideration of the petitioner's application for grant of the licence under the Uttar Pradesh Cinemas (Regulations) Act, 1955, for exhibiting cinema films

2. The petitioners are the owners of premises No 26/30, Sahitya Sammelan Marg, Allahabad. In 1971, they applied to the District Magistrate, Allahabad for permission under the U P. Cinematograph Rules, 1951 for the construction of a permanent building for the use of cinematograph exhibition The Hindi Sahitya Sammelan, Allahabad, filed objections They also made representations to the State Government against the petitioners' application The State Government directed the District Magistrate Allahabad to look into the matter carefully and to see whether or not it would be in public interest to grant permission The District Magistrate, Allahabad, enquired into the matter and, on March 28, 1972, passed an order holding that the construction of a cinema building by the petitioners in the aforesaid premises will not be contrary to public interest He accorded permission to the petitioners to construct the cinema building within two years The petitioners state that they started the construction and completed the cinema building by March, 1975 at a cost of over Rs 60,00,000/- The cinema building was fully air-conditioned and sound proof and had a seating capacity of 920

3. On January 31, 1974, the State Government issued a notification under S 4(1) of the Land Acquisition Act in respect of premises No 26/30, i e, the land on which the cinema building was being constructed Notice of this notification was served on the petitioners on March 31, 1974 The petitioners filed a writ petition No 1932 of 1974 in this Court and obtained an order staying further proceedings in pursuance of the said notification Subsequently the State Government withdrew the notification under S 4(1) and on Jan 30, 1975 the writ petition was dismissed as having become infructuous.

4. Six days later, namely, on Feb 6, 1975, another notification under S. 4(1) of the Land Acquisition Act was issued for acquiring this very land for the same purpose, namely, extension of the Hindi Sangrahalaya of the Hindi Sahitya Sammelan Building Soon thereafter a notification under S 6 of the Land Acquisition Act was also issued.

5. The petitioners filed another writ petition No 3171 of 1975 to challenge the validity of these notifications

6. During the pendency of this writ petition, the petitioners applied to the District Magistrate, Allahabad for the grant of a licence for exhibiting cinema films in the cinema building The District Magistrate referred this application to the State Government and required directions whether he should decide it or should await disposal of the land acquisition proceedings and the writ petition It appears that on Oct 18, 1979, the State Government, after making enquiries, directed the District Magistrate to

grant a provisional licence to the petitioners The District Magistrate, however, instead of doing so again referred the matter to the Government stating that in his opinion a licence should not be granted during the pendency of the writ petition relating to land acquisition proceedings

7. The matter thus again went into the court of the State Government

8. On Dec 7, 1979, this Court decided the writ petition. The same was allowed and the notifications were quashed The petitioners filed a copy of the judgment before the State Government On Dec 13, 1979, the State Government informed the petitioners to contact the District Magistrate again for the grant of licence. The petitioners made another representation to the District Magistrate on Dec. 18, 1979 requesting him to grant the requisite licence. On Dec 22, 1979, the District Magistrate, however, passed an order refusing to grant the licence Aggrieved, the petitioners went up to the State Government in appeal The State Government directed the District Magistrate to send his comments on the petitioners' appeal After considering the comments furnished by the District Magistrate, the State Government held that the various grounds mentioned by the District Magistrate in his comments were untenable. It allowed the appeal, set aside the order of the District Magistrate but sent the matter back to him for consideration of the question whether it would be in the public interest to grant a cinema licence to the petitioners.

9. The District Magistrate fixed May 3, 1980 for disposal of the application Meanwhile on or about April 15, 1980 the petitioners filed the present writ petition They challenged the validity of the State Government's remand order. Their case was that, in the circumstances, the State Government ought to have granted the licence itself. The District Magistrate had fixed May 3, 1980 for disposal of the application. On that day, the petitioners appeared before the District Magistrate The Magistrate, however, informed the petitioners that he would decide the question of public interest after hearing all concerned persons. On May 12 and 13, 1980, a public notice was published in the newspapers 'Bharat' and 'Amrit Prabhat' inviting objections on May 15, 1980. The petitioners on May 13, 1980, filed an application objecting to this novel procedure of public notice adopted by the District Magistrate. However on May 15, 1980, only one objection was filed and this was by the Hindi Sahitya Sammelan Feeling that the District Magistrate was bent upon rejecting the petitioners' application, the petitioners approached this Court and obtained an interim order The District Magistrate hence did not proceed further in the matter

10. Mr Raja Ram Agarwal, appearing for the petitioners, submitted

(i) that Rule 7(2) was invalid,

(ii) that the question of public interest having been enquired into at the time of the grant of permission to construct the building, could not be reopened subsequently, and

(iii) that the procedure adopted by the District Magistrate on the question of public interest was discriminatory

11. In order to appreciate these submissions, let us look at the facts a little more closely The petitioners had applied for permission to build a cinema building in 1971. The District Magistrate referred that application to the State Government The State Government on Dec. 16, 1971 passed an order stating that under the U P Cinematograph Act, 1952, the District Magistrate as the Prescribed Authority himself has to take the decision whether permission to construct a cinema house on any particular place be given or not Reference was made to U P Cinematograph Rules, especially Rule 7 It was emphasized that if the site of the cinema building was within the distance specified under R 7(2) of educational institutions or hospitals where patients resided then after obtaining the prior permission of the State Government, the District Magistrate could refuse to grant the licence in public interest The District Magistrate was directed to enquire whether the proposed cinema building violated R 7(2) It may be recalled that the Hindi Sahitya Sammelan had filed an objection. The State Government directed the District Magistrate to enquire whether the Hindi Sahitya Sammelan was an educational institution What kind of activity was being conducted by it? Does it impart education to anyone so that it may be called an educational institution? If the District Magistrate thinks that for any other reason the grant of permission will not be in public interest then he should obtain the orders of the State Government in that respect. The District Magistrate was asked to dispose of the application after taking into consideration the aforesaid matters.

12. On March 24, 1972, the District Magistrate, Allahabad, addressed a communication to the State Government He stated that in view of R 7 (2) of the U P Cinematograph Rules, 1951, Hindi Sahitya Sammelan can have no objection to the construction of a cinema building on the site in question Hindi Sahitya Sammelan was not an educational institution It has no hostel or a general hospital Hindi Sahitya Sammelan is a Society which primarily carries on the work of propagating Hindi No educational classes are held in it It is not an educational institution like any school, college or university The District Magistrate went on to state that he has considered all aspects of the matter but he has not been able to find any reason for which it may be said that construction of the cinema building on the site in question could be considered to be against public interest No question of public interest was involved in the construction of the cinema building on the proposed site He went on to state that the proposed cinema building appears to be a big beautiful building which will be completely air-conditioned and sound proof Granting permission for its construction will add to the revenue of the State in the form of entertainment tax Considering all these aspects, it was feasible to grant to the petitioners permission to construct the cinema building He intimated to the State Government that he was accordingly granting the permission to the petitioners. After this communication to the State Government, the District Magistrate on March 28, 1972 granted the requisite permission to the petitioners to construct the cinema building

13. The Hindi Sahitya Sammelan, however, kept on interfering It appears to have prevailed upon the State Government to acquire the premises on which the cinema building was being constructed The State Government issued a notification under S 4(1) of the Land Acquisition Act on January 31, 1974 when the construction of the cinema building had gone on for nearly two years and was nearing completion This notification was, however, withdrawn by the State Government but another notification was issued on February 6, 1975 which was quashed by the High Court by its judgment dated Dec. 7, 1979 Meanwhile the petitioners on March 26, 1974 that is to say, two days before the expiry of the two years' period of limitation prescribed by the District Magistrate for completion of the construction of the cinema building, applied to him for extension of time This application remained pending till July 25, 1975 On that date, the District Magistrate passed an order refusing to extend time on the ground that land acquisition proceedings for acquiring the premises were pending in the form of a writ petition before the High Court

14. In May, 1979, the petitioners made an application to the District Magistrate for the grant of a cinema licence under the U P Cinemas (Regulations) Act, 1955 and the Rules The District Magistrate promptly referred this application to the State Government, even though the State Government directed the District Magistrate to grant to the petitioners the provisional licence, the District Magistrate demurred He again represented to the State Government that in his opinion licence should not be granted during the pendency of the writ petition challenging the land acquisition proceedings

15. The land acquisition proceedings were, however, quashed by the High Court on Dec 7, 1979 A copy of the judgment was filed by the petitioners before the District Magistrate as well as before the State Government The State Government on Dec 13, 1979 directed the petitioners to contact the District Magistrate again in connection with the application for grant of the licence On December 18, 1979, the petitioner made an application before the District Magistrate that the cinema building is complete in all respects, all the concerned departments have inspected it and reported no objection indicating that the rules have been fully complied with It prayed the District Magistrate to grant the requisite licence. On Dec 22, 1979, the District Magistrate Allahabad passed an order rejecting the petitioners' application for the grant of licence Thereupon the petitioner went up to the State Government in appeal under S 5(3) of the U P Cinemas (Regulations) Act, 1955 The State Government asked the District Magistrate to submit his comments on the detailed memorandum of appeal filed by the petitioners The District Magistrate submitted his comments

16. In its order of Feb 15, 1980 disposing of the petitioners' appeal, the State Government stated that the District Magistrate in his comments has given the following reasons for refusing the licence

(i) the cinema building has violated the rules because the cinema hall is within 100 yards of two educational institutions;

(ii) under the rules there is no provision for granting the licence after imposing conditions.

(iii) the appellants' contention that the District Magistrate has refused the licence on inimical grounds is incorrect and the petitioners should be hauled up for it,

(iv) the licence has been refused in public interest and on considerations of public peace and order,

(v) the construction of cinema building was not completed within the prescribed period of time,

(vi) if the licence is granted there is apprehension that breach of peace might take place

17. The State Government in its order stated that the grounds on which the District Magistrate has chosen to refuse the licence to the petitioner do not fall within the purview of the relevant rules. It also held that rules have not, in any manner, been violated

18. The State Government went on to hold that in view of the conditions mentioned in amended R 7 (2), the District Magistrate could refuse the licence for sufficient reasons on the ground that on a particular site the situation of a cinema building may not be in the public interest But, for such refusal, the condition precedent is that the District Magistrate should obtain the prior approval of the State Government. It was also observed that the view of the District Magistrate that licence could not be granted by imposing conditions is incorrect. Under S 6 (2) of the U P Cinematograph Act, 1955 (or S 5 (2) of the U P Cinemas (Regulations) Act 3 of 1956) a licence could well be granted after imposing such conditions as may be considered necessary The Government did not accept the District Magistrate's contention that the cinema building was within 100 yards of educational institutions. Accordingly, the State Government cancelled the District Magistrate's order refusing to grant the licence It allowed the appeal and sent the matter back to the District Magistrate with a direction that it may reconsider the application of the petitioners after giving them an opportunity of hearing (which was not given earlier) and then to pass a reasonable and valid order It was also directed that if in the public interest the prior permission of the State Government was considered necessary then he should refer the matter to the State Government through the Commissioner

19. The learned Standing Counsel submitted that the writ petition was premature The State Government has remanded the matter to the District Magistrate for consideration of the question whether the situation of the cinema building was or was not in the public interest The District Magistrate should, therefore, be permitted to proceed with the matter and take a decision. We are, however, not inclined to dispose of the writ petition on this short ground We think that, in the circumstances, we should dispose of the matter one way or the other because we have gained the impression that neither the State Government nor the District Magistrate is eager to decide the application one way or the other They have sent the matter back and forth many times Initially the application was made to the District Magistrate but he instead of applying his mind and deciding the matter referred the application to the State Government The State Government, on October 18, 1979, directed the District Magistrate to grant a provisional licence subject to the result of the writ petition in which land acquisition proceedings were challenged The District Magistrate never the less did not grant the provisional licence but reiterated his view that during the pendency of the writ petition the licence should not be granted The matter again went back to the State Government. Meanwhile the land acquisition writ petition was allowed The petitioners filed copies of the judgment before the State Government as well as the District Magistrate The State Government again directed the petitioners to approach the District Magistrate for disposal of the application for the grant of a licence This time the District Magistrate quietly dismissed the application without either affording the petitioners an opportunity of hearing or giving any reasoned order The petitioners again went up in appeal The State Government called for the comments of the District Magistrate It received detailed comments which showed that the District Magistrate was of the opinion that, inter alia, because of an apprehension of breach of peace it was not in the public interest to grant the licence. Yet the State Government took shelter behind a technical plea that before coming to the conclusion and rejecting the application on the ground of public interest, the District Magistrate should have taken the prior permission of the State Government. After holding that all the rules have been complied with and there was no violation of any of the rules or provisions of the Act. But the State Government again sent the matter back to the District Magistrate The District

Magistrate this time adopted the novel procedure of having public hearings The petitioners have been sent back and forth enough number of times

20. The position is that the question of compliance of the rules and whether the situation of the site of the cinema building was in the interest of general public had been examined thread-bare before the permission to construct the building was granted in 1972 It was again examined by the State Government and it was held that the reasons for which the District Magistrate refused the licence do not fall within the purview of any of the provisions of the U P Cinematograph Rules and no rule has been violated But under the amended R 7 (2), if the Licensing Authority for sufficient reasons thinks that the site of the cinema building was not in the public interest then he could refuse the licence

21. It will be remembered that the District Magistrate had in his comments mentioned six grounds out of which four were found by the State Government to be having no merit Grounds Nos 4 and 6 mentioned the question of peace and order, Ground No 4 says that licence has been refused keeping in mind the public interest and law and order situation Ground No 6 mentioned that if the licence was granted then maintenance of peace was likely to be endangered The question, therefore, becomes considerably narrowed down The question of law submitted by the learned counsel for the petitioner was that problems of law and order or apprehensions of breach of peace were immaterial and irrelevant while considering the question whether it was in the public interest to grant the licence Learned counsel for the petitioners submitted that under S 6 of the U P. Cinemas (Regulation) Act, 1955, the State Government or the District Magistrate has power to suspend exhibition of films if he is of the opinion that any film which is being publicly exhibited is likely to cause the breach of peace Such an order of suspension could last for a period of two months subject to the State Government extending it, S 7 of the Act gives power to suspend, revoke and cancel a licence It sayed that a licence granted under S 5 may be cancelled or revoked in the public interest. Sub-s. (1-A) gives particular grounds for the licence being cancelled or revoked. The grounds are that the licence was obtained through fraud or misrepresentation, or that there was a mistake as to an essential matter at the time of grant of licence or that the licencee has been guilty of the breach of the provisions of the rules or conditions of the licence or that the licencee has been convicted of any offence, or that on account of any change occurring in the situation of the place of the licencee, the continuance of the licencee is considered prejudicial to decency or morality

22. It will thus be seen that a licence cannot generally be revoked or cancelled on the ground of apprehension of breach of peace On that ground a licence can be suspended temporarily under S 6 Danger to breach of peace is never a permanent phase It is a passing or transient feature in the life of a city Sub-s (1-A) of S 7, however, opens with the phrase "in particular and without prejudice to the generality of the power conferred by sub-s (1), a licence may be cancelled or revoked under that sub-section on any of the following grounds, namely, . "

23. Under S 7 (1) a licence can be revoked or cancelled in the public interest It may hence be argued that the particular instances mentioned in sub-s (1-A) of S. 7 are not exhaustive and a licence may be revoked or cancelled on other grounds relevant to public interest Assuming this to be so, a licence may be cancelled or revoked on the ground of apprehension of breach of peace in cases not dealt with under S 6 S 6 gives specific power to suspend a licence temporarily on the ground that there is likelihood of breach of peace On such a ground a licence cannot be cancelled or revoked Even if it be assumed that breach of peace can conceivably be a ground for cancellation or revocation then the apprehension of breach of peace must be established to be of such a widespread and permanent nature which cannot be dealt with under S 6 by suspension of a licence

24. What are the facts? In his comments, the District Magistrate gives a mere apprehension From the version of the comments of the District Magistrate mentioned in the State Government's order it does not appear that there was any apprehension of breach of peace in the locality as a permanent feature In this connection, the observations of the Andhra Pradesh High Court in Neelam Wines, Hyderabad v. Commissioner of Police, Chatta Bazar, Hyderabad, AIR 1981 Andh Pra 191, are apposite There an application

for the grant of licence for running a wine shop was refused from law and order point of view Dealing with it, the Court observed (at p. 195) —

"We are not oblivious to the possibility of some unruly elements gathering around the wine shop and disturbing peace But we hold that it is not normally permissible to the State to prevent a person from doing his lawful business or carrying on his lawful activity on the basis that some other person or persons might be provoked to disturb peace, because of those lawful acts Where such a situation develops or is likely to develop the clear duty of the police would be to afford protection to the lawful activities and to put down those who are the law breakers The police by totally prohibiting the carrying on both the legal activity as well as the illegal activity would only bring about peace of the graveyard That cannot be the purpose of the Act"

Certainly that is not the purpose of the U P Cinematograph Act, 1952 (or U P. Cinemas (Regulations) Act (3 of 1956)) In paragraph 9 of the counter affidavit filed on behalf of the State Government, it has been averred that the expression "public interest" is well known to the legal world and it cannot be said that it provides any unfettered and unguided discretion The general object of the Act itself, namely, to regulate the exhibition of cinematograph films within a residential locality consistent with the social and cultural requirements and ideals, provides enough guidelines for exercise of power It cannot be doubted that the exhibition of cinematograph films has a social, moral and cultural impact on the neighbourhood It is further stated that 'public interest' has to be judged taking into account the interest of the public in general of that town and the persons of that locality for ascertaining that it is in the public interest to grant licence under S. 5 read with R 7 of the Rules These being the general objects of the Act, the question that a licence should be refused on the ground that there was likelihood of breach of peace would arise in rarest of the rare cases, if at all. The public interest for purposes of granting the licence confines itself to the interest of the public of the town or of the locality. There is not even a whisper in the counter affidavit filed either by the State Government or the District Magistrate that there was a genuine and real apprehension of a permanent and widespread breach of peace if licence was to be granted to the petitioners. It may be remembered that the question of public interest was thoroughly examined at the time of the grant of permission to construct the building It has also to be kept in mind that a person who invests a huge sum after being given the permission to construct after considering every aspect including public interest, acquires some sort of a right to the grant of the licence for showing the films in the building so constructed He cannot be treated as a mere begger asking for charity There is no allegation that the petitioners will show such films as are likely to cause breach of peace or that the antecedents of the petitioners are such that by their very presence they are likely to cause breach of peace in the locality In the circumstances, the apprehension of large scale continuing of peace appears to us to be a figment of imagination devoid of any reality

25. There seems to be no doubt that the relevant rules having been complied with there was no objection with regard to the electrical requirements or ventilation or sanitation, fire precautions or the like The question of public interest in respect of the location of the site of the cinema building had been gone into earlier and has been gone into by the State Government on this occasion while considering the question of the grant of licence The only outstanding thing was apprehension of breach of peace That, as shown above, was an illusory apprehension.

26. In the counter affidavit filed on behalf of the District Magistrate it has been stated that many representations were received by him In pursuance of the public notice, though the petitioners have stated that only one objection against the grant was received and that was by the Hindi Sahitya Sammelan The District Magistrate had not chosen to clarify the position. In the rejoinder, the petitioners have stated that the various representations were in favour of the grant of the licence to the petitioners.

27. At one stage, the learned Standing Counsel doubted whether the question of public interest was required to be gone into at the time of grant of permission to construct the building Rule 3 deals with application for constructing a building. Sub-rule (3) thereof requires the Licensing Authority to be satisfied that the site plans and the specifications fully conform to the rules before granting the requisite approval to the

construction of the building In Smt Bhudevi v State of U P 1967 All L J 703 it was held that the process of approval of the site is an integral part of the grant of a licence under the U P Cinematograph Act and that the requirement of R 3(3) that the site plans and the specifications fully conform to the rules means all the rules on the subject The whole of R 7 would be attracted Rule 7 specifically requires consideration of the question of public interest Thus it is not correct to say that in 1972 there was no legal requirement to consider the question of public interest

28. The learned Standing Counsel also emphasized that originally the permission was granted to complete the building in two years under R 3(3) Rule 3(3) requires that the period within which construction shall be completed was also to be stated Two years' period was so stated Before the expiry of the period of two years the petitioners on March 26, 1974 applied for extension of time for completing the constructions fully This application remained pending for more than a year It was rejected on July 25, 1975 on the ground that a writ petition challenging the land acquisition proceedings was pending In that writ petition an interim order staying the proceedings has been passed by the High Court and so the District Magistrate was powerless to do anything Meanwhile the petitioners stated that the District Magistrate continued to give to the petitioners permits for cement, steel, etc to enable it to complete the building The building was completed by March, 1975 long before July 25, 1975 when the application for extension of time was formally rejected

29. In our opinion, the relevant part of R. 3(3) is directory In the circumstances, the petitioners did not commit any violation of rules in completing the building by March 1975 instead of March, 1974

30. The State Government was justified in its view that the District Magistrate can impose such conditions as it may think reasonable Sub-s. (2) of S 5 provides —

"(2) Subject to the foregoing provisions of this section and to the control of the State Government and the interests of the general public, the licensing authority may grant licences under this Act on such terms and conditions and subject to such restrictions as it may determine and on payment of such fees as may be prescribed."

Thus, the placing of conditions and restrictions is inherent to the grant of a licence In this view of the matter we do not think it fit to deal with the other points raised on behalf of the petitioner

31. In the result, the petition succeeds and is allowed The impugned order of the State Government dated February 15th 1980 is modified The District Magistrate, Allahabad, is directed to forthwith grant to the petitioners the requisite licence subject to reasonable conditions and restrictions In the circumstances, the parties will bear their own costs

Petition allowed

1981 ALL. L. J. 1166

P N GOEL, J

Asha Ram, Appellant v State, Respondent

Criminal Appeal No 1871 of 1978, D/- 27-8-1981

(A) Penal Code (45 of 1860), S. 161 — Prevention of Corruption Act (1947), S. 5 — Evidence of Officer arranging raid — Could be relied on for conviction if no infirmity found in his testimony. AIR 1980 S C 873 Foll. AIR 1973 S C 498 and AIR 1974 S C 218 Ref. (Para 14)

(B) Penal Code (45 of 1860), S. 161 — Inability to do some favour or disfavour — Could not by itself be a ground for acquittal. Case law discussed. (Para 34)

Cases Referred :	Chronological	Paras
AIR 1981 S C 1235	1981 Cri L J 741	24
AIR 1980 S C 873	1980 Cri L J 564	13
AIR 1977 S C 666	1977 Cri L J 254	31, 33
AIR 1974 S C 218	1974 Cri L J 307	12
AIR 1973 S C 498	1972 Cri L J 1293	12
AIR 1968 S C 1323		32
AIR 1954 S C 637	1954 Cri L J 1656	29

N P Midha, for Appellant, Addl Govt Advocate, for Respondent.

JUDGMENT :— Asha Ram, appellant, Assistant Registrar Qanoongo, attached to Tahsil Agra, has been convicted and sentenced under Ss. 161, I P C and 5(2) of the Prevention of Corruption Act, 1947, to suffer rigorous imprisonment for 18 months on each count The sentences have been made to run concurrently

2. Facts giving rise to this appeal are these Bedi Lal and Munni Lal, P Ws 2 and 3 are natives of village Samogar, Police Station Deoki, district Agra. They had agricultural lands in Samogar Munni Lal used to live at Calcutta in connection with service These two persons agreed to exchange their agricultural fields On 27-5-1976 Munni Lal moved an application, Ex Ka-7, before the Sub Divisional Officer, Agra for the exchange of his fields with those of Bedi Ram On 5-6-1976 Bedi Ram filed written statement indicating his consent to the proposed exchange On the same day the Sub Divisional Officer passed order that the file be put up before Tahsildar, Agra on 21-6-1976 and parties be informed accordingly On 21-6-1976 Bedi Ram went to Tehsil Agra and met the appellant The appellant told him that the file had not been received in Tahsil Thereupon Bedi Ram and Munni Lal reached the office of the Sub Divisional Officer and came to know that the file had not been sent to Tahsil till then and that it would be sent on the next day On 22-6-1976, Mahendra Nath, P W 3, clerk of the Sub Divisional Officer, Agra, sent the record to Tahsil The file was received in Tahsil on 23-6-1976 at about 8 A.M by K. S Kulshresth, P W 4, revenue clerk, Tehsil In the month of June, 1976 there were morning shift of offices On the same day K S Kulshresth obtained order from the Tahsildar The Tahsildar marked the file to Naib Tahsildar/Registrar Qanoongo Under the verbal instructions of the Registrar Qanungo, the files marked for him are handed over to the Assistant Registrar Qanungo of the concerned area Therefore, on 23-6-76 Kulshresth entered the file of this case as well as other files in the despatch register to be handed over to the appellant. The file of the present case was received by the appellant on the same day But he signed of its receipt on 25-6-76. On 23-6-76 Bedi Lal and Munni Lal met the appellant. The appellant told them that their file had been received but they would have to pay some money He demanded Rs 200/- adding that without giving the said money their work would not be done. Munni Lal had Rs 100/- with him. He immediately gave Rs. 100/- to the appellant. Bedi Lal promised to bring the money from his house within a day or two On reaching their village Samogar there took place some consultation between Bedi Lal and Munni Lal and they decided to get a corrupt official/officer to get the appellant arrested. Pooran Chand, a native of Samogar, also agreed to the suggestion of Bedi Lal and Munni Lal and he promised to accompany them On 25-6-1976 Bedi Lal and Munni Lal and Pooran Chand left their village and reached the Vigilance Officer at Agra at about 10 A M In the way Bedi Lal got a complaint written out by Birj Singh (D. W 1) Bedi Lal and others met Superintendent of Police (Vigilance) and submitted the complaint to him The Superintendent of Police (Vigilance) directed them to meet Deokinandan Sharma, Deputy Superintendent of Police (Vigilance) (P W 1), who was having his seat outside his room These three persons then met Deokinandan Sharma, who arranged to call two persons Mahendra Singh Sarpanch (P W 7) of village Albania and Shyam Bir Singh of village Bisharipur. Sri Romal Singh Dy S P. and three Inspectors Yogendra Pal Singh, Bhanwar Pal Singh and P C Agnihotri were also there Bedi Lal affirmed his complaint and produced a currency note of Rs 100/- which was meant to be given as bribe to the appellant. Deokinandan Sharma made his initial on the currency note and its number was noted Phenophthalein powder was applied on the currency notes by Yogendra Pal Singh Inspector The currency note was then handed over to Bedi Lal for being handed over to the appellant as bribe money Thereafter all the persons left the Vigilance Officer and reached the compound of police hospital which is near Tehsil After formality of personal search of all the persons, at about 1-30 P M Deokinandan Sharma, Yogendra Pal Singh, Bedi Lal and Munni Lal went into the room of the Qanungo. Mahendra Singh and some other persons remained in the verandah just out side the room of the Qanungo. Other persons stood at Tea Canteen. Bedi Lal started talking with Asha Ram who was doing work while sitting on a chair Asha Ram asked him if he had brought Rs 100/- Bedi Lal asked him to reduce the amount. The appellant replied that he had taken Rs. 100/- from Munni Lal and, therefore, he would not reduce the amount Bedi Lal then handed over the currency note of Rs 100/- to the appellant requesting him to get his work done early The appellant kept the currency note in the front pocket of his shirt and then began to see the file of Bedi Lal Thereupon Deokinandan Sharma gave a signal to the persons standing in the varandah and tea canteen. Mahendra Singh and all others then went into the room of the Qanungo Deokinandan Sharma gave out his name and designation Then he took search of the appellant and recovered the currency note

of Rs 100/- from the chest pocket of his shirt Hands of Bedi Lal and the appellant were got washed in Sodium Carbonate liquid The colour became pink The pocket of the shirt of the appellant was also washed in Sodium Carbonate liquid The colour of the wash became pink Recovery memo Ex Ka-3 was prepared on the spot and duly signed Another memo of the personal search of the appellant was duly prepared (Ex Ka-4) It is said that copies of both these recovery memos were given to the appellant Deokinandan Sharma then obtained the file of Bedi Lal by giving report to the Naib Tehsildar The appellant was taken to police station Shahganj Agra where Deokinandan Sharma lodged report Ex Ka-5 and handed over the appellant there

3. The appellant did not admit the allegations of the prosecution. He asserted that when he was working somebody thrust currency note forcibly in his pocket, that when he looked up and found Bedi Lal only and none else, that he threw away the currency note, that then some persons came into his room He was then taken to the police station The recovery memo was not written at the alleged place of occurrence He further asserted that he was previously Lekhpal, that Bedi Lal was having malice against him for two reasons -- (1) Bedi Lal was previously proceeded against for taking illegal possession of Gaon Samaj land on the basis of the entries made by him, and (2) 16 Biswas land out of 3 Bighas of plot No 104 of Bedi Lal went under the waters of Jamuna Therefore, he, as Lekhpal, had reduced his area

4. The prosecution examined Deokinandan Sharma, Bedi Lal, Munni Lal and Mahendra Singh (P Ws 1, 2, 5 and 7) to prove its case besides Shish Ram Singh, Vigilance Inspector (P W 8), who investigated into the case. The prosecution also examined Mahendra Nath, clerk of the S.D M. and K.L. Kulshreshtha, revenue clerk Tehsil (P.Ws. 3 and 4). Reference has been made to their testimony above

5. On the other side the appellant examined Buri Singh and Sita Ram Sharma (D. Ws. 1 and 2).

6. Buri Singh is the scribe of the complaint/application of Bedi Lal Ex. Ka-1 It was got written by Bedi Lal before reaching the Vigilance Officer Agra on 25-6-76 at about 10 A.M. It means that the complaint was written out by Buri Singh some time before 10 A.M. Buri Singh stated that Bedi Lal got complaint Ex Ka-1 on 25-6-76 at 7 P M. The appellant had been arrested by Deokinandan Sharma at about 1-30 P M Report of the occurrence was lodged at police station Shahganj at 3-30 P M In all these circumstances the statement of Buri Singh cannot inspire confidence

7. Sita Ram Sharma (D W 2), Supervisor Qanungo has proved entries of Khasra of the year 1968-69 (1376 F) His evidence is of no help to the appellant

8. The learned Special Judge (Sessions Judge) Agra believed the evidence of the prosecution witnesses and convicted and sentenced the appellant for the offences mentioned above

9. Learned counsel for the parties have been heard and the entire record has been perused

10. Learned counsel for the appellant urged that Deokinandan Sharma (P W 1) was interested in the success of the trap, that Bedi Lal was inimical to the appellant from before, that Munni Lal was companion of Bedi Lal, that Mahendra Singh had not supported the full version of the prosecution and that he gave evidence under the influence of the police officers and that, therefore, reliance should not be placed on the testimony of the prosecution witnesses

11. Bedi Lal and Munni have faithfully narrated the version of the prosecution Deokinandan Sharma has corroborated their testimony on the material point of the giving of bribe money to the appellant and its recovery from the pocket of his shirt Mahendra Singh was in the verandah He did not catch/hear the talks which transpired between Bedi Lal and the appellant inside the room He has also not stated about the passing of the money from Bedi Lal to the appellant He has testified to only one fact and it is this that the currency note in question was recovered by the police officer from the front pocket of the shirt of the appellant He has further stated that the hands of Bedi Lal and the pocket of the shirt of the appellant were got washed in a liquid and that the said liquid became pink He further stated that he had signed on the recovery memo Ex Ka-3 and memo of the personal search of the appellant Ex. Ka-4 Lastly, he has stated that the Vigilance Officer picked up a file from the table In cross-examination he denied by suggesting that he did not see anybody forcibly thrusting the money in the pocket or the appellant throwing it away

12. In support of his contention the appellant's counsel has referred to the cases of —

(1) Ram Prakash Arora v State of Punjab AIR 1973 S C 498 In this case it was laid down that evidence of interested and partisan witnesses who were concerned in the success of the trap must be tested in the same way as that of any other interested witness, and that in a proper case the Court might look for independent corroboration before convicting the accused

(2) Darshan Lal v Delhi Administration AIR 1974 S C 218 In this case the principle laid down in the case of Ram Prakash Arora (Supra) was referred to and in the circumstances of the case it was held that the evidence of trap witnesses was not sufficient to record the conviction of the accused and that the evidence of the trap witnesses should have been corroborated by some independent and trustworthy evidence

13. On the other side the learned counsel for the State urged that an accused can be convicted merely on the evidence of the police officer who laid the trap in case his testimony was reliable and that in such a case no corroboration was necessary The learned State counsel referred to the case of Hazari Lal v. The State AIR 1980 S C 873 In this case Paras Nath (P W 8) was Inspector Anti Corruption Department He arranged raid The Supreme Court observed (at p 876)

"We, however, wish to say that the evidence of P. W 8 is entirely trustworthy and there is no need to seek any corroboration We are not prepared to accept the submission of Shri Frank Anthony that he is the very Police Officer who laid the trap should be sufficient for us to insist upon corroboration We do wish to say that there is no rule of prudence which has crystallized into a rule of law, nor indeed any rule of prudence, which requires that the evidence of such officers should be treated on the same footing as evidence of accomplices and there should be insistence on corroboration In the facts and circumstances of a particular case a Court may be disinclined to act upon the evidence of such an officer without corroboration, but, equally, in the facts and circumstances of another case, the Court may unhesitatingly accept the evidence of such an officer It is all a matter of appreciation of evidence and on such matters there can be no hard and fast rule, nor can there be any precedential guidance"

14. In the present case, no doubt Deokinandan Sharma Deputy Superintendent of Police (Vigilance) arranged the raid, but on this ground alone his testimony cannot be brushed aside The appellant's counsel has not been able to point out any infirmity in his testimony on account of which his testimony should not be believed

15. Bedi Lal, no doubt, appears to have some enmity with the appellant. He was previously in the services of the police He was a constable Later on, he became a Head Constable He remained in police service for about 10 years There is, however, nothing to show that he ever worked with Deokinandan Sharma (P W 1) He has admitted that previously Asha Ram Appellant was Lekhpal of his village Samogar He has denied the suggestion that the appellant made entry of his illegal possession on Gram Samaj land He, however, admitted that there was a case under section 115-C of the U P Zamindari Abolition and Land Reforms Act Then he stated that he did not remember if a sum of Rs 1520/- was fined on him Then he stated that the Tehsildar passed order directing him to leave the land and that then he left the land He pleaded ignorance if this matter arose on the report of the appellant This statement clearly shows that Bedi Lal had taken illegal possession of the land of Gaon Samaj, that there was a case under S 115-C against him, that he was made to pay compensation of Rs 1520/- and had to leave the land under the orders of the Tahsildar

16. Bedi Lal has then admitted that river Jamuna flows by the side of his village, that on this account there used to take place settlement of his village every five years and that there did take place settlement at the time when the appellant was Lekhpal of his village He has plot No 104 measuring 3 bighas in his village. He was asked that because 16 Biswas land of plot No. 104 went under the waters of Jauma the appellant reduced the area of his plot. Bedi Lal replied that he did not know. This goes to suggest that the assertion of the appellant is justified

17. Bedi Lal has then admitted that there was partibandi amongst Parsu Ram Prabhan, Mukat Singh, Prabhu Dayal and him Prabhu Dayal brought a case under section 307 I P C in which he was an accused Asha Ram was Lekhpal at the time of the pendency of the case. In connection with that case there took place some wordy altercation between him and the appellant

18. The above instances go to show that Bedi Lal had malice against the appellant from before the present occurrence Therefore, it can be said that he can falsely concocted a case against the appellant.

19. In this connection it will be noticed that Munni Lal (P W 3) had absolutely no malice or enmity against the appellant Munni Lal simply wanted to exchange the land with that of Bedi Lal On this ground it cannot be said that he would perjure himself simply under the influence of Bedi Lal There appears no infirmity in the statement of Munni Lal

20. Mahendra Singh is a respectable person of village Albana He was Sarpanch of his village at the time of occurrence On the date of occurrence he was going from Power House towards Baloo Ganj at about 11-30 A M He was called in the Vigilance Office through a constable This witness has given a limited statement which has been detailed above His statement does not indicate that he was in any way under the influence of the police or the Vigilance Officers His statement does not show that he was in any way connected with Bedi Lal and Munni Lal In these circumstances it can easily be held that he is quite an independent and reliable witness There is no reason not to believe his testimony

21. The position that follows is that reliance can easily be placed on the evidence of Deokmandan Sharma, Munni Lal and Mahendra Singh The testimony of these witnesses fully makes out the case set up by the prosecution against the appellant

22. It may be remarked that there is no material on record to show except the statement of the appellant that the currency note in question was forcibly kept by some one in his pocket and that as soon as he saw Bedi Lal, he threw the currency note from his pocket The statement of the appellant to this effect is clearly negatived by the testimony of Mahendra Singh

23. For what has been discussed above it is fully proved that the currency note in question was recovered from the possession of the appellant. There is no material on record to indicate that this currency note was kept by Bedi Lal in the pocket of the appellant. Taking into account the statement of Munni Lal and Deokmandan Sharma as well as Mahendra Singh it can be said that this currency note was given to the appellant as bribe money

24. Learned counsel for the appellant referred to the case of Banshi Lal Yadav v. State of Bihar, 1981 Cri L J 741 (AIR 1981 S C 1235) to show that if the currency note was forcibly thrust into the pocket of the accused no presumption under section 4 of the Prevention of Corruption Act 1947 would arise There is no dispute to this principle But in the instant case, the currency note was not thrust into the pocket of the appellant by Bedi Lal or anybody else On the other hand the evidence of the prosecution witnesses fully prove that Bedi Lal gave the currency note to the appellant and the appellant himself kept it in the pocket of his shirt Therefore, the case of Banshi Lal Yadav does not help the appellant

25. Taking into consideration what has been found above, it is apparent that the appellant is guilty of the offence defined in section 5(1)(d) of the Prevention of Corruption Act According to section 5(1) a public servant is said to commit the offence of criminal misconduct in the circumstances detailed in clauses (a), (b), (c), (d) and (e) Clause (d) reads as follows

"(d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage."

Taking into consideration the facts alleged and proved by the prosecution the case of the appellant squarely falls under this clause.

26. The appellant's counsel contended that the appellant was not guilty of the offence under S 161 I P C because the Tahsildar marked the file to the Naib Tahsildar and Registrar Qanungo, that the Registrar Qanungo was, therefore, to make a report in the matter and that the appellant could not have shown any favour to Bedi Lal and Munni Lal

27. S 161 punishes a public servant who accepts or obtains for himself or for any other person any gratification whatever, other than legal remuneration, as a motive or reward for doing any official act or showing, in the exercise of his official functions, favour to any person

28. Expression "a motive or reward for doing" has been clarified in S 161 itself in the following words

"A person who receives a gratification as a motive for doing what he does not intend to do,—"

29. The appellant's counsel has referred to two cases

(1) Madan Mohan Singh v State of U P, AIR 1954 S C 637 In this case the appellant was Excise Inspector and posted at Baghpat circle of Meerut The complainant Ghammanlal was a licensed vendor of the liquor and drugs in the same area He and his brothers had licences of 7 shops of liquor and 3 shops of drugs Ghammanlal made an application to the appellant on 22-3-1948 that the appellant should recommend him to draw 50 gallons of liquor and 2 seers of Ganja from the bonded warehouse and godown because the Holi festival was approaching The appellant recommended only 8 gallons of liquor and 4 Chhataks of Ganja and while making the recommenation he asked Ghamman Lal to pay him bribe at the rate of 5 per cent on the total amount of contract for the shops On 23-3-1948 Ghammgn Lal went to Meerut to obtain liquor from the warehouse His friend Balwant Singh met him and advised him to contact the Anti-Corruption Department and make a complaint against the appellant. Ghammanlal told the Dy S P Anti Corruption Department that he would be paying Rs 50/- as bribe The currency notes were signed by the District Magistrate Ghammanlal then approached the appellant and paid Rs 48/- to the appellant who accepted them Thereafter the appellant was apprehended and searched The appellant contended that he never demanded any bribe from Ghammanlal, that Ghammanlal and Balwant Singh were highly inimical to him and that they had falsely implicated him

He further asserted that Ghammanlal had placed the money on the window still and that then he was got arrested His further defence was that under the circular issued by the Excise Department the appellant was collecting subscriptions from all licensed shops The magistrate, on an examination of the entire material, came to the conclusion that the prosecution failed to prove the guilt of the appellant The State preferred an appeal. The High Court set aside the order of acquittal and convicted the appellant. The Supreme Court found that the sanction for the prosecution of the appellant was not a valid one The Supreme Court further found that on facts the view of the High Court was not correct. In the course of the judgment, the Supreme Court observed (at p 641),

"The essence of an offence under section 161 of the Indian Penal Code is the obtaining or acceptance, by a public servant, of a gratification other than legal remuneration as a motive or reward for doing or forbearing to do an official act or for showing or forbearing to show any favour or disfavour to any person or for rendering any service or disservice to him The first question that requires consideration is, with what motive or as reward for what act, was the sum of Rs 48/- paid as illegal gratification by the complainant and accepted by the accused "

30. The Supreme Court then found that there could be no occasion at all for the demand of bribe by the appellant on the facts of the case

31. The facts of the present case are quite distinct from the case of Madan Mohan Singh In the present case it appears that the appellant took the money because a report was to be sent on the application of exchange of holdings Prima facie, the report was first to be submitted by the Registrar Qanungo and then the Naib Tehsildar As the appellant demanded money for the report to be sent by the Registrar Qanungo and Naib Tehsildar it appears that he demanded the bribe money on behalf of or for the Registrar Qanungo and Naib Tehsildar It is a matter of common experience that ordinarily the senior officers take illegal gratification through their subordinates and that in the illegal gratification the subordinates also take a share The present case seems to be an instance of such type of cases Therefore, in the present case it cannot be said that section 161 I P C is not applicable

(2) Trilok Chand Jain v State of Delhi, AIR 1977 S C 666 — In this case S K Jain complainant used to manufacture rubber motor parts in the factory at Shahdara. On his application, the Delhi Electric Supply Undertaking sanctioned a power connection for his factory The complainant deposited the estimate of expenses. For a period of 4 months no steps were taken by the employees of the Undertaking to give connection. S P Gupta, Inspector of the Undertaking, approached the complainant and solicited a bribe of Rs. 125/- The complainant did not intend to pay bribe He contacted Dy Superintendent of Anti Corruption Department The bribe money of Rs 100/- was actually handed over to Trilok Chand Jain, a permanent labourer working under S P Gupta because Trilok Chand Jain represented that he had been sent by Inspector Gupta Trilok Chand did not know as to why Inspector Gupta wanted the money It was found that Trilok Chand had absolutely no concern with the matter and as such he could not have taken the bribe money abusing his official position Trilock Chand was, therefore, acquitted. On facts this case is also of no help to the appellant in the

instant case the records marked to Registrar Qanungo were to be handed over to the appellant The file of Bedi Lal and Munni Lal was undoubtedly sent to the appellant Hence, it cannot be said that the appellant had absolutely no concern in the matter

32. The learned counsel for the State has referred to the case of Bhanuprasad Hariprasad Dave v State of Gujarat, AIR 1968 S C 1323 In this case a lady teacher Madhukanta handed over a postcard written by Raman Lal requesting her and another lady teacher Chandrakanta to meet him in connection with some work, to the appellant No. 1, a police sub inspector probably with the request that Raman Lal be pulled up for his conduct The sub-inspector called Raman Lal to the police station through a constable (appellant No 2) The said sub-inspector abused and slapped Raman Lal and threatened to take action against him He demanded a sum of Rs 100/- from Raman Lal if he wanted him to hush up the matter Raman Lal approached Dy S P Anti Corruption Department At the bidding of the sub-inspector the money was given to the constable The money was recovered from the constable The sub-inspector and the constable both were prosecuted under section 161 I P C and section 5 Prevention of Corruption Act It was held that both the appellants were guilty of both the offences A question arose before the Supreme Court whether the sub-inspector had committed any offence because he could not have investigated into the matter The Supreme Court observed (at p 1327),

"The question whether there was any offence which the first appellant could have investigated or not is irrelevant for that purpose. If he had used his official position to extract illegal gratification the requirement of the law is satisfied "

33. It may be pointed out that in the case of Trilok Chand Jain (AIR 1977 S C 666 at p 670) (supra) it was observed,

"It is true that in law the incapacity of the government servant to show any favour or render any service in connection with his official duties does not necessarily take the case out of the mischief of these penal provisions. Nevertheless, it is an important factor bearing on the question as to whether the accused had received the gratification as a motive or reward for doing or forbearing to do any official act or for showing any favour or disfavour in the exercise of his official functions This question as to whether the government servant receiving the money had the requisite incriminatory motive is one of fact "

34. In view of the principle laid down in the above cases, in the instant case the appellant cannot save his skin by simply showing that the Tahsildar had marked the file to Registrar Qanungo In this aspect of the matter the appellant is also guilty of the offence punishable under section 161 I P C

35. No other point was urged by the parties' counsel

36. The sentence of 18 months' imprisonment is quite appropriate and cannot be considered severe

37. In view of what has been found above there is no merit in this appeal

38. Appeal is dismissed and the conviction and sentence of the appellant under sections 161 I P C and 5(2) Prevention of Corruption Act 1947 recorded by the Special Judge Agra are affirmed The appellant is on bail to which he shall surrender and serve out the sentence

Appeal dismissed

1981 ALL. L. J. 1172

(SUPREME COURT)

(From Allahabad)*

A D KOSHAL, V BALAKRISHNA ERADI AND R. B MISRA, JJ

Civil Appeal No 515 of 1970. D/- 15-10-1981

K C Kapoor, Appellant v Smt. Radhika Devi (dead) by Lrs and others, Respondents

Hindu Law — Joint family property — Alienation by son the Karta who was in exclusive possession — Consent by widow — Estoppel — Plea of — Sale for legal necessity — Proof. S. A. No. 362 of 1966, D/- 19-2-1970 (All) Reversed. ((1) Evidence Act (1872), Ss. 106 and 115; (ii) Civil P. C. (1908), S. 100, O. 6, R. 2.).

On the death of her husband, the property devolved on the widow plaintiff 1, son deft 2 and plaintiffs 2 & 3, the sons of deft 2 The

*Second Appeal No. 362 of 1966, D/- 19-2-1970, (All — Lucknow Bench).

entire property was mutated in the name of deft 2 both in the revenue records as well as municipal registers The disputed properties consisted of block of houses in Rae Bareli town Till the date of the disputed sale-deed defendant No 2 was in possession of the entire property left by his father and also acted as its exclusive manager He received compensation for some of the Zamindari property, a part of which was also sold by him in 1959 for a consideration of Rs 800/- In the years 1960 and 1961 defendant No 2 constructed a one-story building on a plot of land in Lucknow, where he was employed as a clerk in the Department of Health of the Government of Uttar Pradesh and where he was residing with his wife and children The disputed sale-deed was executed by defendant No 2 on 14-2-1964 in respect of the western portion of the block of houses in favour of defendant No 1 In that sale-deed defendant No 2 described himself as "exclusive and complete owner" of the Rae Bareli property and claimed that he was in possession and occupation thereof with powers of transfer of all kinds " The suit was filed for setting aside the sale-deed alleging that half of the property belonged exclusively to Pltf 1, and that Pltfs 2, 3 acquired interest by birth in the other half, along with deft 2 She also alleged that the sale transaction was not for any necessity of the family and that she did not consent to the sale and thus she was not estopped from challenging the alienation The trial court came to the conclusion that the house at Lucknow was joint family property and the sale by Deft 2 was for benefit of the family and therefore for legal necessity and dismissed the suit The appellate court confirmed the finding inter alia on the ground that the plaintiff was estopped from challenging the sale because of her consent However, the High Court accepted the appeal, cancelled the sale-deed and granted decree for possession of property The findings of High Court on the question of estoppel and sale for necessity were against deft 1, the vendee

Held that, the High Court was in error in cancelling the sale-deed and granting relief to plaintiffs S A. No 362 of 1966, D/- 19-2-1970 (All — Lucknow Bench) Reversed. (Para 8)

The finding given by the lower appellate court on the point of estoppel was eminently reasonable, That finding being a finding of fact and being based on good evidence, it was not open to the High Court to interfere with it in second appeal (Para 10)

It could not be contended that the plea of estoppel could not be allowed to be raised for the reason that no proper foundation was laid for it in the pleadings Undoubtedly the written statement is martistically drafted and leaves much to be desired, but then pleadings are not to be construed in such a hypertechnical manner and what is to be seen is whether the allegations gave sufficient notice to the plaintiffs of what case they had to meet It is a significant fact that no objection to the lack of particulars was taken at the stage when issues were framed or later when statements of parties' counsel were recorded on a subsequent occasion or during the course of arguments addressed to the trial court, the District Judge and the High Court, even though the issue of estoppel was hotly contested before all three of them All these circumstances unmistakably indicate that the case put forward by defendant No 1 was throughout understood by the plaintiffs to be that it was the belief induced in him by the representation of plaintiff No 1 which made him accept the title of defendant No 2 as being exclusive (Para 10)

In the instant case defendant No 1 was a total stranger to the family of the plaintiffs and in the very nature of things could not have had any personal knowledge referable to the actual manner in and the precise source from which either the Lucknow house or, for that matter, the Rae Bareli property was acquired, such manner and source being within the special knowledge of plaintiff No 1 and defendant No 2 only Therefore, it was on the plaintiff 1 to prove the same Since plaintiff 1 stayed away from the witness box the court has been deprived of the only real evidence which could throw light on the source of the consideration paid for the purchase of the Lucknow house (Para 12)

Further, the alienation was also for legal necessity The property sold was in a dilapidated condition and the sale proceeds were spent on constructing second storey on a joint family house in which deft 2 was staying (1856) 6 Moo Ind App 393 (P C.) and AIR 1922 Bom 122 Foll (Paras 14, 15)

Cases Referred: Chronological Paras

AIR 1922 Bom 122 ILR 46 Bom 312 14, 15
(1856) 6 Moo Ind App 393 (P C) 14

Mr G L Sanghi, Sr Advocate, Mr K P Gupta, Advocate with him, for Appellant, Mr G C Mathur, Sr Advocate, Mr. C P. Lal, Advocate with him, for Respondents Nos. 2 and 3

KOSHAL, J. :— This is an appeal by special leave against a judgment of a learned Single Judge of the High Court of Allahabad dated 19th February, 1970 reversing in a second appeal the first appellate decree passed on 1st June, 1966 by the District Judge, Rae Bareli in confirmation of the decree of the trial Court The prayer made by the plaintiffs in the suit, which was dismissed by the first two Courts, was to the effect that a sale-deed executed on 14th February, 1964 (Exhibit A-1) by defendant No 2 in favour of defendant No 1 in respect of a portion of a block of houses situated in Rae Bareli, be cancelled, and that possession of that portion be delivered to the plaintiffs who should also be awarded mesne profits While accepting the second appeal, the High Court decreed the suit except in regard to mesne profits

2. Most of the facts giving rise to this appeal are undisputed and may be briefly stated with reference to the following pedigree-table .

Sheo Dularey Misra = Radhika Devi
(Plaintiff No 1)

Parmeshwar Din Misra (Defendant No 2)

Gajendra Naram (Plaintiff No 2) — Sunil (Plaintiff No 3)

In the years 1916 and 1918 Sheo Dularey Misra (S D Misra for short), who was a leading lawyer at Rae Bareli, purchased a block of houses in that town by means of two sale-deeds (Exhibits 2 and 3), both executed by one Shambhu Dayal In the year 1931 S D Misra filed a suit against his father and brothers for a declaration that he was the absolute owner of the Rae Bareli houses above mentioned as also of a 4 annas and 9 pies share in proprietary Zamindari situated in Mohal Badri Prasad of Village Tera Baraula in Pargana and district Rae Bareli On the 29th August 1931 a decree based on a compromise (Exhibit 5) was passed in that suit to the effect that S D Misra was the exclusive owner of the Rae Bareli houses and also of a half of the said 4 annas and 9 pies share in the Zamindari

On the death of S D. Misra in 1951, his entire property was mutated in the name of defendant No. 2, both in the revenue records as well as in the registers maintained by the Rae Bareli Municipal Committee From then onwards till the date of the disputed sale-deed (Exhibit A-1) defendant No 2 was in possession of the entire property left by his father and also acted as its exclusive manager He received compensation for some of the Zamindari property, a part of which was also sold by him on the 12th Jan 1959 to one Imam Ali for a consideration of Rs 800/- (vide Exhibit A-19) In the years 1960 and 1961 defendant No. 2 constructed a one-storey building on a plot of land in Khurshid Bagh, Lucknow, where he was employed as a clerk in the Department of Health of the Government of Uttar Pradesh and where he was residing with his wife and children

The disputed sale-deed (Exhibit A-1) was executed by defendant No 2 on the 14th Feb 1964 in respect of the western portion of the said block of houses for Rs 6,500/- in favour of K C Kapoor, defendant No 1 who is the sole appellant before us In that sale-deed defendant No 2 described himself as "exclusive and complete owner" of the Rae Bareli property and claimed that he was "in possession and occupation thereof with powers of transfer of all kinds " The necessity for the sale was thus described by him

"I am constructing a house in Mohalla Khurshed Bagh, City Lucknow, the lower portion whereof has already been constructed and for the construction of the upper portion whereof funds are required "

3. This litigation started on the 17th September 1964 with the institution of a suit by the three plaintiffs It was claimed therein that on the death of S D Misra, plaintiff No 1 succeeded to a half share in his property, being his widow, while the other half was inherited by defendant No 2 so, however, that his sons (plaintiffs Nos 2 and 3) had an interest therein by birth In other words, while half of the property left by S D Misra was claimed to belong exclusively to Radhika Devi, Plaintiff No. 1, in respect of the other half the assertion was that it belonged to a coparcenary consisting of defendant No. 2 and his two sons The relief of possession of the property sold by virtue of sale-deed Exhibit A-1 was prayed for in consequence of the cancellation of that document which was sought to be set aside for the reason that the transaction covered by it was not for any necessity of the said family

4. In the written statement the stand taken by defendant No. 1 was that defendant No. 2 was the sole owner of the entire block of houses above mentioned and had full power to alienate the same, but that even if it

was proved to be coparcenary property as alleged, the sale would still be good as it was made for legal necessity In this connection the contents of paragraph 15 of the written statement may be quoted here with advantage —

"That defendant No. 2 sold the house in suit for the purpose of building a more profitable and advantageous house at Lucknow and with a view to dispose of a construction which was old and in perilous condition and which was of no present utility Even if the house in suit is proved to be joint family property the transfer is for legal necessity by the Karta and is binding on the joint family and the plaintiffs "

Two other material pleas were put forward in paragraphs 14 and 16 of the written statement and are extracted below

"14 That defendant No 2 represented to the answering defendant No 1 that defendant No 2 was the sole owner of the house, a portion of which is the subject-matter of dispute, and in fact he was all along been acting as sole owner of the properties left by his father The answering defendant No 1 also made diligent and reasonable enquiries about the right, title and interest of defendant No 2 and his sole power to transfer it, and as such the answering defendant is a transferee in good faith for consideration and without notice "

"16. That defendant No 2 executed the sale-deed in favour of the answering defendant with the active consent and approval of plaintiff No 1 and plaintiff No 1 is estopped from asserting her right against it "

Statements of counsel for parties were recorded by the trial court on the 27th of April, 1965 when it framed 8 issues, of which issues Nos 1 to 3, 5 and 7 were

"1 Whether plaintiffs and defendant No. 2 formed a joint family? If so, who was the Karta of the family?

"2 Whether plaintiffs Nos 2 and 3 have interest in the house in suit by birth?

"3 Whether defendant No 2 had a legal necessity to sell the house? If so, its effect?

"5. Whether defendant No. 1 is a transferee for value in good faith and is entitled to protection of Section 41 of the Transfer of Property Act?

"7. Whether the suit by plaintiff No 1 is barred by estoppel?"

Statements of learned counsel for the parties were again recorded on 28th May 1965 and 31st May, 1965 On behalf of defendant No 1 a part of his case was stated like this

"Defendant is a purchaser for value in good faith and without notice. In any view of the case the disputed portion is not more than the share of Parmeshwar Din and the alienation is valid and cannot be impeached by the plaintiffs Disputed portion was sold with the active consent and approval of plaintiff No 1 and she is estopped from challenging the transaction "

5. In its judgment the trial court held that all the three plaintiffs and defendant No 2 formed a joint Hindu family of which defendant No 2 was the Karta and that plaintiffs Nos 2 and 3 acquired an interest by birth in the property left by their grandfather

In deciding issue No 3 the trial court took note of the following facts

(a) The joint Hindu family consisting of the three plaintiffs and defendant No. 2 received compensation for the Zamindari

(b) The family had income from the Zamindari.

(c) The family derived rent from the said block of houses

(d) S D. Misra was a successful lawyer, which circumstance made it probable that he had left behind some cash in addition to other property

(e) On 12th January 1959 defendant No 2 received Rs. 800/- as consideration for the sale covered by Exhibit A-19

(f) Sanction for the plan of the building of the Lucknow house (Exhibit A-21) was accorded by the Lucknow Municipality on 28th June 1960 and the building was completed in 1961

(g) There is no evidence to show that defendant No. 2 had income of his own from which he could save enough money to be spent on the said building

(h) Plaintiff No 1, who was actively conducting the case on behalf of the plaintiffs, and defendant No 2, had both stayed away from the witness-box

Taking all these facts into consideration the trial court concluded that the Lucknow house was the property of the said joint Hindu family. It went on to point out that the disputed sale was an act of good management in view of the following circumstances :

(i) The portion of the block of houses sold through exhibit A-1 was in a dilapidated condition and on 14th July 1964, i e , less than 5 months after the sale, the municipal authorities issued a notice to defendant No 1 pointing out that the building purchased by him was in a dangerous condition and requiring him to demolish it within 3 days, so that defendant No 2 was under an obligation to pull down the building and either leave the site underneath un-built (which would have meant a loss of some income to the family) or to construct a new building thereon

(ii) Construction of a building in Lucknow would have been more rewarding income-wise than erecting one at Rae Bareli

(iii) Defendant No 2 was employed at Lucknow and it was in the interest of the family to put on a second storey in the house there

The trial court concluded that the sale was, in the circumstances above mentioned, for the benefit of the family and, therefore, for legal necessity

Issue No 5 was decided by the trial court against defendant No 1 for the following reasons

(a) Defendant No 1 knew that the property sold to him had descended from S D Misra who had left behind a widow and a son, so that defendant No 1 could not be regarded as a purchaser without notice of the fact that the plaintiffs had an interest in the house

(b) Defendant No 1 did not consult any lawyer to make sure that defendant No 2 was the sole owner of the property sold as asserted by the latter

The trial court, therefore, held that defendant No 1 was not entitled to any protection under section 41 of the Transfer of Property Act

In relation to issue No 7 the trial court remarked that it was the duty of defendant No. 1 to give the details of the mis-representation constituting estoppel in the written statement, which was not done, so that the evidence on the point could not be looked into. Issue No 7 was thus decided against defendant No. 1.

Legal necessity for the disputed sale having been found by the trial court to be established, it dismissed the suit with costs

6. It is also necessary to recount at some length the findings arrived at by the learned District Judge in appeal. The conclusions reached by the trial court that the plaintiffs and defendants No 2 formed a joint Hindu family and that the said block of houses belonged to that family were not challenged before him and the main contest in the course of the first appeal embraced points of legal necessity and estoppel as also the applicability of section 41 of the Transfer of Property Act to the facts of the case Taking up the last point first, the learned District Judge decided it against defendant No 1 for the following two reasons

(a) Defendant No 1 had had notice that the building in dispute originally belonged to S D Misra and that the latter died leaving behind a widow, a son and a grangson Thus defendant No 2 (No 1?) was posted with the knowledge that at the time of the sale in his favour persons other than defendant No 2 had interest in the property in dispute

(b) Plaintiffs Nos 2 and 3 were minors on the date of the sale and even at the time of the institution of the suit and could not, by reason of their minority, be deemed to have consented to the ostensible ownership of the property vesting in their father

On the question of estoppel, the learned District Judge discussed in detail the evidence produced before the trial court and concluded that on 22nd January, 1964, when a sum of Rs 1000/- was paid by defendant No. 1 to defendant No. 2 as earnest money through receipt Exhibit A-26, plaintiff No 1 gave her consent to the transaction of sale in the presence of defendant No 1 as well as that of Radha Krishan D W 5 and Gopal Nath Chopra, D W 6, both of whom were attesting witnesses to that receipt He went on to hold that the trial court was in error when it refused to look into the evidence on the point with the observation that the particulars of the consent of plaintiff No 1 were not given in the pleadings The learned District Judge was firmly of the opinion that the statement in para 16 of the written statement to the effect that the sale had taken place with the active consent and approval of plaintiff No 1 was enough to raise the question of estoppel and that it was not necessary for defendant No 1 to further mention in his pleadings the particulars of such consent or the details of the evidence by which the same was to be proved The learned District Judge concluded that by reason of the consent given by plaintiff No 1 to the sale, she was estopped from attacking disputed sale-deed

On the question of legal necessity, the District Judge took note of all those facts

which the trial court had taken into consideration as also of the following additional circumstances

(a) Defendant No 2 was the only adult male member of the family at the time of the sale He had throughout been managing the property of his father and was the Karta of the joint Hindu family aforesaid

(b) The sale had come about with the consent of plaintiff No 1 who was the only other adult member of the family

In the result, the learned District Judge upheld the finding of the trial court that the Lucknow house belonged to the joint Hindu family He further held, for more or less the same reasons as had weighed with the trial court in that behalf, that the sale was an act of prudence on the part of defendant No 2 who had wisely sold a dilapidated building, and instead of pulling it down and incurring expense over its re-construction, had raised money for the purpose of building the first floor of the new house at Lucknow which was a big city as compared to the "small and sleepy town" of Rae Bareli

On the above findings, the first appeal was dismissed with costs

7. Before the High Court it was conceded on behalf of defendant No 1 that the widow of S D Misra had inherited half of his property by reason of the provisions of section 3 of the Hindu Women's Right to Property Act, 1937 (for short the 1937 Act), that she had become the full owner of that half share on the commencement of the Hindu Succession Act in 1956 (hereinafter referred to as the 1956 Act) and that she was, therefore, not bound by any sale of her share effected by her son unless she was estopped from challenging it The learned Single Judge, therefore, at once took up the question of estoppel, reliance in support of which was placed on behalf of defendant No 1 on a portion of his own testimony as DW-3 which, when freely translated, would read thus

"Parmeshwar Din told his mother that a portion of the Rae Bareli house was in ruins and yielded low rent, that the family (ham log) were residing at Lucknow and that he wanted to sell a portion of the Rae Bareli house and make the Lucknow house two-storeyed which would result in a better rent yield and would also provide comfort for residence (of the family) Then Parmeshwar Din's mother said 'It is your thing, do as you wish' "

The learned Single Judge was of the opinion that this statement could not estop plaintiff No 1 from challenging the sale in so far as her share in the disputed house was concerned His reasons were

The above-cited statement of respondent No 1 (defendant No 1) does not indicate if the portion which was being actually sold was then specified to appellant No 1 (plaintiff No 1) by respondent No 2 (defendant No 2) So if in these circumstances she did not resist the proposal saying that Parmeshwar Din was at liberty to do as he chose since it was his property, it can by no means be construed to mean that she thereby readily agreed even for the sale of her share by her son

The question of legal necessity was also determined by the learned Single Judge against defendant No 1 with the following findings

(a) There was no pleading by defendant No 1 in his written statement to the effect that the house at Lucknow was the property of the said joint Hindu family Besides, in his deposition as DW-3, defendant No 1 had himself stated that to his knowledge Parmeshwar Din was the sole owner of that house

(b) Merely because S D Misra possessed property and cash at the time of his death and that property continued to yield some income thereafter did not furnish reasons enough for the Court to presume that the Lucknow house belonged to the joint Hindu family A presumption to that effect could only be raised if it was shown that there was sufficient nucleus for the acquisition of that house

In view of the above findings the learned Single Judge cancelled sale deed Exhibit A-1 and, accepting the appeal, passed a decree for possession of the disputed property in favour of the plaintiffs

8. After hearing learned counsel for the parties at great length we have no hesitation in recording our disagreement with the High Court on the findings reached by it in relation to both the points canvassed before it, namely, those of estoppel and legal necessity, and are fully satisfied that it stepped outside the limits of its jurisdiction when it interfered with the conclusions of fact arrived at by the learned District Judge on the basis of fully acceptable evidence and a correct appreciation thereof

9. Before we proceed to detail our reasons for differing with the view expressed by the High Court we would like to advert to that aspect of the case which concerns the

rights of plaintiff No 1 in the property inherited by her husband The trial court acted on the assumption that the entire property left by S D Misra on his death vested in the joint Hindu family consisting of his widow, son and grand-sons No challenge to this assumption was made before the learned District Judge and the case proceeded on the basis that it was correct Before the High Court, however, the assumption was assailed and, as already stated, it was conceded on behalf of defendant No 1 that plaintiff No 1 succeeded to life estate in a half share in the property of her husband in pursuance of the provisions of section 3 of the 1937 Act and that such an estate ripened into absolute ownership on the enforcement of the 1956 Act. This concession, in our opinion, could be said to have been correctly made only on the assumptions (1) that S D Misra died intestate or that if he left a will, he devised a half share in the disputed house to plaintiff No 1 and (2) that the share to which plaintiff No. 1 succeeded was not relinquished in favour of defendant No 2 or otherwise transferred to him by her right up to the time when the disputed sale took place

10. We shall now take up the question of estoppel. Plaintiffs Nos 2 and 3 being minors that question does not arise in their case and it is only in relation to the half share of plaintiff No 1 in the disputed property that it calls for a decision In this connection the following facts which are undisputed may be taken note of

(a) On S D Misra's death his entire property was mutated in the name of his son (defendant No 2) to the exclusion of the former's widow (Plaintiff No 1)

(b) Right up to the date of the disputed sale that property was managed exclusively by defendant No 2

(c) No objection to the exclusion of her name from the records of the revenue department or of the municipal committee or from the management was ever preferred by plaintiff No 1 who fully acquiesced in such exclusion all through

(d) Defendant No. 2 alone received compensation for the Zamindari and sold a portion thereof as sole owner (vide exhibit A-19) again without any objection on the part of plaintiff No. 1.

(e) When negotiations for the disputed sale were initiated defendant No 1 enquired from defendant No 2 as to how the latter had acquired full ownership of the property in dispute The reply of defendant No 2 as contained in his letter from Lucknow dated 14th January 1964 (exhibit A-25) was

"Regarding our talks about the sale of my house at Station Road, Rae Bareli and regarding your enquiry about the title to the said house, I have to inform you that I am the absolute owner of the portion of house proposed to be sold

"I own all responsibility and give you word of honour that there is absolutely no dispute about my title to the portion proposed to be sold and you should have no hesitation on that score

"Further I may add that I realize the rent of the shops which you can enquire from the tenants "

Presumably defendant No 1 was not quite satisfied with this reply and asked defendant No 2 to furnish copies of the municipal records which were shown to defendant No 1 on the 22nd January 1964 at the Lucknow residence of defendant No 2

(f) According to the testimony of defendant No 1 as DW-3 and of the two witnesses (Radha Krishan-DW-5 and Gopal Nath Chopra-DW-6) who attested receipt exhibit A-26, it was at that stage that defendant No 1 told his mother about the proposed sale and she consented thereto In the words of defendant No 2 she declared "It is your thing, do as you wish " The evidence of these three witnesses was not challenged during the course of their cross-examination

These facts would conclusively show that by declaring in the presence of defendant No 1 that the property belonged to the defendant No 2 and that he was at liberty to deal with it as he wished, plaintiff No 1 represented to defendant No 1 that her son was the sole owner of the property and that she had nothing to do with it. Her declaration is, therefore, a clincher on the point of estoppel and we find it impossible to agree with the learned Single Judge when he says that the declaration did not mean that defendant No 2 had the permission of plaintiff No. 1 to deal with the latter's share of the property In our opinion the declaration does not suffer from any such ambiguity as the learned Single Judge has read into. In giving the details of the proposed sale the son had not told the mother that he was selling only his own half share in that part of the block of houses situated in Rae Bareli which was proposed to be sold He said in clear terms

that a portion of the Rae Bareli house was to be sold and his mother declared that he was the sole arbiter in the matter of the disposal of the property There was no proposal to sell only defendant No 2's undivided half share nor did any question arise of either defendant No 1 purchasing it or plaintiff No. 1 being consulted about it. In the absence of any qualifying words limiting the proposed sale to such a share, the lady must be taken to have understood the statement made to her by her son as carrying its plain meaning, i e , that the sale was to be of the entire portion chosen for the purpose and her consent must be construed accordingly

Learned counsel for the plaintiff vehemently argued that even if the declaration made by plaintiff No 1 be interpreted as we have done, it would create no estoppel against her inasmuch as defendant No 1 had not acted on it but had purchased the property on the strength of the representations made to him by defendant No 1 Now it is true that defendant No 1 had made enquiries regarding the title of defendant No 2 to the property in dispute and the latter had made an unequivocal representation that he alone was the owner thereof, but then it was only after the lady had been consulted and had told her son to go ahead with what he thought proper as he was the owner of the property that receipt exhibit A-26 was executed Till then defendant No. 1 was not fully satisfied about the title of defendant No 2 and had not only raised the question with defendant No. 1 at Lucknow but even after the assurance given by the latter in communication exhibit A-25 insisted on the municipal records being produced for his inspection The inquiry into the title was, therefore, very much in progress when defendant No 2 consulted his mother in the presence of defendant No 1. This was presumably done to allay the lurking suspicion in the mind of defendant No. 2 as to the title to the entire property vesting in defendant No 2

It was contended on behalf of the plaintiffs that the representation made by the lady could not have been taken at its face value by any prudent purchaser in view of the fact that one-half of the property left by S. D Misra had admittedly devolved on plaintiff No 1. This contention suffers from two important infirmities. Under section 3 of the 1937 Act, plaintiff No. 1 would have succeeded to a half share only if S. D. Misra had died intestate. So the question would be whether or not S. D Misra left a will The concession made before the High Court on the point of inheritance of a half share by plaintiff No 1 was obviously based not on any facts within the knowledge of defendant No 1 but on the circumstance that nobody had talked of any will by S D Misra Whether or not such a will was made was a fact specially within the knowledge of plaintiff No 1 and, as stated earlier, she remained absent from the witness box so that the Court is left in the dark as to what was the actual state of affairs The onus of proof of the allegation that she was the owner of a half share in the property at the time of the sale was on her and she was duty bound to depose to facts which would make section 3 aforesaid applicable to her case Her failure to depose to the existence thereof must result in a finding that she has failed to prove the issue

Again, even if it be assumed that plaintiff No 1 succeeded to a half share in the property of S D Misra, there was no impediment in the way of her relinquishing that share in favour of her son either immediately after her husband's death or at any other point of time prior to the disputed sale This aspect of the matter cannot be lost sight of in view of the fact that on S D Misra's death all his property was mutated in favour of his son to the exclusion of plaintiff No 1 and was all along being dealt with by him as its sole and absolute owner without any objection whatsoever having been raised by her at any point of time to such exclusion or dealing

In the above situation defendant No 1 was fully justified in accepting her word on the point of ownership, the said section 3 notwithstanding

The above discussion of the evidence has been entered into by us merely to show that the finding given by the learned District Judge on the point of estoppel was eminently reasonable and that the short ground on which the High Court turned the tables on defendant No 1 was untenable That finding of the District Judge being a finding of fact and being based on good evidence, it was not open to the High Court to interfere with it in a second appeal

Before parting with the question of estoppel, we may briefly notice another contention put forward on behalf of the plaintiffs whose learned counsel urged that no plea of estoppel could be countenanced for the reason that no proper foundation was laid for it in the pleadings. A combined reading of paragraphs 14 and 16 of the written statement, however, furnishes a complete

answer to the contention The representation said to have been made by plaintiff No 1 is set out in paragraph 14 while the plea that she was estopped from contesting the sale is taken in paragraph 16 It is true that the plea last mentioned is linked with "the active consent and approval of plaintiff No 1" and not in so many words with the said representation It can also not be disputed that defendant No 1 did not specifically state that he purchased the disputed property in the belief that the representation was true and that he would not have entered into the transaction but for that belief Thus undoubtedly the written statement is inartistically drafted and leaves much to be desired, but then pleadings are not to be construed in such a hypertechnical manner and what is to be seen is whether the allegations made in paragraphs 14 and 16 gave sufficient notice to the plaintiffs of what case they had to meet In this connection we may refer to the significant fact that no objection to the lack of particulars was taken at the stage when issues were framed or later when statements of parties' counsel were recorded on a subsequent occasion or during the course of arguments addressed to the trial Court, the District Judge and the High Court, even though the issue of estoppel was hotly contested before all three of them All these circumstances unmistakably indicate that the case put forward by defendant No 1 was throughout understood by the plaintiffs to be that it was the belief induced in him by the representation of plaintiff No 3 (No 1") which made him accept the title of defendant No 1 (No 2") as being exclusive In this view of the matter it is too late in the day for the plaintiffs to raise the contention under consideration and we have no hesitation in rejecting it as untenable

11. We may now attend to the controversy about the legal necessity for the disputed sale The contest on the point is restricted to that half share of the property sold which belonged to the coparcenary consisting of the son and grand-sons of S D Misra In this connection the High Court observed that not only defendant No 1 did not plead in his written statement that the Lucknow house was the property of the coparcenary but that he also stated in the witness-box as DW-3 that to his knowledge defendant No 1 was the sole owner of that house. We are clearly of the opinion that the High Court erred in taking either of these circumstances as a minus point for defendant No 1 In so far as the written statement is concerned, it contains a definite plea in para 15 to the effect that if the disputed property is proved to be joint Hindu family property its transfer was made by the Karta for legal necessity so that it was binding on the family Was it then incumbent on defendant No 1 to further plead how he proposed to prove the legal necessity? This question was pointedly posed to learned counsel for the plaintiffs during the course of arguments and although his answer was in the affirmative, he could quote neither law nor precedent in support of the same

It may also be pointed out that no objection by the plaintiffs was ever taken at any stage of the trial to any lack of particulars of the legal necessity set up by defendant No 1 in paragraph 15 of the written statement On the other hand they were fully posted about what case they have to meet on the point by reason of the contents of that paragraph itself in which it was specifically asserted that the disputed house was sold by defendant No 2 " for the purpose of building a more profitable and advantageous house at Lucknow and with a view to dispose of a construction which was old and in perilous condition and which was of no present utility " In view of this averment it was fully open to defendant No 1 to prove by evidence that putting up a second storey in the Lucknow house constituted legal necessity and, in the process, to establish that the Lucknow house was owned by the said coparcenary Again, no objection was taken at the evidence stage to the right of defendant No 1 to show that the Lucknow house was so owned and thereby to prove the existence of legal necessity for the sale No fault can thus be found with the case of defendant No 1 on the ground of his failure to take a specific plea in the written statement about the ownership of that house vesting in the coparcenary

Nor was the High Court right in putting the construction that it did on the testimony of defendant No 1 as DW-3 to the effect that to his knowledge defendant No 2 was the sole owner of the Lucknow house Obviously all that he meant was that according to such knowledge as he had, the Lucknow house vested in the exclusive ownership of defendant No 2; and that knowledge, in the circumstances of the case, could be no more than a belief arising from what he was told by defendant No 2 who had been at pains to stake his claim to the exclusive ownership of all the property under his control, including the property left by his father In this connection we cannot lose sight of the fact

that defendant No 1 was a total stranger to the family of the plaintiffs and in the very nature of things could not have had any personal knowledge referable to the actual manner in and the precise source from which either the Lucknow house or, for that matter, the Rae Bareli property was acquired, such manner and source being within the special knowledge of plaintiff No 1 and defendant No 2 only That part of the deposition of defendant No 1 which the High Court has pressed into service against him cannot, therefore, form the basis of a solution to the question of the ownership of the property

12. In the present case both plaintiff No 1 and defendant No 2 have stayed away from the witness-box and have thus deprived the Court of the only real evidence which could throw light on the source of the consideration paid for the purchase of the Lucknow house There may be some force in the argument that no duty was cast upon defendant No 2 to appear as a witness in as much as he was not a contesting party, but then such an excuse is not open to plaintiff No. 1 who was actively contesting the case in the trial court on behalf of herself and her two grandchildren It is in the light of this significant circumstance that the Court must decide whether or not defendant No 1 has been able to discharge the burden of proving that the Lucknow house was purchased with joint Hindu family funds This important aspect of the matter was completely lost on the High Court although it was an unassailable ground when it formulated the proposition that before a presumption could be raised that a property acquired by a member of a joint Hindu Family could be regarded as the property of the family, it must be shown that the family owned other property which could be regarded as a nucleus providing a sufficient source for the later acquisition Furthermore, in assessing the evidence on the point, the High Court referred only to two facts, namely, that S D Mistra left immovable property and cash at the time of his death and that that property continued to yield some income thereafter, but paid no heed to at least three other important circumstances which had been listed by the trial court in support of the finding that a sufficient nucleus for the purchase had been proved Those circumstances are :

(a) The family received compensation for the Zamindari

(b) On 12th January 1959, defendant No. 2 received Rs. 800/- as consideration for the sale covered by exhibit A-19

(c) No evidence had been produced to show that defendant No 2 had income of his own from which he could have saved enough money to be spent on the Lucknow building

We may add that there is definite evidence in the form of exhibit A-99 to the effect that in 1965 the family of defendant No 2 consisted of nine sons and that he was then holding a subordinate position in the office of the Director of Health Services, U P, at Lucknow with a salary of no more than Rs 240/- per mensem It goes without saying that his salary was too meagre to have sufficed for the maintenance of the family and that any savings therefrom were out of question

Although each of the facts just above taken note of, when considered in isolation, may not enable the Court to raise a presumption of the sufficiency of the requisite nucleus, collectively that constitute a formidable array and practically a clincher in favour of such a presumption, especially in the absence of any attempt on the part of the plaintiffs to produce evidence showing that defendant No 2 had any source of i[illegible] of his own other than his salary And then the failure (referred to above) of plaintiff No 1 to step into the witness-box is enough for the Court to raise another presumption namely, that her deposition would not have supported the plaintiffs' case The onus of proof of the issue on the defendant was therefore, very light and stood amply discharged by the facts noted in that behalf by the trial court, with whose finding on the point first appellate court concurred No case at all was thus made out for interference by the High Court with that finding

13. The High Court did not express any dissent from the conclusion concurrently reached by the trial court and the learned District Judge that the disputed sale constituted an act of prudence on the part of defendant No 2 and was on that account for the benefit of the family We find ourselves in full agreement with that conclusion which too is based on fully reliable evidence and follows logically therefrom, as also with the reasons given by the two courts in support thereof However, we may point to another significant factor which lends strength to that conclusion, the same being that defendant No 2 was not only the Karta of the family and its sole adult male member at the time of the sale but was also the father of the only other two coparceners for whom he must naturally be having great affection and whose interests he would surely protect and promote, rather than jeopardise, there being

no allegation by the plaintiffs that he was a profligate or had other reason to act to their detriment

14. The Lucknow house being the property of the joint Hindu family consisting of defendant No 2 and his sons and the disputed sale being an act of good management, the latter must be held to be justified by legal necessity, which expression, as pointed out in Nagindas Manekial v Mahomed Yusuf Mitchella, I L R 46 Bom 312 (AIR 1922 Bom 122), is not to be strictly construed In that case the facts were very similar to those obtaining here and may be briefly recapitulated A joint Hindu family had several houses, one of which was in such a dilapidated condition that the Municipality required it to be pulled down The adult coparceners contracted to sell it to a third person The joint family was in fairly good circumstances and it was not necessary to sell the house which, however, could not be used by the family for residence and would not have fetched any rent. In a suit for specific performance of the contract to sell instituted by the purchaser, the minor coparceners contended that the contract did not affect their interest in the absence of "necessity" for the sale In repelling the contention, Shah, J, who delivered the leading judgment of the Division Bench, referred to the manner in which the expression kutumbarthe had been construed by Vijnanesvara in the Mitakshara and observed

"The expression used must be interpreted with due regard to the conditions of modern life I am not at all sure that Vijnanesvara intended to curtail the scope of the word kutumbarthe while explaining it I do not see any reason why a restricted interpretation should be placed upon the word 'necessity' so as to exclude a case like the present in which defendants Nos. 1 and 2, on all the facts proved, properly and wisely decided to get rid of the property which was in such a state as to be a burden to the family I think that the facts of the case fairly satisfy the test."

Fawcett, J, who agreed with these observations added a separate short note of his own and relied upon the following passage in Hunoomanpersaud Panday v. Mt. Babooee Munraj Koonweree (1856) 6 Moo Ind App 393, P C)

"But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded" (Emphasis supplied)

Although these remarks were made in relation to a charge created on the estate of an infant heir by its manager under the Hindu law, it is well settled that the principles governing an alienation of property of a joint Hindu family by its Karta are identical

15. The perimeters of the expression kutumbarthe, as interpreted in Nagindas's case (AIR 1922 Bom 122) (supra) which meets with our unqualified approval, fully embrace the facts of the present case in so far as legal necessity for the disputed sale is concerned

16. In the result the appeal succeeds and is accepted The judgment impugned before us is set aside and that of the District Judge restored There will be no order as to costs of the proceedings in this Court

Appeal allowed

1981 ALL. L. J. 1182

K N MISRA, J

Anirudh Rai and another, Petitioners v Board of Revenue, U P, Allahabad and others, Respondents

Civil Misc Writ Petn No 6676 of 1980, D/- 24-8-1981

(A) Constitution of India, Art. 226 — Concurrent finding of fact — Trial court's finding that particular order of consolidation authority was fraudulent — Finding based on oral and documentary evidence — Order not shown to be perverse or wrong in any manner — No infirmity in concurrent finding — High Court cannot interfere. (Para 7)

(B) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 209 — U. P. Consolidation of Holdings Act (5 of 1954), Ss. 12 and 49 — Order under S. 209 obtained by fraud — Suit under S. 49 is not barred.

When a false report of service is obtained by the plaintiff and thereby he obtains an ex parte decree it would amount to playing fraud on court Where an ex parte decree has been obtained by fraud by forging signatures of a party summoned, the decree is a nullity and cannot be allowed to stand It is a 'well-

established proposition that fraud vitiates the most solemn proceedings of courts of law and if the court passing a decree had been deceived into accepting a compromise, the decree would not be said to exist in the eyes of law. There is no bar imposed by any of the provisions of the U P Consolidation of Holdings Act against proof of fraud which may invalidate any action taken by a court in a suit under section 209 U P Z A & L R. Act in which rights in land are claimed. 1969 Rev Dec 61 (All) Foll (Para 8)

Therefore in the instant case where the plaintiff claims to be co-bhumidhar along with the defendant in the land in suit he can show that the order passed by the consolidation authorities in the aforesaid proceedings under S 12 of the Unamended Act was no order in the eye of law as it stood vitiated by fraud and the court was competent to consider that question and record a finding on it on merits. No separate suit was, therefore, required to be filed for seeking cancellation of the Order passed by the Consolidation Officer (Paras 8, 12)

(C) U. P. Consolidation of Holdings Act (5 of 1954), Ss. 49 and 52 — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 229B, 176 and 331 — Consolidation Scheme — Denotification of village — Subsequent suit for declaration and partition — Jurisdiction vests in authority under S. 229B/176.

After denotification of the village the jurisdiction to entertain and decide the suit for declaration and partition vests in the Assistant Collector under section 229-B/176 of the U P Zamindari Abolition and Land Reforms Act. The jurisdiction of the consolidation courts cease from the date of denotification and they could not entertain any suit or application in respect of the proceedings done during consolidation operation. The orders passed during consolidation operations, if they are valid and not without jurisdiction, would be binding between the parties and no suit will be entertainable by the revenue or civil court challenging those orders. Such suits shall be barred under the provisions of section 49 of the Act and would also be barred by the principle of res judicata but if any order has been passed during consolidation operations by the consolidation authorities which is per se without jurisdiction and had been obtained fraudulently the same would be a nullity and void and would not be binding on the parties and the jurisdiction of the revenue court would not be excluded under the provisions of section 49 of the Act and the entries made during consolidation operations based on such fraudulent and without jurisdiction orders would be open to challenge in regular title suits and could be shown to be wrong on merits (Para 13)

Further, it is well settled that a decree or order which is void and a nullity is not binding on parties and is liable to be ignored and the same need not be set aside by the court passing it or through a separate suit in civil court seeking its cancellation (Para 17)

(D) Transfer of Property Act (4 of 1882), S. 122 — Evidence Act (1 of 1872), Ss. 91, 92 — Gift — Oral evidence — Admissibility — Gift in favour of member of H. U. F. — Effect. (Hindu Law — Gift.)

A gift is a transfer without consideration. The gift must be accepted by the donee or by some one on his behalf. The donee must be an ascertained person. Gift to unascertained persons would be invalid. After making gift the donor is divested with all his interest in the property and a condition cannot afterwards be attached nor he can later on indicate that by making gift of the property to a specified person he had meant to gift it to others as well, and such evidence would be inadmissible under sections 91 and 92 of the Evidence Act. An unqualified gift will not be cut down by subsequent words nor it would operate to create title in favour of others, who were not donees. The donee gets absolute ownership in the property. A gift cannot be benami and donee, who accepts the gift for and on his own behalf, acquires absolute ownership in the property and he cannot be said to be holding it as benamidar for others. The donee cannot be said to be holding the property in the representative capacity for and on behalf of other members of the joint family. It is well settled that even in joint family a member of the joint family and even a karta can acquire and hold separate property in his name. An ancestral property or a property acquired with the aid or assistance of joint family funds will alone be treated as a joint family property and not those other properties which a member of joint family acquires for himself from his own separate funds and the joint family funds are not utilised in acquiring it (Para 20)

(E) Constitution of India, Art. 226 — Order of remand — Court should avoid in case of protracted litigation.

To remand the suit to the trial court would necessarily have the effect of keeping alive

the strife between the parties and prolonging this long drawn litigation by another round of legal battle in the trial court and thereafter in appeal and it is time that final curtain is drawn and this long meandering course of litigation between the parties is put to an end and the court should be loath to entertain a plea which would have the effect of condemning succeeding generation of families to spend major part of their lives in protracted litigation AIR 1974 S C 2241 and AIR 1976 S C 866 Foll (Para 24)

Cases Referred: Chronological	Paras
1979 All L J 645	17
AIR 1976 S C 866	24
1976 All L R 627	8
AIR 1974 S C 2241	24
AIR 1973 S C 2451	16
1970 All L J 505	17
1969 Rev Dec 61 (All)	8
1964 All L J 722 1964 Rev. Dec 237	21
AIR 1961 Ker 293	22
AIR 1959 S C 1362	22
AIR 1954 S C 340 1954 All L J 551	11
AIR 1936 All 671 1936 All L J 993	22
(1921) 64 Ind Cas 583 (Cal)	22
(1912) ILR 36 Bom 387 (P C)	22
(1906) ILR 30 Bom 119	22
(1901) ILR 25 Mad 7	22
(1900) ILR 22 All 149 (P C)	22

R K Singh, for Petitioners, Pradeep Chand and R C Srivastava, for Respondents

ORDER :— This writ petition under Article 226 of the Constitution of India is directed against the judgment and order dated 28-7-1980 passed by the Board of Revenue U P at Allahabad in second appeals Nos 23 and 24 of 1978-79, Anirudh Rai and another v Pitambar Rai and others, dismissing the appeals and confirming the judgment and decree dated 10th November 1978 passed by the Additional Commissioner Gorakhpur Division, in first appeals Nos 515/1056/A and 516/1057/A of 1973 filed by the petitioners Anirudh Rai and others by which the Additional Commissioner had dismissed the aforesaid appeals and had confirmed the judgment and decree dated 31st October, 1973 passed by the Assistant Collector, Ist Class, Azamgarh, in two suits Nos. 423 and 424 filed by Pitamber Rai opposite party No 4 under section 229B/176 of the U. P. Zamindari Abolition and Land Reforms Act. The trial court declared opposite party No. 4, Pitamber Rai to be co-bhumidhar to the extent of 1/6th and ¼th share respectively in the suit lands involved in suits Nos 424 and 423 The petitioners have challenged in this writ petition the aforesaid judgments and decree passed by opposite parties Nos 1 to 3

2. Briefly stated the facts giving rise to this writ petition are that Pitamber Rai, opposite party No 4 filed two suits under section 229-B/176 of the U P Zamindari Abolition and Land Reforms Act Suit No 423 of 1972 was in respect of land of Khata No. 77 of village Madhasiya Tappa Kota, Pargana Nizamabad, district Azamgarh, whereas suit No 424 of 1972 was in respect of land of Khata No 78 of the said village Plaintiff opposite party No 4 Pitamber Rai claimed that the land of Khata No 77 was Sir of one Jaddu Rai who had gifted it in the year 1924 to Bajrangi Rai opposite party No 6 and Kalap Nath Singh, the father of opposite parties Nos 4 and 5 The plaintiff Pitamber Rai claimed that after the death of his father Kalap Nath Rai, his half share devolved upon him and his brother Madan Rai and thus he claimed one-fourth share in the Khata in dispute He further asserted that the defendant Anirudh Rai and Yadu Nath Rai hold no right, title or interest in the land in dispute and they had fraudulently and fictitiously got their names recorded as co-bhumidhars during consolidation operations of which he had no notice or knowledge The plaintiff further asserted that the defendants Anirudh Rai and Yadu Nath Rai held no share in the land in question and the order passed by the Consolidation Officer in their favour was null and void being vitiated by fraud Anirudh Rai is petitioner No 1 in the present writ petition and Yadu Nath Rai is now dead and his son Sheo Kant Rai is petitioner No 2 in the writ petition In the other suit No 424 of 1972 which was in respect of Khata No 78 the plaintiff Pitamber Rai claimed 1/6th share with the allegations that the land of the said holding was sir land of Maya Rai who had gifted it to Kalap Nath Rai, Bajrangi Rai and Smt Surti, wife of the donor Maya Rai, who is arrayed as opposite party No 7 in the writ petition The plaintiff further pleaded that upon the death of the father, Kalap Nath Rai, his one-third share had devolved upon him and his brother Madan Rai and that he has got 1/6th share in the holding in dispute He also contended that the names of Anirudh Rai and Yadu Nath Rai were fictitiously and fraudulently got recorded as co-bhumidhar during consolidation operations as aforesaid The orders passed by the Consolidation Officer recording their names as co-bhumidhars was illegal, void and without

jurisdiction and the defendant Anirudh Rai and Yadu Nath Rai hold no right, title or interest in the land in suit The aforesaid suits were contested by the petitioners with the allegations that Kulap Nath Rai had received the property through the aforesaid gift deeds of the years 1922 and 1924 in a representative capacity and they being brothers of Kulap Nath Rai and members of joint family have got one-third each in the share of Kulap Nath Rai which he had received in a representative capacity They further pleaded that their names were rightly recorded during consolidation operations by the Consolidation Officer vide Order dated 23-6-1960 passed under S 12 of the unamended U P Consolidation of Holdings Act, hereinafter referred to as the unamended Act, and that the present suit is barred under Sec 49 of the U P Consolidation of Holdings Act hereinafter referred to as the Act They further pleaded that the allegations with regard to obtaining the aforesaid order fraudulently and fictitiously is altogether baseless and wrong They further pleaded that since the plaintiff had accepted them as co-bhumidhars in the land in suit and had also filed a compromise in the aforesaid case, although the same was not got verified, he is estopped by the principle of acquiescence and estoppel from challenging the right, title and share of the answering defendants It will be relevant to mention here that no plea regarding non-maintainability of the suits in the Revenue Court was specifically pleaded nor it was raised even at the time of the framing of the issues

3. The trial Court framed the following issues

1 Whether the plaintiff was the co-bhumidhar of the suit land along with defendants 2nd set ?

2 Was the order dated 23-6-60 under Section 12 of the U P C H Act farzi and a result of fraud ? Is it binding on the plaintiff ?

3 What is the share of the parties in the suit land ?

4 Whether the defendants 1st and 2nd set are co-bhumidhars along with the plaintiffs of the land in suit ? If so, what is their share ?

5 Whether the suit is barred by Sec 49 of the U P C H Act ?

6 Whether the suit is barred by principles of estoppel ?

7 To what relief, if any, is the plaintiff entitled ?

4. Opposite party No 3 after taking into consideration the entire oral and documentary evidence on record, decreed the suit holding the plaintiff to be co-bhumidhar along with defendants 2nd set and that his share in the land involved in Suits Nos 423 and 424 is 1/4th and 1/6th respectively He also recorded a finding that the order dated 23-6-1960 passed under Section 12 of the unamended Act was fraudulently and fictitiously obtained by the defendants Anirudh Rai and Yadu Nath Rai and that the order was also without jurisdiction inasmuch as the Consolidation Officer could not himself decide the question of title regarding co-bhumidhari rights in the land in suit in proceedings under S 12 of the unamended Act He thus found that the aforesaid order dated 23-6-1960 was fraudulent, void and without jurisdiction and not binding on the plaintiff and the contesting defendants cannot get any right, title or share in the land in suit on its basis It was further held that the suit is not barred under Sec 49 of the Act nor it is barred by the principle of estoppel as no compromise was filed by the plaintiff in the aforesaid case before the Consolidation Officer and some one impersonated for him in signing the alleged compromise which was also not got verified The trial Court, after considering the entire oral and documentary evidence on record, held that it is clear beyond doubt that the plaintiff, who was opposite party in the case under Sec 12 of the unamended Act, was clearly and designedly kept away from the knowledge of the proceedings. It was further held that the alleged compromise did not bear the signatures of Pitamber Rai and no consent decree could be obtained as attestation was lacking It further held that the defendants succeeded in securing an ex parte decree on a farzi service report of the summons issued to Pitamber Rai After considering the entire facts and circumstances of the case, it found that the order of 23-6-1960 was obtained by fraud and is consequently an absolute nullity It also held that since the proceedings under S 12 of the unamended Act were initiated by an application dated 30th July, 1958, i e prior to enforcement of Amendment Act No XXXVIII of 1958, the provisions of S 12 of the unamended Act, applied and the Consolidation Officer had no jurisdiction to decide the case and pass orders holding the defendants Nos 1 and 2 to be co-bhumidhars in the land in dispute

5. Aggrieved by the said order the petitioners filed appeals which were dismissed by opposite party No 2 vide judgment and

decree dated 10th Nov, 1978 A perusal of the order passed by opposite party No 2 would indicate that the learned counsel for the appellants (petitioners) had stated during the course of arguments that he had nothing to say against the finding of the trial Court to the effect that the order of the Consolidation Officer was fraudulently obtained Apparently, therefore, the petitioners had not challenged the said finding of the trial Court and the only point which was canvassed before the first appellate Court was that the suit of the plaintiff was barred under S 49 of the Act and the aforesaid order passed by the Consolidation Officer could not be ignored unless it was got set aside Both these arguments were repelled by the first appellate Court and the appeals were dismissed The petitioners thereupon filed second appeals before the Board of Revenue which were also dismissed vide Order dated 28th July, 1980 and the findings, recorded by the Courts below were upheld The aforesaid orders passed by opposite parties Nos 1 to 3 have been challenged in this writ petition

6 I have heard learned counsel for the petitioners and opposite party No 4 and have perused the impugned orders as well as the averments contained in the writ petition and the counter-affidavit and the rejoinder affidavit

7 Learned counsel for the petitioners argued that the finding recorded by opposite parties Nos 1 to 3 holding the aforesaid order dated 23-6-1960 to have been fraudulently obtained by the petitioners is not sustainable as the same has been based on mere conjectures and surmises This argument is untenable A concurrent finding of fact has been recorded by opposite parties Nos 1 to 3 holding that the order dated 23-6-1960 was fraudulently obtained by the petitioners The finding recorded by the trial Court, already referred to above, is based on appraisal of both oral and documentary evidence on record and nothing could be pointed out on behalf of the petitioners to indicate that it is wrong or perverse in any manner whatsoever I have perused very carefully the orders passed by opposite parties Nos 1 to 3 and I do not find any infirmity in the concurrent finding recorded by opposite parties Nos 1 to 3 on the aforesaid question

8. Learned counsel for the petitioners next argued that the suit of the plaintiff was barred under Sec 49 of the Act He further argued that so long as the aforesaid order dated 23-6-1960 stands and is not set aside by competent Civil Court the plaintiff's suit for declaration would not be maintainable Placing reliance upon a decision of this Court in State of U P v Madho Kumar Swarup, 1976 All LR 627, wherein it was held that a collusive decree even for defeating the provisions of law would not be a nullity, it would at best be a voidable decree and so long as it is not avoided by due process of law, it will remain binding on the parties to the suit, the learned counsel argued that the order dated 23-6-1960 cannot be said to be a nullity and it will be binding between the parties unless avoided by due process of law Learned counsel for the petitioners, however, conceded that in the aforesaid case the decree was branded to be a collusive decree and not a fraudulent decree The aforesaid case, therefore, is not applicable to the facts of the present case Fraud vitiates the most solemn transaction and if a plaintiff suppresses a vital fact and manipulates false service report on the basis of which the Court is induced to pass ex parte decree, it would amount to fraud in relation to the proceedings of the Court The fraud must also be intrinsic to the proceedings of the Court, that is, it must be in the conduct of the suit by keeping the defendant out of Court by a deliberate employment of the machinery of the Court in such a way that the defendant is prevented from placing his case before the Court When a false report of service is obtained by the plaintiff and thereby he obtains an ex parte decree it would amount to playing fraud on Court Where an ex parte decree has been obtained by fraud by forging signatures of a party summoned, the decree is a nullity and cannot be allowed to stand It has been held by this Court in Sri Jasi Ram v Dy Director of Consolidation, 1969 Rev Dec 61, that it is a well-established proposition that fraud vitiates the most solemn proceedings of Courts of law and if the Court passing a decree had been deceived into accepting a compromise, the decree would not be said to exist in the eyes of law It was further held that there is no bar imposed by any of the provisions of the U P Consolidation of Holdings Act against proof of fraud which may invalidate any action taken by a Court in a suit under Sec 209, U P Z A and L R Act in which rights in land are claimed In this view of the matter in the present suit where the plaintiff claims to be co-bhumidhar along with the second set of defendant in the land in suit he can show that the order passed by the consolidation authorities in the aforesaid proceedings under Sec 12 of the

unamended Act was no order in the eye of law as it stood vitiated by fraud and opposite party No 3 was competent to consider that question and record a finding on it on merits No separate suit was, therefore, required to be filed for seeking cancellation of the order dated 23rd June, 1960 passed by the Consolidation Officer

9. There is yet another ground to hold that the order dated 23-6-1960 passed by the Consolidation Officer did not require cancellation by a separate suit as it was an order without jurisdiction Undoubtedly the present proceedings under Sec 12 of the unamended Act was filed on 30th July, 1958, i e prior to the passing of U P Act No XXXVIII of 1958 which came into force on 27th Nov, 1958 Since the objection was filed on 30th July, 1958 under Section 12 of the unamended Act and the same was pending on the date of enforcement of U P Act No XXXVIII of 1958 the same was to be heard and decided under the provisions of the unamended Act as if the said amending Act had not come into force as was provided in S 49, sub-clause (ii) of the said amending Act, which reads as follows

"Notwithstanding the amendment of the principal Act by this Act all proceedings, commenced prior to, and pending on the date on which this Act comes into force —

(i)

(ii) under S 8 and the subsequent section of the principal Act shall, subject to the provisions of S 50 of this Act, be conducted and concluded in accordance with the provisions of the principal Act, as if this Act had not come into force"

10. In view of the provisions the said objection which was filed under Sec 12 of the unamended Act and was pending on the date of enforcement of the said amending Act No XXXVIII of 1958 was to be conducted and concluded in accordance with the provisions of Section 12 of the unamended Act The Consolidation Officer in accordance with the provisions contained in Section 12, sub-clause (4) of the unamended Act should have referred the case to the competent Civil Court for determination of the question of title by the arbitrator because the objection filed by Amrudh Rai and Yadu Nath Rai involved a question of title as they had claimed to be co-bhumidhars along with the recorded persons The names of the objectors were not recorded as co-bhumidhars on the land in question Hence the objection filed by them involved a determination of the question of title and the Consolidation Officer had no jurisdiction to decide that question himself It was incumbent on him to refer that question to the Civil Court under S 12, sub-clause (4) of the unamended Act which reads as follows

"Where the objection filed under sub-section (1) involves a question of title and such question has not already been determined by a competent Court the Consolidation Officer shall refer the question for determination to the Arbitrator"

11 Learned counsel for the petitioners argued that since in this case the plaintiff Pitamber Rai had not contested the case hence there was no necessity of referring the matter to the Civil Judge under the provisions of Sec 12, sub-clause (4), of the unamended Act This argument is unsustainable The aforesaid provision envisages that where an objection filed under sub-section (1) of S 12 involves a question of title the Consolidation Officer has to refer the same for decision to the competent Civil Court in case the said question was not already determined by any competent Court Admittedly prior to the filing of the objection by the petitioners under S 12, sub-section (1), of the unamended Act the question of title, i e the claim of co-bhumidhari rights, which the petitioners had set up, was not already determined by any competent Court The petitioners were not recorded as co-bhumidhars on the land in question and they had claimed co-bhumidhari rights in it and as such the objection undoubtedly involved a question of title and had to be referred to the arbitrator for determination under S 12, sub-section (4), of the unamended Act and the Consolidation Officer had, therefore, no jurisdiction to pass any order in favour of the petitioners even in ex parte proceedings Thus apart from the fact that the ex parte proceedings were fraudulently obtained by the petitioners the Consolidation Officer had no jurisdiction to pass orders on merits in favour of the petitioners His order was, therefore, null and void It has been held in Kiran Singh v. Chaman Paswan, AIR 1954 SC 340 that a decree passed by the Court without jurisdiction is a nullity and it can be ignored whenever it is sought to be enforced even in execution proceedings or in any suit or collateral proceedings and no amount of consent would confer jurisdiction on Court which lacks inherent jurisdiction

12. Thus we find that the order dated 23-6-1960 passed by the Consolidation Officer was without jurisdiction and was fraudulently obtained and as such it was a nullity and opposite party No 3 had jurisdic-

tion to entertain the suit irrespective of the aforesaid order and there was no necessity for filing a separate suit in Civil Court for setting aside the said order

13 Learned counsel for the petitioners next argued that the suit was barred under Section 49 of the Act He contended that the plaintiff opposite party No 4 instead of filing the present suit could have approached the Consolidation Officer of the appellate or revisional authority against the said order seeking its vacation on the ground that it was fraudulently obtained or that it was not sustainable on merits Having not approached the consolidation authorities the present suit of the plaintiff-opposite party No 4 was barred under Sec 49 of the Act This argument is unsustainable Admittedly the suit has been filed after the de-notification of the village under S 52 of the Act There is nothing on record to indicate that the petitioners were aware about the fraudulent order prior to de-notification of village and as such there was no occasion for the plaintiff-opposite party No 4 to have approached the Consolidation Officer seeking his redress against the aforesaid impugned order which was fraudulently obtained and was without jurisdiction After de-notification of the village the jurisdiction to entertain and decide the suit for declaration and partition vests in the Assistant Collector under S 229-B/176 of the U P Zamindari Abolition and Land Reforms Act The jurisdiction of the consolidation Courts ceased from the date of de-notification and they could not entertain any suit or application in respect of the proceedings done during consolidation operation The orders passed during consolidation operations, if they are valid and not without jurisdiction, would be binding between the parties and no suit will be entertainable by the Revenue or Civil Court challenging those orders Such suits shall be barred under the provisions of Section 49 of the Act and would also be barred by the principle of res judicata but if any order has been passed during consolidation operations by the consolidation authorities which is per se without jurisdiction and had been obtained fraudulently the same would be a nullity and void and would not be binding on the parties and the jurisdiction of the Revenue Court would not be excluded under the provisions of Section 49 of the Act and the entries made during consolidation operations based on such fraudulent and without jurisdiction orders would be open to challenge in regular title suits and could be shown to be wrong on merits

14 Section 27 of the Act, after its amendment by U P Act No 12 of 1965 provides that all entries in the record of right prepared in accordance with the provisions of sub-section (1) shall be presumed to be true until the contrary is proved This amendment has been made applicable with retrospective effect Thus the entries made in consequence of the impugned order of the Consolidation Officer could be shown to be erroneous and fraudulently obtained and without jurisdiction They are liable to be disapproved and ignored on a finding recorded in the case that the proceedings were without jurisdiction and the order was fraudulently obtained The contention of the learned counsel for the petitioners is, therefore, unsustainable and the suit filed by the plaintiff-opposite party No 4 was not barred under Sec 49 of the Act

15. Learned counsel for the petitioners next argued that the suit of the plaintiff was not cognizable by the Revenue Court Although this plea was not taken in the written statement nor any issue was pressed on that point in the trial Court nor it was pressed in the first appellate Court but the said question was raised on behalf of the petitioners before the Board of Revenue which, after considering it on merits, held that the suit was maintainable in the Revenue Court and I do not find any infirmity in the said finding Admittedly the plaintiff's suit is one for declaration and partition filed under S 229-B/176 of the U P Zamindari Abolition and Land Reforms Act and it relates to agricultural holding The jurisdiction of the Civil Court is specifically barred under the provisions of S 331 (1) of the U P Zamindari Abolition and Land Reforms Act which provides that

"(1) Except as provided by or under this Act no Court other than a Court mentioned in column 4 of Sch II shall, notwithstanding anything contained in the Civil Procedure Code, 1908 (V of 1908), take cognizance of any suit, application, or proceedings mentioned in column 3 thereof, or a suit, application or proceeding based on a cause of action in respect of which any relief could be obtained by means of any such suit or application

Provided that where a declaration has been made under S 143 in respect of any holding or part thereof, the provisions of Sch II in so far as they relate to suits, applications or proceedings under Chap VIII shall not apply to such holding or part thereof

Explanation — If the cause of action is one in respect of which relief may be grant-

ed by the Revenue Court, it is immaterial that the relief asked for from the Civil Court may not be identical to that which the Revenue Court would have granted"

16 The aforesaid provisions clearly indicate that the present suit in which the plaintiff-opposite party No 4 sought declaration that he is co-bhumidhar along with the second set of defendants alone was maintainable under S 229-B of the U P Zamindari Abolition and Land Reforms Act He had also claimed 1/4th and 1/6th share in the aforesaid holding in dispute and had claimed partition and separation of his share which was maintainable under the provisions of S 176 of the U P Zamindari Abolition and Land Reforms Act Such suits could not be entertained by the Civil Court in view of the aforesaid provisions contained in S 331 (1) of the U P Zamindari Abolition and Land Reforms Act which bars the jurisdiction of the Civil Court to entertain such suits The Explanation appended to the said section clearly provides that if the cause of action is one in respect of which relief may be granted by the Revenue Court, it would be immaterial that the relief asked for from the Civil Court may not be identical to that which the Revenue Court may have granted In the present suit the plaintiff opposite party No 4 had asserted that the entry in the names of defendants Nos 1 and 2 (petitioners) was per se wrong and illegal and the same is based on an order which was fraudulently obtained and void being also without jurisdiction This question could incidentally be gone into by the Revenue Court in the present suit The decree being void could be ignored and the Revenue Court had jurisdiction to determine that question It has been held by the Supreme Court in Gorakh Nath v H N Singh, AIR 1973 SC 2451, that if a document is void the consolidation authorities had jurisdiction to go into the question but if the document is voidable it had no jurisdiction to consider that question unless the document is avoided by the party concerned from a competent Court Similarly after de-notification of the village when the jurisdiction to entertain the suit for declaration vested in the Revenue Court it had jurisdiction to determine the question whether the order passed by the Consolidation Officer was void and ineffective on the ground urged by the plaintiff

17. There is yet another reason to repeal the aforesaid contention of the learned counsel It is well settled that a decree or order which is void and a nullity is not binding on parties and is liable to be ignored and the same need not be set aside by the Court passing it or through a separate suit in Civil Court seeking its cancellation Even at the risk of repetition it may be observed that in view of what has been stated above the order dated 23-6-1960 passed by the Consolidation Officer was void and a nullity, being without jurisdiction hence there was no necessity of filing an application for its setting aside before the Consolidation Officer nor there was any necessity for filing appeal or revision against it before the appellate or revisional consolidation authorities for its avoidance, even if, though not conceding, it be taken that such an application, appeal or revision could be filed before them in spite of de-notification made under Sec 52 of the Act It has been held by this Court in Jai Singh v Hanumant Singh, 1979 All LJ 645, that where the dispute regarding entries in revenue papers is raised the jurisdiction of Civil Court will be barred under S 331 of the U P Zamindari Abolition and Land Reforms Act The jurisdiction depends on the cause of action of the suit mentioned in the plaint hence the averments in the plaint with regard to the cause of action has to be strictly scrutinized to determine whether the suit is solely cognizable by Revenue Court or otherwise It was further observed that (at p 646)

"In the present case, the real cause of complaint of the plaintiff was the state of affairs in the revenue records in spite of the existence of the compromise The plaintiff stated that the compromise was entered in the Civil Court and it was not given effect to in the revenue papers Taking advantage of this position, the defendant got his name entered as a shikmi This complaint was hence primarily in relation to the entries in the revenue papers The plaintiff himself alleged that because of the entry of the defendant's name as shikmi he was trying to interfere with the plaintiff's possession This was obviously the alleged consequence of the state of affairs in the revenue papers It is well settled that the Civil Court cannot direct correction of the revenue papers This is a function that is done by Revenue Courts (See Parsottam v Narottam, 1970 All LJ 505) In view of this decision it is clear that the basic cause of action was such that relief on that could effectively be granted only by the Revenue Court The suit was hence not maintainable in the Civil Court It is barred by S 331 of the U P

Zamindari Abolition and Land Reforms Act"

18 The present suit was, therefore, maintainable in the Revenue Court I thus find that the contention of the learned counsel for the petitioner is devoid of any merit

19 Learned counsel further argued that even on merits the petitioners have got a share in the property He contended that Kalap Nath Rai had received the land in question in the representative capacity through gift deeds executed by Maya Rai in the year 1972 and Jaddu Rai in the year 1924 He further contended that the Courts below have wrongly held that there could not be acquisition of property in the representative capacity by way of gift He further, referred to an affidavit of Jaddu Rai, the donor, which was filed in the case before the trial Court wherein he had mentioned that the gift made to Kalap Nath Rai was in representative capacity, hence it is established that the father of opposite party No 4 Kalap Nath Rai had received the property in a representative capacity through the aforesaid gift I do not find any substance in this argument

20 A gift is a transfer without consideration The gift must be accepted by the donee or by some one on his behalf The donee must be an ascertained person Gift to unascertained persons would be invalid After making gift the donor is divested with all his interest in the property and a condition cannot afterwards be attached nor he can later on indicate that by making gift of the property to a specified person he had meant to gift it to others as well, and such evidence would be inadmissible under Sections 91 and 92 of the Evidence Act An unqualified gift will not be cut down by subsequent words nor it would operate to create title in favour of others, who were not donees The donee gets absolute ownership in the property A gift cannot be benami and donee, who accepts the gift for and on his own behalf, acquires absolute ownership in the property and he cannot be said to be holding it as benamidar for others The donee cannot be said to be holding the property in the representative capacity for and on behalf of other members of the joint family It is well settled that even in joint family a member of the joint family and even a karta can acquire and hold separate property in his name An ancestral property or a property acquired with the aid or assistance of joint family funds will alone be treated as a joint family property and not those other properties which a member of joint family acquires for himself from his own separate funds and the joint family funds are not utilized in acquiring it Since gift is a transfer without consideration, hence it cannot be said that in acquiring property through gift any joint family funds were utilized The property thus acquired through gift by a member of joint family cannot be branded to be joint family property nor the donee, although he may be a karta of the joint family, can be said to hold the property in a representative capacity for and on behalf of all other members of joint family The property received through gift would be held by him as his separate property and other members of the family will have no interest or share in it In the present case, therefore, Kalap Nath Rai donee cannot be said to have held the property in a representative capacity His name along with other donees was recorded and continued in papers ever since execution of the gift deeds and upon his death the name of his son, the opposite party No 4, was mutated The petitioners never raised any claim of the property prior to consolidation operations and they somehow got their name surreptitiously and fraudulently recorded by means of the aforesaid order dated 23-6-1960 which, as already mentioned above, was void and a nullity There is also nothing on record to indicate that Kalap Nath Rai was head and Karta of the family nor the petitioners have been able to establish their possession over the land in dispute Thus I find that the petitioners have not been able to establish their alleged claim of co-bhumidhari rights in the land in suit and there is no force in the aforesaid contention of the learned counsel of the petitioners

21. The learned counsel for the petitioners drew my attention to an affidavit of the donor Juddu Rai filed in, the case before the trial Court wherein he had mentioned that the property was given by him to Kalap Nath Rai and his brothers and that Kalap Nath Rai held it in a representative capacity It was thus argued that the petitioners on the basis of the evidence are entitled to one-third share each with the plaintiff-opposite party No 4 in the land in suit It is not disputed that Juddu Rai is alive But he was not examined in the case as a witness and thus could not be subjected to cross-examination It is also admitted that no order was passed by the Court as required under O XIX, R 1, C P C permitting defendants-petitioners to prove any particular fact or facts by affidavit nor any

order was passed by Court ordering affidavit in question to be read in evidence, hence the aforesaid affidavit cannot be read in evidence It has been held by this Court in Kedar Pandey v Ram Din, 1964 Rev Dec 237 (1964 All LJ 722 at p 724) that

"The affidavit could not constitute evidence in spite of the fact that there was no counter-affidavit by the defendant"

22. In another earlier case, Kunwar Inderjit Singh v Gir Raj Singh, AIR 1936 All 671, the Division Bench of this Court held that a mere affidavit is not evidence, and the person making this affidavit is to be subjected to cross-examination if it is to be used likewise Apart from it the donor Jaddu Rai having gifted the property to Kalap Nath Rai had divested himself of all rights in the property and those vested absolutely in donee Kalap Nath Rai along with other specified donees in the gift deed, which was duly registered He cannot now enlarge the scope of gift by saying that he had made gift of property to Kalap Nath Rai and his brothers and that Kalap Nath Rai had held it in a representative capacity The testimony of Jaddu Rai in the aforesaid affidavit, although the same cannot be read in evidence for reasons already stated above, will not be admissible in evidence in view of the provisions contained in Sections 91 and 92 of the Evidence Act It is well settled that no oral evidence of intention is admissible for the purposes of constructing deeds or ascertaining the intention of parties See Bai Kishan Das v W F Lagge, (1900) ILR 22 All 149 (PC) It is also well settled that the evidence as to the acts and conducts of the parties is also inadmissible because such conduct can only lead to the inference that there was a contemporaneous oral agreement or settlement between the parties, which cannot be proved See Achutaramaraju v Subbaraju, (1901) ILR 25 Mad 7 and Dattoo v Ramchandra, (1906) ILR 30 Bom 119 It has also been held by the Calcutta High Court in Madhab Charan Das v Rajani Mohan Das, (1921) 64 Ind Cas 583, that it is not open to tender evidence of acts and conduct of the parties with a view to show that a document is not really which it purports to be In Vissanji v Shapurji Burjorji, (1912) ILR 36 Bom 387 (PC), it was held that evidence of what took place after execution of a document was not admissible on the question of its construction In G Valia Raja v. T Vareed, AIR 1961 Ker 293, it was held that where the terms of a document are plain and unambiguous no evidence of subsequent conduct of the parties as to how they understood them, or treated their relationship, is admissible The Supreme Court also took the same view in Union of India v Kishorilal Gupta, AIR 1959 SC 1362, wherein it was held that we are concerned with the expressed intention of parties and when the words are clear and unambiguous there is no scope for drawing upon hypothetical construction or supposed intentions of the parties

23. Thus, it is abundantly clear that the evidence afforded by the aforesaid affidavit of Sri Jaddu Rai is not admissible in evidence and on its basis it cannot be urged that Kalap Nath Rai, the donee had received the property in question in a representative capacity and that the petitioners are co-bhumidhars and entitled to share in it The petitioners' claim thus fails also on merits and they cannot be held to be co-bhumidhars in the land in suit along with opposite parties No 4 to 5. I, therefore, see no substance in the aforesaid argument of the learned counsel for the petitioners

24. Lastly, learned counsel for the petitioners contended that the Board of Revenue had not recorded any finding on the question whether the order dated 23-6-1960 passed by the Consolidation Officer was without jurisdiction or not and as such the impugned order passed by the Board of Revenue be quashed and the case be remanded to it requiring the Board of Revenue to consider and record a finding on the aforesaid question It has been repeatedly held by the Supreme Court that remand should be avoided in a case of protracted litigation See Sant Narain Mathur v Rama Krishna Mission, AIR 1974 SC 2241 and Beehan Pandey v Dulhin Janki Devi AIR 1976 SC 866 In the latter decision the Supreme Court observed that to remand the suit to the trial Court would necessarily have the effect of keeping alive the strife between the parties and prolonging this long drawn litigation by another round of legal battle in the trial Court and thereafter in appeal and it is time that final curtain is drawn and this long meandering course of litigation between the parties is put to an end and the Court should be loath to entertain a plea which would have the effect of condemning succeeding generation of families to spend major part of their lives in protracted litigation

25. Hence in this view of the matter I think no useful purpose will be served nor it appears appropriate in exercise of powers in writ jurisdiction under Article 226 of the Constitution to remand the case specially

when there is no merit in the contention of the learned counsel for the petitioners and the order passed by the Consolidation Officer appears to be per se without jurisdiction as already observed above

26. No other point was pressed before me

27. In view of what has been said above I find no merit in the writ petition It is accordingly dismissed I, however make no order as to costs

Petition dismissed

1981 ALL L. J. 1192

K N MISRA, J

Sugar Singh, Petitioner v Deputy Director of Consolidation and others, Respondents

Civil Misc Writ Petn No 9501 of 1980, D/- 17-8-1981

(A) Constitution of India, Art. 226 — Consolidation proceedings — Settlement Officer entertaining appeal, by condoning delay — Revision against, not filed by petitioner — He cannot challenge order of Settlement Officer in writ petition (U. P. Consolidation of Holdings Act (5 of 1954), Ss. 47, 48)

(Para 4)

(B) U. P. Consolidation of Holdings Act (5 of 1954), S. 19 — Allotment of chak — Plots held by C in capacity of daughter of A and not as wife of B — Allotment of such plots to C in chak, in capacity of wife of B — Can be treated to be a "udan" chak.

(Para 5)

(C) U. P. Consolidation of Holdings Act (5 of 1954), S. 19 — Allotment of chak — Local inspection by Deputy Director of Consolidation — Statements of persons of locality collected on spot, regarding ownership of trees situated on plot in question, not recorded — Such statements cannot be treated as evidence — Order of allotment of chak based on such statements, would be illegal and erroneous.

(Para 7)

M C Dwivedi, for Petitioner, S D Dubey, for Respondents

ORDER:— This writ petition is directed against the order dated 6-10-1980 passed by the Deputy Director, Consolidation, Jhansi, opposite party No 1 by which he allowed the revision filed by opposite party No 4 and the Chak of the petitioner was amended

2. Briefly stated the facts giving rise to this writ petition are that opposite party No 4 Smt Shanti was allotted two Chaks Chak No. 261 was allotted to her in respect of her holding which was recorded in her name as the wife of Jagdish while Chak No 262 was allotted to her in respect of the holding which was recorded in her name as the daughter of Ram Das Although, the opposite party No 4 was the tenure-holder in respect of both the holdings which belong to her as the daughter of Ram Das and wife of Jagdish, but the Assistant Consolidation Officer proceeded to allot her two Chaks as aforesaid The petitioner's Chak number is 282 and he was allotted a portion of plot No 535 in his Chak This plot 535 originally belonged to opposite party No 4 and her sister Smt Lalli The sister of opposite party No 4 Smt Lalli was allotted a portion of plot No 535 in her Chak and allotment to her is not disputed in the present writ petition The opposite party No 4 had filed objection which was directed against the allotment of plots contained in Chaks Nos 261 and 262 She had asserted that she be allotted Chak on her original plot No 535 which is near the village Abadi This objection was registered as case No 3130 and was decided by the Consolidation Officer vide order dated 25th March, 1977 The objection was partly allowed and she was allotted land near the village Abadi on her original plots Nos 530, 532 and 537, which she had held in her holding as the daughter of Ram Das By this order, she got a Chak near the village Abadi on the land which originally belonged to her in her holding in the capacity as the daughter of Ram Das She was, however, not allotted Chak on her original plot No 535 on which she had claimed a Chak specially on the ground that trees, belonging to her, are situated thereon The opposite party No 4 thereupon preferred an appeal which was registered as Appeal No 288 of 1977 It is said that at the time of hearing of the appeal, an application was moved by her that she is satisfied so far as her Chak No 262 is concerned and she, therefore, did not press her appeal in respect of it The Settlement Officer (Consolidation) dismissed the appeal of opposite party No 4 vide order dated 26th April, 1977 contained in Annexure 'VI' to the writ petition treating it as not pressed The opposite party No 4, after about three years filed another appeal on 16-4-1980 with an application for condonation of delay This appeal was said to be directed against the order dated 29-3-1979 Learned counsel for the opposite party No 4 has admitted that the said date was inadvertently wrongly mentioned in the memo of appeal which was in fact directed against the order dated 25-3-1977 passed by the Consolidation Officer in case No 3130 and it

was directed so far the allotment of Chak 261 was concerned No counter-affidavit has been filed on behalf of the petitioner Hence the Settlement Officer (Consolidation) condoned the dealy treating the explanation furnished by the opposite party No 4 to be sufficient for condoning the delay and he partly allowed the appeal vide order dated 30-6-1980 contained in Annexure 'H' to the writ petition and a Chak-road was provided as approach to her Chak No 261 which was allotted to her on the aforesaid plots Nos 530, etc The opposite party No 4 still aggrieved by the said order, preferred a revision under Section 48 of the U P Consolidation of Holdings Act before the Deputy Director of Consolidation The petitioner did not file any revision against the said order by which the Settlement Officer (Consolidation) had condoned the delay in filing the appeal by opposite party No 4 and had partly allowed the same The Deputy Director of Consolidation after hearing the parties in the said revision allowed it vide order dated 6-10-1980 and altered the Chak of the petitioner and of opposite party No 4 By this order, the opposite party No 1 had allotted Chak to the opposite party No 4 on her original plot No 535 after making spot inspection on 4-10-1980 The Deputy Director of Consolidation has mentioned in his order that by the side of plot No 535, there are certain trees which belonged to her and she has been proposed a 'Udan' and with these observations, he allotted plot No 535 to the opposite party No 4 The petitioner was allotted in his Chak Plots Nos 530M, 532M, 544/1M and 573/1 Aggrieved by this order, the petitioner has preferred this writ petition

3. I have heard the learned counsel for the petitioner and the opposite party No 4 I have also perused the impugned order passed by the opposite party No 1 very carefully

4. The learned counsel for the petitioner has argued that the opposite party No 4 having got his appeal dismissed as not pressed, she was not entitled to prefer another appeal against the order passed by the Consolidation Officer He further pointed out that in the appeal filed by her on 16-4-1980, she has concealed the said fact that her appeal was earlier dismissed as not pressed and as such she was not entitled to any interference and the Settlement Officer (Consolidation) acted illegally in condoning the delay in filing the appeal by her which, in the aforesaid circumstances, was itself not maintainable as the earlier appeal preferred by her was not pressed and was consequently dismissed I do not find any substance in this argument The petitioner has annexed as Annexure '3' to the rejoinder affidavit copy of the application dated 18-4-1977 filed by opposite party No 4 which indicates that the opposite party No 4 had mentioned in her application that her Chak No 262 be kept intact, as she has no grievance in respect of it. It is thus apparent that the opposite party No 4 had not pressed her appeal so far her Chak No 262 is concerned The Settlement Officer (Consolidation) without considering her grievance with respect to Chak No 261, dismissed the appeal in toto The opposite party No 4 had therefore, preferred another appeal seeking the condonation of delay Although, in that appeal, the date of order passed by the Consolidation Officer was mentioned 29-3-1979 instead of 25-3-1977 The Settlement Officer (Consolidation) condoned the delay and partly allowed the appeal providing her Chak-road to the Chak allotted to her on plot No 530 etc, in her Chak No 261 The petitioner had not filed any revision challenging the order of Settlement Officer (Consolidation) condoning the delay in filing the said appeal He, therefore, cannot be permitted now to urge that the Settlement Officer (Consolidation) should not have condoned the delay and should not have entertained the appeal In the circumstance, stated above, I do not find any infirmity in the order passed by the Settlement Officer (Consolidation) condoning the delay and entertaining the appeal specially when no counter-affidavit was filed by the petitioner The learned counsel for the petitioner argued that the Deputy Director of Consolidation has wrongly mentioned in his order that the opposite party No 4 was allotted a 'Udan' Chak near village Abadi meaning thereby that no plot of her original holding was included in her Chak The learned counsel further pointed out that plots Nos 530, 532 533 and 573 were the original plots which she has held and Chak was allotted to her by the Consolidation Officer on the said plots near village Abadi The order passed by opposite party No 1, therefore, being based on misreading of fact stand vitiated in law is liable to be quashed The learned counsel for the opposite party No 4 in reply argued that the said plots were held by her in the capacity as the daughter of Ram Das and not as the wife of Jagdish The allotment of these plots in her chak No 261 which has been allotted to her in the capacity of the wife of Jagdish should be treated to be a 'Udan' chak

5. I find substance in the argument of the learned counsel for the opposite party No 4

The Assistant Consolidation Officer while preparing statement of proposal and making allotment of chaks to tenure-holder in the unit had not clubbed the two separate holdings of the opposite party No 4, one which she had held as wife of Jagdish and another as daughter of Ram Das, and she was allotted separate chaks Nos 261 and 262 for her separate holdings, one of which she had held as sole tenure-holder and another as co-tenure-holder along with her sister If the opposite party No 4 would not have been allotted separate chaks as against her separate holdings then the aforesaid observation of the Deputy Director of Consolidation regarding 'udan' chak to her on plots Nos 530 etc would not have been correct but since separate chaks have been allotted to her for her separate holdings, the aforesaid observation of the Deputy Director of Consolidation appears to be technically correct The impugned order, therefore, cannot be said to be vitiated on that ground

6 The learned counsel for the petitioner next argued that the Deputy Director of Consolidation has altered the chak of the petitioner and has taken out plot No 535 from his chak by wrongly observing that trees situated by the side of said plot belong to opposite party No 4 and by the impugned order fair and equitable allotment has not been made which is against the spirit of the Act and the petitioner has been materially prejudiced

7. In the matter regarding allotment of chaks the consolidation authorities have to act with great care and caution In Sec 19 of the Act very few guidelines are given and how, in what manner and at what place chaks be allotted to concerned tenure-holders appears to rest mostly upon the discretion of the Consolidation authorities In the absence of proper guidelines covering all the contingencies the discretion should always be exercised in accordance with the principles of equity, justice and good conscience In Section 19 of the Act, as originally enacted, it was provided that the statement of proposals should be prepared in the prescribed form showing particulars specified in Cl (b) of sub-section (1) of Section 11 of the Act in respect of each tenure-holder i e the list of all the plots of the original holdings and also the khasra numbers of the plots proposed to be allotted to each tenure-holder in lieu of the original plots of his holding and the nature of rights therein, the rental value and soil classification of the fields so allotted In Clause (c) of sub-sec. (1) of Section 19 of the Act, as it then stood, it was specifically provided that briefly reasons in support of the proposal be mentioned in the statement of proposals itself The aforesaid provision contained in Clause (c) clearly indicates the intention of the legislature that a reasoned allotment was to be made and not only that much but the reasons were also to be indicated in the statement of proposals prepared in the prescribed form itself The legislature had thus not left the matter merely on sole discretion or subjective satisfaction of the consolidation authorities but the allotment of chaks was to be made indicating reasons for making proposed allotment It was to be done objectively scrutinizing whole thing keeping in view the interest of the entire body of tenure-holders and also having regard to prescribed particulars to be followed while making allotment The said provision contained in sub-cl (c) of sub-sec (1) of Section 19 of the Act was later on deleted by U P Act No XXXVIII of 1958 apparently because the recording of reasons for making proposed allotment of plots to each tenure-holder in the unit was found unmanageable and unworkable The spirit of the said provision, however, pervades although the said clause stood deleted for some reasons By the deletion of the said clause the consolidation authorities cannot be said to be vested with unbridled discretion to make allotment of chaks irrationally They have always to make a reasoned and justified allotment of chaks The concerned consolidation authorities should not act arbitrarily to benefit one particular tenure-holder at the cost of others In matters of allotment equities are to be adjusted The interest of small tenure holders should not be sacrificed nor it be ignored vis-a-vis big tenure-holders who should not be permitted to grab the best land of others merely on the ground that their scattered plots of the holding has to be consolidated to the maximum at three places The tenure-holders, if need be, can be allotted more than three chaks in order to make equitable allotment of chaks to other tenure-holders The legislature in its wisdom by contemplating such eventualities has provided that no consolidation made shall be invalid for the reason merely that the number of chaks allotted to a tenure-holder exceeds three Thus even more than three chaks can be allotted but very rarely and only in exceptional circumstances The scheme of the Act clearly envisages fair allotment of chaks to all Tenure-holders should be allotted land at the place where they held largest part of their holding The allotment of 'Udan' chak, i e. not containing any of the original plots, is to be avoided as far as possible

The tenure-holder would not get any cause of grievance if he is allotted chak containing some of his original land It has been noticed that objections are generally raised when the tenure-holder is not allotted land near village abadi of equal valuation which he had originally held and his original plots are allotted to some one else near village abadi He also feels aggrieved if he is not allotted land of his original holding endowed with irrigation facilities or having trees or other improvements thereon Such irregularities in allotment should always be avoided There appears to be some executive instructions issued by the Directorate of the Consolidation department in the matter regarding allotment of chaks but those instructions contained in the Consolidation Manual have no statutory binding force and non-compliance of those executive instructions would not make the allotment illegal or void It, therefore, appears necessary that statutory rules be made on the subject providing in detail guidelines in the matter regarding allotment of chaks meeting all contingencies so as to avoid inequitable allotment of chaks and fair allotment to all the tenure-holders be made, which is the main purpose and cherished spirit of the Act In this background the impugned order is to be judged In the present case the Deputy Director of Consolidation acted with utmost care to decide the case after making spot inspection I do not find any other infirmity in the impugned order except that he fell in error in basing his order on the version of the residents of the village who had collected on the spot and had stated that the trees situated by the side of plot No 535 belong to opposite party No 4 It is not disputed by the petitioner that plot No 535 belonged to opposite party No 4 and her sister but he contended that the trees are not situated on plot No 535 and those trees which are situated by the side of plot No 535 do not belong to opposite party No 4 The Deputy Director of Consolidation has observed that on his local inspection, he found certain trees situated by the side of plot No 535 and the persons of the locality who had collected there on the spot had told him that those trees belong to opposite party No 4 This observation, to my mind, cannot be treated to be an evidence and it cannot be made basis of any decision The Deputy Director of Consolidation should have either recorded the statements of those persons on oath giving opportunity to the petitioner to cross-examine them and to lead evidence in rebuttal if he wanted to place reliance upon the version of those persons with regard to the ownership of the trees situated on the plot in question or by the side of plot No 535, I, therefore, find that the order passed by the Deputy Director of Consolidation on the aforesaid ground is illegal, erroneous and cannot be sustained

8. In the result, the petition succeeds and is, therefore, allowed The impugned order dated 6-10-1980 passed by the Deputy Director of Consolidation, opposite party No 1, contained in Annexure No 4 to the writ petition, is hereby quashed and the case is remanded to him with the direction to decide the case on merits in the light of the observations made above The parties shall, however, bear their own costs of this writ petition

Petition allowed

1981 ALL L. J. 1195

S J HYDER, J

Ramji Sahai, Appellant v Badri Pd and others, Respondents

Second Appeal No 1399 of 1971, D/- 10-9-1981

Hindu Law — Joint Hindu family — Widowed daughter allowed to live with joint family — She and her progeny are not entitled to benefit as a member of joint Hindu family. AIR 1969 SC 1330 and AIR 1969 SC 1076, Rel. on (Para 7)

Cases Referred :	Chronological Paras
AIR 1969 SC 1076	11
AIR 1969 SC 1330	9

S N Agarwal and Yogesh Agarwal, for Appellant, Shitla Pd, for Respondents

JUDGMENT :— This is a defendant's second appeal The suit of the plaintiff-respondent No 1 for a declaration that he was a co-sharer in the house in dispute and for joint possession over the same was decreed by the trial Court The said decree had been affirmed by the last Court of facts, hereinafter referred to as 'the Court of appeal'

2. One Rameshwar Dayal had three sons— Kalka Prasad, Mata Prasad and Vishwanath Prasad We are not concerned in this appeal with Vishwanath Prasad who died issueless Rameshwar Dayal had also a daughter named Smt Kastura who had been married Smt Kastura had a son named Daya Kishan Plaintiff-respondent No 1 Badri Prasad is the son of Daya Kishan Mata Prasad had three sons— Markandey Lal, Jagdamba Prasad and Raj Narain Defendant-appellant No 1 is the son of Markandey Lal whereas

defendant-appellant No 2 is Markandey Lal himself Jagdamba Prasad was impleaded as defendant No 3 in the suit and Bholanath son of Raj Narain was impleaded as defendant No 5 Kalka Prasad left behind two sons, namely, Lallan Prasad and Kashi Prasad Kashi Prasad was impleaded as defendant No 1 to the suit and Lallan Prasad was impleaded as defendant No 2 There is no controversy between the parties with regard to these facts

3. The case of the plaintiff-respondent was that the husband of Smt Kastura had died and she had been allowed to live with Rameshwar Dayal and his three sons and had thus become a member of the joint Hindu family so to say by co-option It was further stated that on the death of Smt Kastura, Daya Kishan and thereafter Badri Prasad, plaintiff-respondent No 1, acquired the status of a member of the joint Hindu family The plaintiff stated that Daya Kishan acting as a Karta of the said joint Hindu family purchased the house in dispute in the name of Kashi Prasad for a sale consideration of Rs 200/- and a sale deed was executed by the transferor on July 9, 1945 According to the plaintiff, the house in dispute was the joint Hindu family property in which he had 1/3rd share He stated that shortly before the institution of the suit, the defendant-appellants Ramji Sahai and Markandey Lal threw away his goods from the said house and asserted their exclusive title to the same It was on these allegations that the relief for declaration and joint possession was claimed by the plaintiff-respondent No 1

4. Markandey Lal and Ramji Sahai, defendants-appellants before this Court, alone contested the suit They stated that the house in dispute had been actually purchased by Kashi Prasad from his own funds It was further stated that on Aug 1, 1960, Kashi Prasad had executed a gift deed of the house in favour of the appellant Ramji Sahai and that the appellants alone were in possession of the house in dispute after the said gift The averment that Smt. Kastura had become a member of the joint Hindu family or that her son Daya Kishan or the plaintiff-respondent Badri Prasad were such members was specifically traversed

5. It may be stated that Kashi Prasad, the alleged donor of defendant-appellant No 1, filed a written statement supporting the stand taken by the defendant-appellant. He, however, abstained from taking any part in the proceedings Jagdamba Prasad, grandson of Rameshwar Dayal, did not file any written statement but he nevertheless appeared as a witness for plaintiff-respondent No 1 No other person impleaded as a defendant in the suit filed his written statement or contested the claim of the plaintiff-respondent

6. The two Courts below have concurrently come to the conclusion that Smt Kastura was married in the lifetime of Rameshwar Dayal They have further found that her husband died during the lifetime of Rameshwar Dayal and thereafter Smt Kastura started living with the family of Rameshwar Dayal They have further found that Smt Kastura had become a member of the joint Hindu family of Rameshwar Dayal and after her death, her son Daya Kishan and on the death of Daya Kishan, Badri Prasad occupied that status They also came to the conclusion that the house in dispute has been purchased by Daya Kishan from the funds of the joint Hindu family and the sale deed was obtained Benami in the name of Kashi Prasad In consequence they have found the gift deed dated Aug 1, 1960 executed by Kashi Prasad in favour of defendant-appellant No 1 Ramji Sahai to be invalid Finally they came to the conclusion that Badri Prasad had one-third share in the house in dispute as member of the joint Hindu family and he was entitled to the relief claimed

7 Learned counsel appearing for the defendants-appellants has rightly not disputed the finding of fact that Smt Kastura became a widow during the lifetime of her father and she was being maintained by Rameshwar Dayal and his sons He has, however, contended that this act of charity on the part of Rameshwar Dayal and his sons could not lead to the conclusion that Smt Kastura or her progeny became entitled to the benefits of a member of the joint Hindu family Learned counsel submitted that a joint Hindu family is a creature of law and except in the case of adoption, no stranger, much less a female, could be introduced in that family

8 I have given serious consideration to the submission of the learned counsel and I feel inclined to agree with him There is good authority to which I shall presently refer in support of the proposition urged by him However, before referring to the submission of the learned counsel, it may be stated that the main events in the case put forward by the plaintiff-respondent took place before the coming into force of the Hindu Succession Act of 1956 and this appeal will, therefore have to be decided untrammelled by the changes introduced in law by the said Act

9. Mulla in Hindu Law 1959 Edition, has stated at page 322 that joint family property

is synonymous with coparcenary property At page 314, he has stated that coparcenary is a much narrower concept than a joint Hindu family and again at page 305 he has stressed that coparcenary is purely a creature of law and that it cannot be created by the act of parties, save in so far that by adoption a stranger may be introduced as a member thereof At page 319 he has stressed the fact that no female can be a coparcener under a Mitakshara Law He has pointed out that even a wife, though she is entitled to be maintained out of the husband's property, is not her husband's coparcener In view of the observations from Mulla's Hindu Law the view taken by the two Courts below about the status of Smt Kasturi and her son and her son's son appear to be clearly erroneous and legally unsustainable In State Bank of India v Ghamandi Ram, AIR 1969 SC 1330 the law is stated thus (at p 1333)

"A coparcenery under the Mitakshara School is a creature of law and cannot arise by an act of parties except in so far that on adoption the adopted son becomes a coparcener with his adoptive father as regards the ancestral properties of the latter"

10. The law declared by the Supreme Court is in accord with the authoritative dictum from Mulla's Hindu Law to which reference has already been made

11 It has been held by the Court of appeal that the property in dispute was purchased from the funds belonging to the joint Hindu family which have been withdrawn from the Bank by Daya Kishan This finding is based on the ground that Daya Kishan had taken a loan from the Bank of a sum of Rs 200/- about a week prior to the execution of the sale deed The Court of appeal has also come to the conclusion that the earnings of Kashi Prasad were insufficient for the acquisition of the property The reasons given by the Court of appeal appears to be largely speculative Be that as it may, the fact remains that there is no evidence worth the name from which it could be gathered that the earnings of the joint Hindu family went into the acquisition of the property In Mudigowda Gowdappa Sankh v Ramchandra Revgowda Sankh, AIR 1969 SC 1076, Ramaswami, J speaking for the Court stated that there was no presumption that a Hindu family merely because it was joint was possessed of any joint property The burden of proving that any particular property is joint family property is, therefore, in the first instance, upon the person who claims it as a coparcenary property It was further stated that if possession of a nucleus of the joint family property was either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. There was no evidence of any joint family nucleus on which the presumption of the property being a joint family property could be founded In my opinion, the finding recorded by the Court of appeal on this aspect also is infirm and must be set aside

12. Finally it may be stated that the plaintiff-respondent had not pleaded any case of Benami The said question was not put in issue and the parties were not required to lead evidence thereon The two Courts below have devoted much time and attention on the investigation of this point which was wholly (sic) be looked into in support of a plea which is not founded in the pleadings

13 In view of the above discussion, this appeal must succeed The result is that this appeal is allowed The suit of the plaintiff-respondent No 1 Badri Prasad is dismissed The defendants-appellants shall be entitled to their costs of the two Courts below The costs of this Court shall be easy

Appeal allowed

1981 ALL. L. J. 1197

M P MEHROTRA, J

Bhopal Singh, Petitioner v State of Uttar Pradesh, Respondent

Civil Misc Writ Petn No 11066 of 1980, D/- 7-9-1981

(A) U P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 4-A — Ceiling proceedings — Grievance of tenure-holder as to not considering by Prescribed Authority and Appellate Court whether certain plot was unirrigated — No contention was pressed to substantiate that the plot was unirrigated — No copy of memorandum of appeal filed — Tenure-holder cannot raise the controversy in writ petition in respect of plot in question. (Constitution of India, Art. 226). (Para 5)

(B) U P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S 4-A — Claim as to 'boring' did not amount to 'private irrigation work' — Foundation for such case not laid in objection before Prescribed Authority — Contention cannot be allowed to be raised for the first time in writ petition. (Constitution of India, Art. 226). (Para 6)

Cases Referred: Chronological Paras
1979 All LJ 1113 1979 All WC 579 4
1979 All WC 9 6

Virendra Singh, for Petitioner, Standing Counsel, for Respondent

JYJKY/E745/81/PGS/SNV

ORDER .— This petition arises out of the proceedings under the U P Imposition of Ceiling on Land Holdings Act

2. The facts, in brief are these The petitioner was issued notice under S 10 (2) of the Act and he filed his objections They were decided by the Prescribed Authority and thereafter, an appeal was filed The appeal was decided by the appellate Court Thereafter, a writ petition was filed in this Court and I allowed the same by my judgment dated 9-4-1979, a true copy whereof is Annexure 1 to the petition I remanded the case with certain directions as to how the land was to be determined as irrigated or unirrigated Thereafter, the case was heard by the Prescribed Authority and the said controversy was examined by the said Authority who passed his order dated 28-1-1980, a true copy whereof is Annexure 2 to the petition Thereafter, an appeal was filed and the same was partly allowed by the appellate Court by its judgment dated 15-9-1980, a true copy whereof is Annexure 3 to the petition A certified copy of the said judgment is also on the record

3. Feeling aggrieved, the petitioner has now come up in the instant writ petition and in support thereof, I have heard the learned counsel for the petitioner and in opposition, the learned Standing Counsel has made his submissions

4. The learned counsel for the petitioner contended that the appellate court did not correctly decide the controversy and treated more land as irrigated than should have been treated as such on a correct interpretation of the Khasra extracts in question I have looked into the Khasra extracts and in my view, taking into consideration the law laid down by the Division Bench in Kallu v State of U P (1978 All LR 753) (1979 All WC 579 ?) (1979 All LJ 1113), the petitioner has actually been a gainer by the manner in which the appellate Court below decided the appeal However, as the State has not come up in any cross-writ petition, therefore, it is not necessary to interfere with the impugned appellate judgment in favour of the State However, so far as the tenure-holder is concerned, as I have stated, he has been a gainer, if the law laid down by the aforesaid Division Bench is taken into consideration

5. The learned counsel contended that the Prescribed Authority and the appellate Court both erred in not considering the plot No 236 which also was one of the several plots in respect of which I had given direction in my aforesaid judgment dated 9-4-1979 It is correct that the said plot has not been expliedly dealt with either by the Prescribed Authority or by the appellate Court, but it seems that this was so because from the side of the petitioner no contention was pressed to substantiate that the said plot was unirrigated No copy of the memorandum of appeal has been filed which could have shown that the petitioner raised any contention in respect of the said plot in the appeal or made any grievance that the Prescribed Authority had not dealt with the said plot in this impugned order In these circumstances, it is not open for the petitioner to seek to raise a controversy in respect of plot No 236

6 The learned counsel contended that in plot No 104 the source of irrigation is shown in the Khasra as boring and the same on the authority of Whirendra Mohan Chaudhary v State (IInd Additional District Judge, Bareilly ?), (1979 All WC 9) should not be treated as covered by a definition of private irrigation work In my view, the facts of the said case were different and in the facts of the instant case, there is nothing to show that the boring in the instant case being operated by anything other than the diesel or electric power In any view of the matter, the foundation for such a case should have been laid in the objection by the tenure holder and then necessary evidence should have been led before the Prescribed Authority to establish that in plot No 104 the boring concerned was not such as was being operated by diesel or electric power Such a contention accordingly cannot be allowed to be raised in the instant writ petition

7. This petition accordingly, fails and is dismissed but there will be no order as to costs

Petition dismissed

1981 ALL. L. J. 1198

S J HYDER, J

Smt Nand Kishori Devi, Appellant v Sahdeo Ram Chaurasia and others, Respondents

Second Appeal No 1249 of 1971, D/- 25-9-1981 *

(A) Civil P. C (5 of 1908), O. 14, R. 1 (5) — Framing of issues — Duty not exclusively of Court — Parties or their counsel are actual participants in process of framing issue and share the duty. (Paras 5, 6)

(B) Civil P C. (5 of 1908), Ss. 100-101 — Second appeal — New plea — Suit for

* Against judgment and decree of J M Srivastava, Civil J, Ghazipur, D/- 16-2-1971

mandatory injunction for demolition of construction and possession of land — Defendants' plea that Municipal Board cannot grant fresh lease to plaintiff — Plea neither taken in grounds of appeal nor raised in Court below — Plea cannot be raised in second appeal. (Para 8)

V D Singh, for Appellant, Faujdar Rai and A N Bhargava, for Respondents

JUDGMENT :— Two questions have been pressed before me by the learned counsel appearing for the defendant-appellant in support of this second appeal He has firstly contended that the trial Court omitted to frame an issue on the right of the appellant based on easement It has been next urged that admittedly the brother of Sahdeo Ram, who was the original plaintiff in the case, namely, Badri Prasad, has been granted a lease of the land in dispute in the year 1945 and no fresh lease could be executed by the Municipal Board in favour of the original plaintiff

2 The suit giving rise to this second appeal was one for mandatory injunction for demolition of certain constructions made by the defendant-appellant on the land shown by letters XI A1 A2 in the map Paper No 14C-2 and for possession over the land underneath the said constructions The suit was resisted by the defendant-appellant on a number of grounds including the ground that he had a right of way over the said land which he had been exercising for more than 30 years The suit was decreed by the trial Court and the decree has been affirmed by the first Court of appeal

3 It appears that the trial Court did not frame any issue with regard to easementary right alleged by the defendant-appellant The question was raised before the Court of appeal and was answered by it against the defendant-appellant The Court of appeal stated that no prejudice had been caused to the defendant-appellant on account of non-framing of the issue It further held that no issue had been pressed on behalf of the defendant-appellant before the trial Court as regards his alleged claim based on the right of easement was concerned

4. In my opinion, the first reason assigned by the Court of appeal is incorrect and cannot be sustained May be that the parties had led evidence even on the question of easementary right before the trial Court. However, the trial Court did not record any finding on the basis of the said evidence Merely giving of an opportunity to the parties to lead evidence is not sufficient to rule out prejudices, if no finding is recorded on the basis of such evidence An important plea thus goes completely undecided The omission to decide a controversy by itself causes prejudice to the party who has raised it

5. The second reason given by the Court of appeal for its decision on this point is, however, substantial and learned counsel for the defendant-appellant has not been able to meet it I have myself gone through the Judge's notes prepared by the trial Court While framing the issues, the trial Court has appended a note stating that the issues were read out to the counsel of the parties and they conceded that no other issue arose on the pleadings of the parties If the concession made by the counsel for the defendant-appellant was only a slip, he could have made an application for framing an additional issue on the question of easement He did not do so No doubt it is the duty of the Court to frame issues in a case The Court, however, does not carry this duty exclusively on its shoulders and it is shared by it with the parties' counsel It is precisely for this reason that issues are read over to the parties and they are called upon to state if they require any additional issue to be framed Sub-rule (5) of Rule 1 of O 14 of the Civil P C is relevant in this connection and is quoted below

"At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under Rule 2 of Order X and after hearing the parties or their pleaders to ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend"

6. The language of the sub-rule quoted above makes it clear that the entire duty of framing the appropriate issues in a case is not that of the Court alone The parties or their counsel are actual participants in the process of framing issues arising in a case

7 It may be stated that some of the pleas which are raised in the pleadings are never seriously intended At the time of framing of issues, a counsel appearing for a party gives up certain pleas and does not press an issue on the basis of unnecessary pleas I am, therefore, inclined to agree with the Court of appeal that in the instant case, the defendant-appellant did not consider it necessary to press the issue relating to the alleged easementary rights and it was on the basis of that concession that the trial Court did not frame an issue on the said plea

8 The second submission urged in support of the second appeal is also devoid of force It was never urged on behalf of the defendant-appellant at any stage that the Municipal Board had granted a lease in favour of Badri Prasad in 1945 and, as such it was not competent to execute another lease in favour of the plaintiff In case such a plea had been raised, plaintiff would have an opportunity to lead evidence to demolish the case now sought to be made out before me It is pertinent in this connection to point out that this question was also not raised before the Court of appeal It also does not figure in the grounds of appeal filed by the defendant-appellant before this Court The defendant-appellant cannot be permitted to urge any ground which does not figure in the grounds of appeal and which was also not taken before the Court of appeal

9 The result of the foregoing discussion is that the second appeal fails and is hereby dismissed with costs

Appeal dismissed

1981 ALL L J 1200

R M SAHAI, J

Jagannath, Petitioner v Board of Revenue, Respondent

Civil Misc Writ Petn No 10167 of 1979, D/- 17-9-1981

(A) U P Zamindari Abolition and Land Reforms Act (1 of 1951), Ss 171, 172 and 174 — Succession to female tenant — Share given to widow of occupancy tenant on compromise in suit for declaration under Ss. 59 and 61 of Tenancy Act, filed by her step-sons — On her death share would not devolve on heirs of last male tenant — Ss. 171 and 172 not attracted — S 174 is applicable. (U. P Tenancy Act (17 of 1939), S. 35)

Where the widow of the deceased occupancy tenant was given a share in the property on compromise in a suit for declaration filed by her step-sons under Ss 59 and 61 of the Tenancy Act the share given to her could not be said to be by way of inheritance or succession and origin of her title could not be traced to her husband Consequently, on her death the property would not devolve on the heirs of the last male tenant In such a case, S. 172 read with S 171 of the Zamindari Abolition and Land Reforms Act would not be applicable and the succession would be governed by S 174 of the said Act as it is a residuary clause in respect of female tenants Further, even though the widow was in possession over the land which once belonged to her husband but her possession could not be deemed to be in same interest as was held by her husband and could not alter the law of succession as provided in S 35 of the Tenancy Act AIR 1976 SC 844, Disting, 1978 All LJ 1235, Rel on (Paras 4, 5, 7)

Under S 35 of the U P Tenancy Act, interest of an occupancy tenant devolved only on male descendants When the step-sons were born on the date the occupancy tenant died the property in law shall be deemed to have devolved on them The denial of their parentage by the widow would not in any manner affect devolution in law The compromise might have been entered irrespective of allegations and counter-allegations in the plaint and written statement, but the finding of fact that they were sons of deceased occupancy tenant related back to the date when the tenant died and succession opened On that date, therefore, whatever interest the tenant had in the holding in dispute devolved on the sons, and his widow, therefore, could not and did not inherit any interest of the deceased tenant The origin of her title, therefore, could not be traced to her husband What was given to her in compromise could not be described as 'absolute, precarious or even inchoate interest or the like" It had no legal link except of course that compromise was in respect of land which belonged to the tenant That, however, cannot be considered to be sufficient in law (Para 6)

(B) U. P Zamindari Abolition and Land Reforms Act (1 of 1951), S. 174 — Word 'son' — It does not include step-son. 1978 All LJ 1235, Rel. on. (Para 7)

Cases Referred . Chronological Paras

1978 All LJ 1235 1978 All WC 721 7
AIR 1976 SC 844 2, 3, 5
1952 Rev Dec 59 (BR) 2

S N Singh and R. N Singh, for Petitioner, G N Verma and Sankatha Rai, for Respondent

ORDER — By this petition filed under Article 226 of the Constitution of India, the declaration granted by three revenue Courts u/s. 229B of the U P Zamindari Abolition & Land Reforms Act, 1951 (hereinafter referred to as the Act) that one-fourth share of Smt Janki, widow of Shiv Ram alias Sri Ram which had come to her by way of compromise entered with op-

posite parties 4 and 5, her stepsons, in a suit for declaration filed by them u/s 59/61 of the U P Tenancy Act devolved on them, after her death, u/s 172 read with S 171 of the Act as she was limited owner of the land in dispute, is challenged as erroneous on the face of it

2 Admittedly Shiv Ram, the occupancy tenant died, in 1941 leaving two widows Smt Janki and Smt Mahdei and two sons from the latter Between 1941 and 1949 Smt Janki appears to have adopted petitioner, although adoption has not been found to be proved and is not in dispute now, which, obviously cast cloud on the sole ownership of opposite parties therefore, they filed a suit for declaration u/s 59 of the U P Tenancy Act against Smt Janki and petitioner The suit was contested and one of the defences raised by Smt Janki was denial of opposite parties' parentage Due to this or for family peace the parties in the suit agreed to settle their difference by compromise in 1951 irrespective of the allegations and counter-allegations, as is clear from paragraph 1 of the compromise, and 1/4th share was given to each, the petitioner, the two opposite parties and Smt Janki It is alleged that Smt Janki surrendered her share in favour of petitioner in 1954 After her death in 1971 the opposite parties filed the suit out of which this petition has arisen for the share of Smt Janki It has been found by all the authorities that Smt Janki was a limited owner, a finding which has not been supported by learned counsel for respondent even and rightly as the tenancy was occupancy and devolution was governed by S 35 of the U P Tenancy Act, But the whole thrust of argument has been on the word, 'inherited' used in Section 172 of the Act and its interpretation by Hon'ble Supreme Court in Ramjiwan v Phoola, (AIR 1976 SC 844)

Section 172 of the Act provides

"a Bhumidhar, sirdar, or Asami, who has after the date of vesting, inherited an inherest in any holding—

(a) as a widow,—
a widow of a male lineal descendant, in the male line of descent,—
mother or father's mother dies, abandons or surrenders such holding or part of thereof, or

(b) xx xxx xx xx xx xx xx xx xx
the holding or a part — shall devolve upon the nearest surviving heir (such heir being ascertained in accordance with the provisions of Section 171), the last male Bhumidhar, sirdar or Assami,"

According to dictionary, the word 'inherit' means, 'to make heir', to be the heir of, succeed as heir, to act as heir Inheritence, therefore, must necessarily be associated with succession or devolution Property must carry the same impress which the owner had Can it be said that the share which Smt Janki got in compromise was as heir of her husband, or in succession to his interest? In Har Prasad Ram Swaroop v Har Ram (1952 Rev Dec 59) the Board of Revenue held that in a case where the Zamindar agreed for continuance of widow's name after her remarriage, the interest shall be deemed to have originated from her first husband Drawing inspiration from it although not relying on it the learned counsel for respondent urged that Smt Janki was given 1/4th share of Shiv Ram alias Shri Ram because she was his widow It shall be deemed that the share which she thus got was of her husband Consequently she inherited it The argument suffers from a fallacy It assumes that Smt Janki was a successor whereas in law she did not and could not have any interest in the property On death of Shiv Ram his interest devolved on his sons No part of it could be inherited by Smt Janki In compromise she might have been given 1/4th share, may be because she was widow of Shiv Ram or stepmother of opposite parties but that could not be by way of inheritence or succession

3. The expression, 'inherited an interest' in any holding in S 172 came up for interpretation before the Hon'ble Supreme Court in Ramjiwan's case (AIR 1976 SC 844 at p 851) (supra) It was held that,

"In order to determine the applicability of Section 172 of the Abolition Act we must go to the origin of the title of the Bhumidhar or the main source from which the bhumidhar has derived interest in the holding The statute has not defined the word, 'interest' and, therefore, it must be deemed to be of the widest amplitude It will include not only an absolute interest but also a limited interest a precarious interest and an inchoate interest or the like "

The question, therefore, is whether the share which was given to Smt Janki in compromise in 1951 can be traced to her husband In other words, can the origin of title of Smt

Janki in the land in dispute be related back to her husband There is no hesitation in saying that it was not, either in law or in fact Under Section 35 of the U P Tenancy Act, interest of an occupancy tenant devolved only on male descendants As opposite parties were born on the date Shiv Ram died the property in law shall be deemed to have devolved on them The denial of their parentage by Smt Janki in 1948 could not in any manner affect devolution in law The compromise might have been entered irrespective of allegations and counter-allegations in the plaint and written statement, but the finding of fact recorded now which is not disputed is that opposite parties were sons of Shiv Ram This finding relates back to the date when Shiv Ram died and succession opened On that date, therefore, whatever interest Shiv Ram had in the holding in dispute devolved on opposite parties Smt Janki, therefore, could not and did not inherit any interest of Shiv Ram The origin of her title, therefore, could not be traced to her husband What was given to her in compromise could not be described as 'absolute, precarious or even inchoate interest or the like' It had no legal link except of course that compromise was in respect of land which belonged to Shiv Ram That, however, cannot be considered to be sufficient in law

4. The revenue courts proceeded on the basis that the compromise was a family settlement the effect of which was that the male lineal descendants i e the opposite parties abandoned their claim to the full held by Shiv Ram The parties thereafter continued in possession over their respective shares and the compromise having been acted upon cannot be denied It may be that parties to the compromise may not wriggle out of it but that is not helpful to opposite parties Assuming that it was a family settlement in which the parties related with each other had a possible claim or semblance of title and the opposite parties are bound by that but that by itself was not sufficient unless it is further held that it resulted in inheritance in favour of Smt Janki It appears that the revenue courts proceeded in a circle First they assumed the compromise to be a family settlement then as it related to property of her husband she was held to have inherited his interest Without going into the question whether on facts found that the petitioner was an outsider and Smt Janki could not have any semblance of title therefore, the compromise could not be treated as family settlement how could Smt Janki be deemed to have inherited interest of her husband is not easy to understand

5. For instance if the opposite parties would have said that Smt Janki being widow of Shiv Ram, was entitled to inherit his 1/4th share could it be said that because of that admission Smt Janki inherited the interest The answer would obviously be in the negative The interest which was given to Smt Janki could not be traced to her husband The legislature has purposely used the word 'interest' It cannot be equated with possession Smt Janki might have continued in possession over the land which once belonged to her husband but her possession cannot be deemed to be in same interest as was held by her husband At least it cannot be treated to be so in law The admission by opposite parties or conferment of 1/4th share on Smt Janki could not alter the law of succession as provided in S 35 of the U P Tenancy Act There is no denial that under the compromise Smt Janki got 1/4th share and the parties to the compromise are bound by it, but that by itself does not create any interest of Smt Janki in the holding as was held by her husband What could not take place in law could certainly not be created by Act of parties The line of succession or devolution could not have been altered There can thus be no doubt that under the compromise Smt Janki did not inherit an interest in the holding On her death therefore, the property could not devolve on the heirs of the last male tenant and the provisions of S 172 read with S 171 were not applicable The succession would be governed by S 174 of the Act, as it is a residuary clause in respect of female tenants

6. It was vehemently argued by learned counsel for opposite parties that in Ramjiwan's case (AIR 1976 SC 844) (supra) the position was more or less identical According to learned counsel under Oudh Rent Act the tenancy was not inheritable and after death of Ramji his widow Smt Menda was to continue in possession for a fixed period of 5 years The learned counsel urged that the Supreme Court held that the interest of the husband was deemed to have devolved on Smt Menda and it was held that her title related back to the time when her husband died The argument

proceeds on misconception of the Supreme Court's decision The words used in S 48 of the Oudh Rent Act were

"heir of a tenant and shall be entitled to retain occupation"

It was held by the Hon'ble Court that retention of occupation by Smt Menda on the death of her husband was in no other capacity but as an heir It, therefore, cannot be said that the same principle applies in the present case As has been seen above the interest which was given to Smt Janki in compromise was not as an heir of her husband, therefore, she could not be deemed to have inherited the interest of her husband

7. It was then urged on behalf of opposite parties that even if S 174 applies the opposite parties on the facts found being stepsons were entitled to succeed to her interest According to learned counsel the word 'son' includes 'stepsons' He maintained that the expression has been used because a woman cannot have two husbands The controversy stands concluded against respondent by numerous authorities It has been held that where the legislature uses the word 'son', and it deliberately omitted from it, stepson then it cannot be deemed to be included by process of interpretation In Ram Sanehi Lal v District Judge, (1978 All WC 721) (1978 All LJ 1235) a question arose whether a stepson was included in male lineal descent It was held that a stepson cannot be considered to be the son Reliance for this was placed on principles of Hindu Law by Mulla, 14th Edition Page 915

8. Now the question is who should be held entitled to the share of Smt Janki Neither petitioner nor opposite parties can succeed to her interest It was claimed by petitioner that Smt Janki surrendered her share in his favour And in any case he acquired rights by adverse possession No finding has been recorded on these questions It was not decided by Courts below as Smt Janki was held to be a limited owner In doing so the Courts below misdirected themselves The question to be decided was not whether Smt Janki had no right, but whether petitioner by virtue of being in possession or because of surrender deed executed in 1954 acquired any right in land in dispute

9. In the result this petition succeeds and is allowed The order passed by all the three authorities are quashed The trial Court shall decide the suit afresh on the question of adverse possession and surrender There shall be no order as to costs

Petition allowed

1981 ALL L J 1203

P N GOEL, J

D D Singh, Appellant v State of U P, Respondent

Criminal Appeal No 1056 of 1980, D/-16-9-1981

(A) Penal Code (45 of 1860), S 161 — Prevention of Corruption Act (1947), S. 5 (2) — Arrest of corrupt public servants red-handed — Arresting officer is duty-bound to procure presence of 2 or more independent and respectable witnesses (Criminal P C (1974), S. 100 (4)).

Statutory desirability in the matter of searches is that there should be two or more independent and respectable witnesses vide S 100 (4) Cr P C Apprehension of corrupt public servants red-handed is a serious matter In this matter it is all the more necessary that the arresting officer procures the presence of independent and respectable witnesses (Para 7)

Thus, where the arresting officer did not make any effort to secure the presence of independent, respectable/reliable witnesses at the time of the arrest of the accused and the recovery of the bribe money, the conviction of the accused under Section 161, I P C and S 5 (2) of the Prevention of Corruption Act (1947) could not be sustained (Para 7)

(B) Penal Code (45 of 1860), S 161 — Prevention of Corruption Act (1947), S. 5 (2) — Conviction of public servant under — Conviction based on testimony of arresting officer whose antecedents were doubtful — Reliance cannot be placed on the testimony — Conviction cannot stand (Evidence Act (1872), S 3.) AIR 1973 SC 498, Followed (Paras 7, 8)

Cases Referred Chronological Paras

AIR 1973 SC 498 1972 Cri LJ 1293 7

A D Giri, for Appellant, Addl Govt. Advocate, for Respondent

JUDGMENT — The decision of this case rests on a short point, viz whether the conviction of appellant D D Singh under S 161, I P C and S 5 (2) of the Prevention of Corruption Act 1947 can be sustained on the testimony of Shyam Behari Tripathi (P W 3), Deputy Super-

intendent of Police (Vigilance) and his Inspector Surya Bhan Singh (P W 4)

2 Chhedi Lal, Sohan Lal, Kanhaiya Lal and Mahabir were co-tenure holders of 5 plots 631, 632, 637, 625 and 638 of village Bara Sirohi Tehsil and district Kanpur In or about November 1975 Ram Lal, father of Bhagirath (P W 2) and his neighbour Munni Lal, father of Ram Kishan purchased half share of Chhedi Lal The other three tenure holders also wanted to sell their shares to Ram Lal On 16-9-1975 they made an application Ex Ka 13 to the Collector Kanpur for permission to sell the land Sohan Lal gave an affidavit (Ex Ka 14) in support of this application There is no material on record on which date this application was actually moved before the District Magistrate On the margin of the application there is order dated 10-11-1975 passed by the District Magistrate asking Tehsildar Kanpur to report at an early date It is said that this application reached the Tehsil There is no material on record to show that this application reached the Tehsildar It is, however, said that Bhagirath and Ram Krishna met the appellant and he demanded an illegal gratification of Rs 100/- for giving report Bhagirath had given Rs 100/- to the appellant in connection with the application of Chhedi Lal for permission to sell his half share in the land Bhagirath was not in a mood to give further illegal gratification to the appellant Therefore, he made a complaint to the Superintendent of Police (Vigilance) on 16-1-1976 Sri I P Bhatnagar, Superintendent of Police (Vigilance) directed Shyam Behari Tripathi, Deputy Superintendent of Police (P W 3) to lay trap On 17-1-1976 Shyam Behari Tripathi took the statements of Bhagirath and Krishna Kumar i e Ram Krishna Then he arranged to lay a trap on 19-1-1976 during office hours It is said that on 19-1-1976 Bhagirath gave 3 currency notes of Rupees 20/- each and 4 currency notes of Rs 10/- each initialled by Shyam Behari Tripathi and treated with phenolphthalein powder to the appellant inside the room of the appellant in the Tehsil The appellant kept the same in the upper pocket of his coat Shyam Behari Tripathi then arrested the appellant and recovered the currency notes in question The hands and coat of the appellant were washed in sodium carbonate solution The wash became pink At the time of the apprehension of the appellant and recovery of the currency notes Bhagirath, Krishna Kumar, Durga Prasad and Deo Singh members of the public and Surya Bhan Singh and Nathu Singh Inspector (Vigilance) were present Recovery memo Ex Ka 6 was prepared on the spot Thereafter the appellant was taken to the police station Kotwali Kanpur where on the basis of the recovery memo Brij Raj Tewari Head constable (P W 5) prepared check report The appellant was handed over to the police

3 Sri R N Pandey Inspector (Vigilance) investigated into the case after obtaining requisite sanction The appellant was challaned Sri R N Pandey died before the commencement of the trial before the Special Judge Kanpur

4 The prosecution examined Bhagirath Shyam Behari Tripathi and Surya Bhan Singh only On the other side Mohammad Jaseem, Mahtab Singh Establishment Clerk District Magistrate Kanpur and Sri Shital Singh Parihar Naib Nazir, Tehsil, Kanpur (D Ws 1 to 3) were examined

5 Bhagirath did not at all support the prosecution version He did not even state that the appellant demanded illegal gratification from him He further stated that complaint to the Superintendent of Police was dictated by Shyam Behari Tripathi He was confronted with his statement recorded by the investigating officer He did not admit to have given the said statement

6 The prosecution did not examine Krishna Kumar Deo Singh and Durga Prasad on the ground that they had been won over by the appellant In this way on behalf of the prosecution there remained the testimony of Shyam Behari Tripathi and his Inspector Surya Bhan Singh

7 Facts and circumstances appearing on the record against the testimony of Shyam Behari Tripathi may be indicated.

(1) Shyam Behari Tripathi directed his Inspector Nathu Singh to call witnesses He brought Durga Prasad and Deo Singh It will be noticed that Bhagirath is resident of Vishnupuri police station Nawab Ganj, Kanpur, Durga Prasad and Deo Singh are residents of Gutariya Bazar, Kanpur They are not residents of the locality of Bhagirath They were not brought by Bhagirath before Sri Shyam Behari Tripathi The prosecution did not examine Nathu Singh, who had brought these witnesses There is no material to show that Durga Prasad and Deo Singh were respectable witnesses Statutory de-

sirability in the matter of searches is that there should be 2 or more independent and respetcable witnesses vide Section 100 (4), Cr P C Apprehension of corrupt public servants red-handed is a serious matter In this matter it is all the more necessary that the arresting officer procures the presence of independent and respectable witnesses In the present case, there is no material even to show the profession of Durga Prasad and Deo Singh Shyam Behari Tripathi has no doubt stated that he had in fact made inquiry about their antecedents Admittedly he made no writing about it In the recovery memo he did not write the profession of these two witnesses Then he showed complete ignorance if Durga Prasad was working in the soap factory of one Narain Singh He also showed ignorance if Durga Prasad was a rickshaw driver Shyam Behari Tripathi then showed complete ignorance whether Durga Prasad and Nathu Singh Inspector were witnesses in a case of the year 1967, State v Mammoo It may be repeated that the prosecution did not examine Nathu Singh Inspector who would have disclosed the respectability of Durga Prasad and Deo Singh It is thus evident that Shyam Behari Tripathi made no effort/attempt to secure the presence of independent, respectable/reliable witnesses to be present at the time of the arrest of the appellant and the recovery of the bribe money

It is further pertinent to remark that the prosecution did not examine Durga Prasad and Deo Singh simply on the ground that they had colluded with the appellant Thus is a bald statement made by Shyam Behari Tripathi It means that even Durga Prasad and Deo Singh are not prepared to support the case of the prosecution

(2) Postive case of the prosecution is that application Ex Ka 13 dated 16-9-1975 moved by Sohan Lal, Kanhaiya Lal and Mahabir for permission and on which the District Magistrate had passed order on 10-11-1975 had reached the Tehsil and that on the date of the arrest of the appellant, this application was at the table of the appellant or in the office of the appellant and Shyam Behari Tripathi took it into his custody at that very time. Shyam Behari Tripathi made mention about it in the recovery memo Except for the statements of Shyam Behari Tripathi and Surya Bhan Singh there is no evidence worth the name that the application Ex Ka 13 had reached Tehsil Kanpur prior to the date of occurrence The prosecution could easily produce an official of the Tehsil to state that this application had been received in the Tehsil and was handed over to the appellant for necessary action Moreover the register of receipt of records etc of the Tehsil could be produced to show that the application had been received in Tehsil prior to the date of occurrence On the other side there is positive statement of Mehtab Singh Establishment Clerk (D W 2) that the application Ex Ka 13 and its accompanying affidavit Ex Ka 14 were taken from him in the evening of the date of occurrence He has stated that the serial number of this application was 1221 and that it was entered in the relevant register on 7-11-1975 and that it had not been sent to the Tehsil prior to the date of occurrence He has further stated that the police officer forced him to write serial number 996 on this application Ex Ka 13 and to find it out Application No 996 was moved on 20-9-1975 and it was moved by one Chhedi Lal vide entry in the register Ex Kha 1 This application had already been disposed of According to Mehtab Singh he could not find the said application Therefore, he struck off No 996 from the application Ex Ka 13 The learned Special Judge has not believed Mehtab Singh because he made no compliant to the District Magistrate in writing that application Ex Ka 13 and affidavit Ex Ka 14 were forcibly taken from him in the evening of the date of occurrence by a police officer Mehtab Singh stated that he had made verbal complaint about it to the Office Superintendent

There are two broad facts which indicate that there is truth in the statement of Mehtab Singh They are

(1) From the date of the occurrence up to the time of the trial application Ex Ka 13 remained in the possession of Shyam Behari Tripathi (P W 3) and subsequently in the possession of the investigating officer, an officer of the Vigilance Department In the title of the application No 1221 is clearly written If this application was numbered 996, No 1221 could not have appeared in the title

(2) On the margin words and figures "With P No 996" are written These words and figures have been struck off This clearly lends support to the statement of Mehtab Singh

The position that follows is that Shyam Behari Tripathi has wrongly stated that the application Ex Ka 13 was with the appellant at the time of his apprehension on 19-1-1976

(3) Positive case of the prosecution is that just before accepting the bribe money from Bhagirath the appellant started writing his report The appellant had not completed the report Just after apprehending the appellant Shyam Behari Tripathi took that incomplete report in his possession Ex Ka 15 Contention of the appellant is that the paper Ex Ka 15 was forcibly obtained from him by Shyam Behari Tripathi As the application Ex Ka 13 had not reached the appellant up to the time of occurrence, he could not have written the paper Ex Ka 15

In this connection it will be noticed that this paper was not handed over at the police station Kotwali at the time of the lodging of the report

In the above circumstances there appears truth in the statement of the appellant that this document Ex Ka 15 was forcibly obtained from him by Shyam Behari Tripathi

(4) It is obvious that Shyam Behari Tripathi and Surya Bhan Singh are interested in the success of the trap They are obviously interested in obtaining the conviction of the appellant Shyam Behari Tripathi had laid trap and arrested Dr B M Singh Nathu Singh Inspector was with him at that time The case ended in acquittal and the trial Judge made certain observations against him These observations led to an inquiry against him In case of Ram Prakash Arora v State of Punjab AIR 1973 SC 498 the Supreme Court observed (at p 501)

"The most regrettable feature of the case is that the raiding party was headed by the D S P about whose conduct in investigation in another case serious strictures had been passed He associated himself with Inspector Rajender Lal and Arjan Singh whose antecedents were equally doubtful They were not even produced as witnesses at the trial It is highly incomprehensible why the D S P did not associate some respectable person or persons whom he could take into confidence rather than take with him Inspector Rajendra Lal and Arjan Singh."

8. Taking into consideration the broad aspect of the case discussed above, I am of the opinion that reliance cannot be placed on the testimony of Shyam Behari Tripathi, the Dy S P and his Inspector Surya Bhan Singh (P Ws 3 and 4)

9 It will be noticed that the appellant examined two other witnesses Mohammad Jaseem and Shital Singh Parihar (D Ws 1 and 3) Mohammad Jaseem is Collection Amin After performing his duty in the morning hours he used to come to Tehsil at about 2 P M He has stated that on the date of occurrence as soon as the appellant went into his court-room, 8 or 9 persons entered into his court-room, that then the appellant cried out as to who they were and why they were taking his search, that on hearing the cries of the appellant he along with Surendra Singh went into the room of the appellant and found that Shyam Behari Tripathi had apprehended the appellant, that the appellant was not putting on coat, that the coat was hanging at the back of his chair and that the currency notes were recovered from his coat This statement creates a doubt as to the truth of the statement of Shyam Behari Tripathi

10 Shital Singh Parihar is Naib Nazir at Tehsil Kanpur He has simply deposed that the appellant had made reports in writing against his own peon Ram Sanehi as well as against peon of the Tehsildar i e Azim Khan His evidence is of no relevance

11 Having taken into consideration the entire material on record, it is held that there is no reliable evidence on behalf of the prosecution and that the case set up by the prosecution has not been proved against the appellant

12 Consequently the appeal is allowed and the conviction and sentence of the appellant under S 161, I P C and S 5 (1) (d) read with S 5 (2) of the Prevention of Corruption Act recorded by the Special Judge Kanpur on 2-5-1980 are set aside

13 The appellant is on bail to which he shall not surrender His bail bonds are discharged

Appeal allowed

1981 ALL L. J. 1207

DEOKI NANDAN, J

Prabhu Sahu, Appellant v Thakur Krishnaji and Radhikaji and others Respondents

Second Appeal No 811 of 1971, D/-24-8-1981 *

Hindu Succession Act (30 of 1956), Sections 30, 6, 14 — Shebaiti rights —Devolution of — Governed by Act — Testamentary disposition by Hindu — Co-shebaits can appoint their successors by will ((i) Succession Act (1925), S. 7, Sch. 3 Para 1 — (ii) Hindu Law — Religious endowments — Succession).

Shebaiti rights are heritable property and the devolution thereof is governed by the rules of Hindu Law applicable to any other species of secular property and the law which now governs the matter is the Hindu Succession Act AIR 1951 SC 293, AIR 1969 SC 569 and AIR 1979 SC 1682, Foll (Para 16)

Shebaiti rights though property, could not, and cannot be alienated inter vivos whether for consideration or otherwise The only kind of disposition of shebaiti rights by an Act inter vivos that has been allowed was by an act of relinquishment in favour of a co-shebait or in favour of the next presumptive heir to the shebaiti rights That was not alienation inter vivos It was regarded to be an acceleration of succession Nature of testementary disposition under Hindu Law pointed (Paras 18, 17)

The restrictions imposed by Hindu Law on the powers of the owners of the property to dispose of them by an act inter vivos have largely been done away with by the provisions of Sections 6 and 14 of the Hindu Succession Act Shebaiti rights or shebaitiship being heritable property like any other secular property, and Hindu Succession Act being applicable thereto as the new Code of the Hindu Law of Succession, it seems impossible to import the restrictions imposed on the free alienation of shebaiti rights by an act inter vivos into the scheme of the law of succession now applicable to the same (Para 19)

Taking a broad view of things and having regard to the necessity of preservation of the worship of a deity in the case of failure of heirs of a shebait, or in case the heirs of a shebait on an intestacy happen to be incompetent, it would subserve the public interest best if the law of testamentary succession is held to be fully applicable to the property of a Hindu in the nature of the shebaitship of deity Thus, the co-shebaits of a religious endowment of a Hindu could have appointed their respective successors by will in accordance with the law of testamentary succession applicable to Hindus under the Hindu Succession Act, 1956, read with the Succession Act, 1925 Distinction between office of trustee and that of shebaits pointed (Paras 20, 22, 27)

Cases Referred	Chronological Paras
AIR 1980 NOC 123 (All)	16
AIR 1979 SC 1682	16
1979 All LJ NOC 70 (All)	13, 14, 16
AIR 1969 SC 569	16
1951 All LJ 132 AIR 1951 SC 293	16

JUDGMENT — This is a defendant's Second Appeal The appellant Prabhu Sahu was the second defendant in the suit On his death, his place has been taken by Basant Lal who was the third defendant and the sixth respondent, and is also one of the legal representatives of his father Vishwanath who was the fifth respondent and the first defendant in the suit The Plaintiffs-respondents, are (1) The Deity of Sri Thakur Krishnaji and Radhikaji installed in one of the houses in suit, namely, House C/15/64 of Mohalla Lallapura Kalan, Varanasi, (2) Mata Prasad, (3) Raghunath Prasad, and (4) Rani Khelawan, Mata Prasad and Raghunath Prasad claim to be the co-shebaits of the deity under the will of Bechan Sahu and Ram Khelawan dated the 13th November, 1959 Ram Khelawan was the fourth plaintiff-respondent It was stated before me that he died in the year 1978, though his name still stands as such in the memorandum of appeal His name shall be struck off, but that will not affect the maintainability of the appeal

2. The trial court had decreed the suit for recovery of Rs 114-90 P as arrears of rent against the first defendent Vishwanath, who was respondent No 5 in the appeal in this Court, with proportionate costs, but had dismissed the claim for his ejectment from the two rooms described at the foot of the plaint, him, for recovery of mesne profits against

*Against Judgment and decree of Ganesh Dutt Dubey, 1st Addl Civil J Varanasi, D/-26-9-1970

and the claim for declaration of title to the property in suit in favour of the plaintiffs Nos 2 to 4 against the defendant No 2 namely deceased appellant Prabhu Sahu On the plaintiffs' appeal therefrom the lower appellate court modified the decree of the trial court and decreed the suit for ejectment of the first defendant Vishwanath and third defendant Basant Lal from the said two rooms and for mesne profits in respect of the same The lower appellate court further declared by its decree that the defendants Nos 2 and 3, namely, Prabhu Sahu and Basant Lal are not the shebaits of the property in suit and have no concern with the same

3 Since the defendants Nos 1 and 3, namely, Vishwanath and Basant Lal, did not appeal from the decree for ejectment and for recovery of arrears of rent and mesne profits against them, that part of the decree should be deemed to have become final against them, and the appeal by Prabhu Sahu could be heard only against the decree declaring that the defendants Nos 2 and 3 were not the shebaits of the property in suit, although the whole of the decree has been challenged and sought to be set aside in his memorandum of appeal In the lower appellate court also, although Vishwanath defendant No 1 did not appeal from the trial court's decree for recovery of rent against him, Prabhu Sahu had appealed therefrom His appeal was dismissed by the lower appellate Court

4. Prabhu Sahu the second defendant and the sole appellant, having died during the pendency of the Second Appeal in this Court, his appeal against the declaration that he was not a shebait of the deity would also appear to have abated in so far as it concerned him personally, but Basant Lal the third defendant who has now been transposed as the appellant in his place, claims not only to have been a shebait jointly with Prabhu Sahu during his lifetime, but also the shebait after him as his heir and legal representative, and, appointed as such, by registered deed dated 18th October, 1965, executed by Prabhu Sahu, vide Paper No 33-Ka Since Basant Lal now claims to be the shebait of the deity and its property as the legal representative and heir of Prabhu Sahu, under that deed, the question whether Prabhu Sahu was one of the shebaits is a question which still survives for consideration in this Second Appeal

5. The endowment was created by Gopal Sahu who was undisputedly the owner of the property in suit by a deed dated 8th November, 1929, vide Exh 101 The deed recites the facts that Gopal Sahu was the sole owner in possession of an area of 9 biswas 10 dhurs Parjawat land bearing plot No 420 in Mohalla Lallapura, Mata Kund, Varanasi, that he had built two houses Nos 164 and 165 thereon and had installed the idols of Sri Thakur Krishnaji and Radhikaji therein and performed their sewa puja himself, that the remaining area was occupied by the houses of certain persons on Parjawat tenure and that he realised Parjawat from them The deed then goes on to recite that, apart from the said houses and the land, Gopal Sahu had another pucca house No 161 of Mohalla Lallapura, Varanasi, which he had purchased under a sale deed dated 27th April, 1889 and which was in his exclusive possession as his sole property The deed declares that all the said property was the self acquired property of Gopal Sahu, who, it was said, had attained the age of 60 years and often remained ill on account of old age and at the time of execution of the deed also he was unwell and did not know how long he would live

On the said premises, the deed declares that Gopal Sahu dedicated the said property, that is the houses Nos 164, 165 and 161 and land of plot 420 having an area of 9 biswas 10 dhurs along with the buildings thereon and the Parjawat rights therein, to Sri Thakur Krishnaji and Radhikaji installed in the shrine No 164 The terms of the endowment, as specified in the deed, were that ownership and possession of the dedicated property became vested in the said Thakurji from the date of the said deed and the executant no longer had any rights therein that so long as the executant was living he would himself perform sewa-puja of the said Sri Thakurji and manage the endowed property, and for managing the property after him, he appointed Bechan Sahu, Shanker and Murli sons of Mathura who were related to him like a grand-son (although he himself had no issue) and Ram Khelawan son of Gajadhar and Prabhu son of Munge as trustees to look after and manage the endowed property and to perform the sewa-puja of Sri Thakurji These terms are followed by certain directions details of which it is not necessary to mention here except for the one which said that Bechan Sahu

would live in house No 164 and himself perform sewa-puja of Sri Thakurji and in case he neglected to do so the trustees would be entitled to make him vacate the house and entrust the sewa-puja to a pujari, and the other direction which said that management of the endowed property and the sewa-puja of Sri Thakurji would be carried on in consultation and in accordance with the majority opinion of the trustees who would settle the accounts of income and expenditure by agreement between themselves The last clause of the deed said that the trustees would have no right to alienate the endowed property

6. It appears that Gopal Sahu survived for a few years after the said deed of endowment According to the finding of the lower appellate court, he died in or about the year 1935 The names of Sri Thakur Krishnaji and Radhikaji through the five trustees appointed by the said deed would appear to have been mutated in the Municipal records, vide Exts 1 to 94 It further appears that Bechan Sahu remained in effective management of the endowed properties and continued to perform the sewa-puja of the deities so long as he lived He died in October, 1960

7. Vishwanath the first defendant in the suit was a tenant of two rooms in the house forming part of the endowment He admits that he was admitted as a tenant by Bechan Sahu He appears to have been the brother-in-law (sister's husband) of Prabhu Sahu, the deceased appellant, and was the father of Basant Lal now substituted as the appellant

8. It appears that none of the trustees other than Bechan Sahu appointed by Gopal Sahu under the deed of endowment ever took any part in the management of the endowed properties, or the sewa-puja of the deities, and Bechan Sahu alone continued to shoulder the whole responsibility and to enjoy the entire benefit without any objection from his co-trustees whose names, however, continued to be recorded along with his name in the Municipal papers as the trustees of the endowed properties Bechan Sahu along with Ram Khelawan Sahu executed a registered deed which purports to be their will in respect of the shebaiti rights in the endowment This deed is dated the 13th November, 1959, and was presented for registration before the Sub-Registrar on the same date It recites the fact of the creation of the endowment and the appointment of the five trustees by Gopal Sahu by the said deed dated 8th November, 1929 It further recites that Prabhu had died some twenty years ago, that Bechan Sahu was particularly entrusted by the said deed of endowment with the duty of performing the sewa-puja and rag-bhog of the deities by living in house No 164 old and 15/64 new which he had been regularly performing, and that Shanker and Murli out of the said trustees had taken no interest in the management of the endowed properties and had maintained no connection therewith

Having said so much the deed states that after the death of Prabhu Sahu the executants alone were the de facto trustees and had the fullest right to manage the endowed properties but of them also Ram Khelawan was a resident of different Mohalla at Varanasi and was unable to perform the sewa-puja and rag-bhog of the deities while Bechan Sahu had become very weak due to old age and did not know when his end would come Under these circumstances, the deed goes on to declare that the executants in consultation with each other and in the interest of convenience and proper management of the endowed property and the proper performance of the sewa-puja and rag-bhog of the deities in accordance with the terms of the deed of endowment dated 8th November 1959, felt it necessary to entrust the same to Raghunath Prasad son of Bechan Sahu, who had been living with the latter in the house No C-15/64 and helping him in the performance of the Sewa-puja and rag-bhog of the deities, and Mata Prasad, who was the grand-son of Ram Khelawan, as the trustees after their death as their heirs, and do appoint them as such This is followed by certain directions as to the terms on which the appointment was made and the description of the endowed properties, which it is not necessary to reproduce here

9. Trouble seems to have been started after the death of Bechan Sahu First there was an exchange of notices in the year 1963 between Raghunath Prasad, the son of Bechan Sahu, who appears to have taken over the duties of performance of the sewa-puja of the deities and of managing the endowed properties after his death, and Vishwanath who was the tenant of two rooms in the endowed property The tenancy of the two rooms was thereafter purported to be terminated by a notice dated 25th August, 1964 which

was served on behalf of the deity by Mata Prasad and Raghunath Prasad both Undisputedly a sum of Rs 30/- was paid by Vishwanath to Raghunath Prasad as rent during this period

10 This was followed by a deed executed by Prabhu Sahu on 18th October, 1965 and presented for registration on the same date After reciting the facts about the creation of the endowment by Gopal Sahu, by the deed dated 8th November, 1929, and its terms, this deed executed by Prabhu Sahu goes on to recite that after the death of Gopal Sahu the intention of Bechan Sahu and Ram Khelawan trustees became dishonest and Bechan Sahu did not take any interest in the Sewa-puja of the deities but was interested only in deriving illegitimate gain out of the endowed properties, with the result that he was removed from the trusteeship by the other trustees and he ceased to have all connection with the deities and the endowed properties, but he continued to raise disputes Ultimately he died Shanker did not also take any interest in the management of the endowed properties According to this deed, the result was that only the executant continued to perform the sewa-puja, rag-bhog of the deities and to look after the endowed properties He had become sixty years of age and was unable to look after the endowed property all alone and it was accordingly necessary to have some one else as a trustee with him

He accordingly appointed Basant Lal son of Vishwanath who was a sister's son by relationship and whose father Vishwanath was a tenant of a portion of house No 164 and who was also for some time past giving the executant all help in performing the sewa-puja, rag-bhog and festivals of the deities and managing the endowed property, as the managing trustee, as also the trustee after him as his legal representative Of the terms of appointment, the two important terms are (1) that from the date of the execution of that deed, Basant Lal would be one of the trustees for arranging the sewa-puja and rag-bhog and festivals of the deities and management of the endowed properties with full powers of management of the trustees, and (2) that after the death of the executant, Basant Lal would also be the trustee in place of the executant as his legal representative with power to appoint a managing trustee to help him. It is not necessary to reproduce the other terms of this deed.

11. As noticed earlier, the decree for recovery of rent, mesne profits and possession by the ejectment of Vishwanath and Basant Lal from the two rooms of the endowed property was not challenged either by Vishwanath, the deceased tenant or by his son Basant Lal, who were defendants Nos 1 and 3, and against whom alone the decree had been passed. It was challenged by Prabhu Sahu alone He was not the tenant nor was that decree passed against him He claimed to be one of the trustees, or speaking technically, one of the co-shebaits of the deity who owned the endowed property, in a portion of which the two rooms were occupied by Vishwanath and his son Basant Lal as tenants If Prabhu Sahu was truly one of the co-shebaits, the decree for rent, mesne profits and ejectment against Vishwanath and Basant Lal was in his favour, inasmuch as it was in favour of the deity and as a shebait, he could only represent the interest of the deity He could not advance any personal cause against the interest of the deity and, at any rate, if there was any cause to be advanced against the decree for rent, mesne profits and ejectment, it was for Vishwanath and Basant Lal to do that. Prabhu Sahu could not have appealed from the decree against Vishwanath and Basant Lal, defendants Nos 1 and 3 respectively, for rent, mesne profits, and ejectment

That part of the decree must be deemed to have become final against them Basant Lal on transposition as the appellant in place of Prabhu Sahu on the basis of his claim of being a trustee as the legal representative of Prabhu Sahu stands in no better position as an appellant as such. The other relief, in respect of [illegible] lower appellate Court has declared that the defendants Nos 2 and 3 namely Prabhu Sahu and Basant Lal are not the shebaits of the property in suit and have no concern with the same, was claimed in the plaint in the following terms, namely, that it be declared that the plaintiffs Nos 2 to 4 are alone the managing trustees of the endowed property described at the foot of the plaint and are in possession over the endowed properties as managing trustees on behalf of the first plaintiff and that the defendants Nos 2 and 3 have no concern with the endowed properties The trial Court found that the recital in the will dated the 13th November, 1959 of Bechan Sahu and Ram Khelawan, Ext 121, that Prabhu Sahu

was dead, was a false recital and, therefore, "the plaintiffs Nos 2 and 3 cannot be declared to be the sole managing trustees of the trust property", that the deed of endowment dated the 8th November, 1929 did not give the trustees any power to appoint their successor and "in the absence of any such provision Bechan Sahu and Ram Khelawan had no right to make a will with regard to the trust property in favour of his son and grandson respectively"

The trial Court went on to hold that "even Bechan Sahu deceased from whom the plaintiffs Nos 2 and 3 alleged to have derived their title was also not a managing trustees", although "it is true that he was doing all the work connected with the trust and he was in possession of the trust property" The further finding recorded by the trial Court on the basis of the evidence on record is that after the death of Bechan Sahu, the plaintiffs Nos 2 and 3 alone were managing the endowed property and they were undoubtedly de facto trustees, but, according to the trial court, "in face of the rightful trustee namely Prabhu, they cannot be held to be the managing trustee of the trust property so long as Prabhu is not removed by a competent court from the post of trusteeship" As regards the claim of the third defendant, namely, Basant Lal, the trial Court held that he could not be held to be a trustee of the trust property, inasmuch as Prabhu, who had appointed him as a trustee in his place "had no right to do so" The trial Court held the suit for recovery of rent and ejectment etc, by the plaintiffs Nos 2 and 3 on behalf of the deity to be maintainable, but in the view that it took of the effect of the fact that all the trustees had not joined in serving the notice dated 25th August, 1964,, by which the tenancy was purported to be terminated, it decreed the suit only for recovery of arrears of rent in the sum of Rs 114-90 P. and dismissed it in respect of the relief for ejectment and mesne profits The relief for declaration was, on the finding reached by the trial court, bound to be dismissed, and was dismissed accordingly

12. As already noticed above, there were two appeals before the lower appellate court—one by the plaintiffs and the other by Prabhu Sahu The first finding arrived at by the lower appellate court on the plaintiffs' appeal was against the plaintiff-appellant It held that Bechan Sahu was not the sole shebait and the other four persons named in the deed of endowment dated 8th November, 1929 as trustees were not mere advisors.

13 According to the lower appellate court, the main contention of the plaintiffs in their appeal before it was that Prabhu Murli and Shankar never accepted the office of Shebaitship that they remained out and disinterested throughout and that even Ram Khelawan, the fourth plaintiff, remained disinterested It was pointed out to the lower appellate Court that the names of all the five co-shebaits were entered in the Municipal records over the houses in suit and it was urged for the defendants on that basis that if Prabhu and others were not taking interest in the shebaiti rights their names would not have been entered in the Municipal records The lower appellate court negatived this contention by accepting the explanation of Mata Prasad who it was said was a lawyer's clerk by profession, the explanation being that he had taken the application for mutation to Prabhu, Murli and Shanker for their signatures but they refused to sign thereon, whereupon he got the application signed by Bechan Sahu alone and moved it as such and since the names of all the five were mentioned in the deed of endowment, the application for mutation was drafted on behalf of all the five of them and the names of all of them were recorded consequently

This allegation was denied by Prabhu Sahu in his statement on oath A copy of that application or any other record to show the circumstances in which the names of all the five were recorded as the trustees of the deity in the place meant for recording the name of the owner of the endowed property in the Municipal records, has not been produced From the documents produced, vide Exts 1 to 94, it does appear that the names of all the five persons stood recorded since before 1940, for the first receipt on record, issued by the Municipal Board, Ext 1, bears the date 17th February, 1940, Mata Prasad claimed to have been appointed to shebait under the will dated the 13th November, 1959 of Bechan Sahu and Ram Khelawan, as the latter's heir The will declares, though falsely, that Prabhu Sahu had died about 20 years ago. The will was duly registered before the Sub-Registrar and not being a secret document and Mata Prasad being a lawyer's clerk he should be presumed to have had knowledge of its contents The

allegation that Prabhu Sahu had died more than twenty years ago was false, and was made in order to effectuate the appointment of Mata Prasad as one of the trustees of the endowed property

The lower appellate court was, under the circumstances, not right in accepting the said explanation trotted out by Mata Prasad at its face value and holding on its basis that the entry of the names of all the five co-shebaits in the Municipal records did not indicate that Prabhu Sahu had become a co-shebait of the deity on the death of Gopal Sahu under the deed of endowment dated 8th November, 1929 Further, the lower appellate Court would appear to have mixed up the two ideas of non acceptance of a trust and relinquishment of office by a shebait While it does appear from the evidence on record that Prabhu Sahu did not take any interest in the sewa-puja or rag-bhog of the deity or in the management of the endowed property after the death of Gopal Sahu, and the allegations made by Prabhu Sahu to the contrary in the deed executed by him on 18th October, 1965 are false it cannot be said on that basis that Prabhu Sahu had initially refused to accept the office of a co-shebait The finding of the lower appellate Court that for more than thirty years at least Prabhu Sahu had not taken any interest in the management of the debutter is most probably right It is also correct that thirty years is a long period of time, but the element of office and property being inseparably inter-linked with each other in the concept of shebaitship under the Hindu Law, it is not possible to say with the lower appellate Court that these facts lead to the conclusion "that he had not accepted the office of the shebait"

The duties of a shebait and the sewa-puja and raghbog of the deity were being attended to during all this period by Bechan Sahu, and that was, partly at least in accordance with the directions of the founder Gopal Sahu as expressed in the deed of endowment Prabhu Sahu cannot be blamed for not meddling in the management of the debutter After all it appears to have been a private trust, The beneficiaries of the endowment could only be the heirs of Gopal Sahu and it being so apparent that he left no heirs as such, the trustees appointed by him could be said to be not only the co-shebaits but also all the co-beneficiaries of the endowment created by him. Their duty was to maintain the worship of the deities That could not have cost much money, and, not only to enjoy the spiritual benefit derived by the worship of the deities, but also to enjoy the balance income of the endowed properties that remained after meeting the necessary expenses of maintaining it and the worship of the deity, as the Prasad of the deity Thus was the property aspect of the office of the co-shebait which Prabhu Sahu did undoubtedly come to possess initially under the deed of endowment dated the 8th November 1929 Prabhu Sahu could not have transferred the office coupled with the benefit attached to it, by an act inter vivos, nor could he have sold it or transferred it for valuable consideration He could have, if he so desired, only relinquished it in favour of one of his co-shebaits Or he could have appointed his successor shebait by his will

As to the last proposition, the law before the enactment of the Hindu Succession Act, 1956, was that succession to shebaitship could not be appointed by will, unless it be the will of the founder who first created the endowment by dedicating property to a deity, property over which he had absolute powers of disposition But, on a review of the authorities on the point, I have in Second Appeal No 626 of 1976 (Ladli Radha Chandra Madan Gopal Ji Maharaj v Shambhu Charan) decided on 2nd March 1979 (1979 All LJ NOC 70), adopted the view that the Hindu Succession Act, 1956, governs the succession of property in the nature of shebait rights possessed by a Hindu, and in the case of a Hindu widow the limited estate possessed by her in shebait rights must be deemed to have fructified into full ownership under Section 14 of that Act and she must be held to have become a fresh stock of descent in respect thereof, to be taken on her death intestate by her heirs prescribed by Section 15 in accordance with the manner of distribution prescribed by Section 16 thereof and the other general rules of intestate succession prescribed by the other provisions of the Act, and that shebaitship was property of a nature capable of being disposed of by testamentary succession under Section 30 thereof It was not necessary for the purposes of that case to go into the wider question whether a shebait may bequeath the shebait rights to one or more of his heirs to the exclusion of any of them In that case, the directions of the founder

as to the devolution of shebaitship were found to have exhausted themselves when his widow became the shebait and she had no male issue In this situation, it was held that she could have lawfully made a testamentary disposition of the shebaiti rights possessed by her

14 That wider question, which did not arise and was not decided in that case (Second Appeal No 626 of 1976 Ladli Radha Chandra Madan Gopal Ji Maharaj v Shambhu Charan) (1979 All LJ NOC 70), does arise in the present case One feature of the present case may, however, be noticed, At the time when Bechan Sahu and Ram Khelawan executed their will purporting to appoint the plaintiffs Nos 2 and 3 as their successor shebaits, all their co-shebaits were alive, if the rules of joint tenancy were to be applied, the shebaiti rights would devolve by survivorship first among the co-shebaits one after the other, and then on the heirs of the last surviving one among the shebaits But it is not easily possible to apply the rule of joint tenancy as it is unknown to Indian law except in the case of Hindu joint families governed by the Mitakshara The parties in this case may be presumed to be Hindus governed by Mitakshara, nevertheless the corner-stone of a Mitakshara coparcenary is the acquisition of interest by birth in paternal property The co-shebaits in the present case did not acquire by birth any interest in the shebaiti rights which they possessed, inasmuch as they were appointed co-shebaits by Gopal Sahu to succeed as such after his death The shebaiti rights were thus their saprathibandh-daya (obstructed heritage) and not apratibandha-daya (unobstructed heritage) The co-shebaits could not, therefore, be said to have held the shebaiti rights as joint tenants, and must be deemed to have held the same as co-tenants having a distinct and equal share in the same It follows that each one of the five co-shebaits appointed by Gopal Sahu had a 1/5th share in the property in the nature of shebaitship of the deity And the respective heirs of each one of the co-shebaits were entitled to inherit the 1/5th share of the co-shebait to whom they happened to be heir

15. The question is whether any of the co-shebaits could dispose of his 1/5th share in the shebaiti by his will and whether in doing so he could appoint a person who was not his heir if he had died intestate, or to a particular one or more of his heirs to the exclusion of others

16 For the reasons given by me in the judgments in Second Appeal No 626 of 1976 (Ladli Radha Chandra Madan Gopal Ji Maharaj v Shambhu Charan) (1979 All LJ NOC 70) and in Second Appeal No 1940 of 1977 (Kalyan Das v Rambir Das) (AIR 1980 NOC 123 (All)), it can be said with certainty that the provisions of the Hindu Succession Act, 1956, do apply to the devolution of shebaiti rights on the death of a Hindu as they apply to all his secular property It is indisputable in view of the authorities noticed in the said two judgments, particularly the three decisions of the Supreme Court in Angurbala Mullick v Debabrata Mullick (AIR 1951 SC 293), Chokalinga Sethurayar v Arumanayakam (AIR 1969 SC 360) and Profulla Choron Requittee v Satya Choron Requittee (AIR 1979 SC 1662 Paragraphs 20, 21 and 22) that shebaiti rights are heritable property and the devolution thereof is governed by the rules of Hindu Law applicable to any other species of secular property and the law which now governs the matter is the Hindu Succession Act Section 30 thereof provides as follows —

"30 Testamentary succession — Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus

Explanation— The interest of a male Hindu in Mitakshara coparcenary property or the interest of a member of a tarwad tavazhi, illom, kutumba or Kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this sub-section"

17 According to S 57 of the Succession Act, 1925 read with para 1 of the Sch III thereto, nothing contained in that Act authorised a testator to bequeath property which he could not have alienated inter vivos, or to deprive any person of any right of maintenance of which he could not deprive him by will The two well known kinds of property which a Hindu could not have alienated inter vivos were the undivided interest of a male Hindu in coparcenary property

governed by the Mitakshara and the Hindu Women's limited estate In order to enable Hindu males to make a valid testamentary disposition of their undivided interest in coparcenary property, and in the case of Hindu women of the property possessed by them as their limited estate besides the unequivocal declaration by the Explanation to S 30, that the interest in coparcenary property could be disposed of by will, Sections 6 and 14 of the Act make it possible to do so in the case of a Hindu male by converting his undivided interest in coparcenary divided into a share equal to that which would have been allotted to him if a partition had taken place immediately before his death, and in the case of women by converting their limited estate in property possessed by them into their full ownership The provisions of Ss 6 and 14 of the Act make the rules of intestate and testamentary succession applicable speaking generally, to the undivided interest in coparcenary property of Hindu males, and to the limited estate in property possessed by Hindu Women

A Hindu male could not have alienated inter vivos his undivided interest in coparcenary property governed by the Mitakshara, and could not have, therefore, made a valid testamentary disposition thereof Such interest did not devolve by succession strictly so called but devolved by survivorship on the surviving members of the coparcenary Section 6 of the Act makes its devolution by testamentary or intestate succession under the Act possible, in cases where a coparcener dies leaving him surviving at least one of the eight female relatives, or the one male relative who claims through a female, specified in Class I of the Schedule, by providing that the interest of the coparcener dying shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death In the case of females, Section 14 converted the property possessed by them as their limited estate into full ownership The result was that the undivided interest of a Mitakshara coparcener became capable of being separate property capable of being alienated inter vivos, immediately before his death. There could be no doubt that a female Hindu could alienate inter vivos all property of which she became a full owner under S. 14 (1) of the Act Thus so far as secular property is concerned, a Hindu could lawfully make a testamentary disposition of it in most cases, the exceptions being the undivided interest in the Mitakshara coparcenary of a male Hindu who did not leave him surviving any of the eight female heirs, or the one male relative claiming through a female specified in Class I of the Schedule, or a female Hindu who continues to hold a restricted estate in property under Section 14 (2) of the Act

18 Shebaiti rights though property, could not, and cannot be alienated inter vivos whether for consideration or otherwise The only kind of disposition of shebaiti rights by an act inter vivos that has been allowed was by an act of relinquishment in favour of a co-shebait or in favour of the next presumptive heir to the shebaiti rights That was not alienation inter vivos It was regarded to be an acceleration of succession The question is whether a Hindu could by virtue of the provisions of the Hindu Succession Act make a valid testamentary disposition of shebaiti rights possessed by him although that Act does not alter the inalienable character of the property in the nature of shebaitship of Hindu religious endowment

19 The rule, prescribed by paragraph 1 of the Schedule III to the Succession Act, 1925, to the effect that nothing contained therein authorised a testator to bequeath the property, which he could not have alienated inter vivos relates not to the nature of the property as such, but to the powers of disposition enjoyed by its owner The restrictions imposed by Hindu Law on the powers of the owners of the property to dispose of them by an act inter vivos have largely been done away with by the provisions of Sections 6 and 14 of the Hindu Succession Act Shebaiti rights or shebaitship being heritable property like any other secular property, and Hindu Succession Act being applicable thereto as the new Code of the Hindu Law of Succession, it seems impossible to import the restrictions imposed on the free alienation of shebaiti rights by an act inter vivos into the scheme of the law of succession now applicable to the same

The object of those restrictions on alienation of shebaiti rights was to properly continue to maintain the service, of the deity by preventing an imprudent shebait from improperly alienating the endowed property by the device of

alienating his shebaitn rights for consideration or for corrupt motives Moreover, even in the case where a man appoints his chosen successor by his will, and in the process of doing so even chooses to disinherit his heir or heirs on an intestacy, the property cannot be said to pass or to be conveyed to the heir appointed by the will, by the testator's act of executing the will in his lifetime, but it passes on his death by the operation of the law of succession, which prescribes, not only the heirs of a person who succeed to his property on an intestacy, but also prescribes the rule that a man may appoint his successor by will The devolution of property in such a case is effected on death by and in accordance with the law of testamentary succession.

20 I may also add in this context that the law of testamentary succession was before the advent of the Britishers in India unknown to the Hindus or to their smriti law Nevertheless, it has, by gradual stages, which it is unnecessary to recount in this judgment, come to be applied to all Hindus and to all the property held by them, by the Hindu Succession Act, 1956 Taking a broad view of things and having regard to the necessity of preservation of the worship of a deity in the case of failure of heirs of a shebait, or in case the heirs of a shebait on an intestacy happen to be do-nothings or incompetent, it would subserve the public interest best if the law of testamentary succession is held to be fully applicable to the property of a Hindu in the nature of the shebaitship of a deity, even if the doing so is regarded to be judicial law making I say so because of the rule prescribed by sub-section (2) of Section 37 of the Bengal Agra and Assam Civil Courts Act, 1887, which runs as follows —

"37 Certain decisions to be according to personal law— Where in any suit or other proceeding it is necessary for a civil Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Muhammedan Law in cases, where the parties are Muhammedans, and the Hindu Law in cases where the parties are Hindus, shall form the rule of decision except in so far as such law has, by legislative enactment, been altered or abolished

(2) In cases not provided for by sub-section (1) or by, any other law for the time being in force, the Court shall act according to justice, equity and good conscience "

21. And to me, it seems equitable and just to extend and apply the law of testamentary succession to property in the nature of shebaitship of a deity

22. I, therefore, hold that in the case in hand, either of the five co-shebaits appointed by Gopal Sahu could have appointed their respective successors by will in accordance with the law of testamentary succession applicable to Hindus under the Hindu Succession Act, 1956, read with the Succession Act, 1925

23. The two documents material in this context, namely, the will dated the 13th November, 1959 of Bechan Sahu and Ram Khelawan (Ext 121) and the deed of appointment of a trustee in execution of power, executed by Prabhu Sahu on 18th October, 1965 have already been noticed in his judgment While there is more difficulty in reading the latter document executed by Prabhu Sahu as a will, nevertheless, the second one of the terms of its appointment appointing Basant Lal as the trustee in place of the executant, namely, Prabhu Sahu, after his death, could be read as an appointment by the will of Prabhu Sahu The document is registered and appears, on its face, to be attested by two witnesses But even the proviso to Section 68 of the Evidence Act does not exempt the calling of an attesting witness in proof of the execution of a will which has been registered in accordance with the Registration Act, 1908, although its execution by the person, by whom it purported to have been executed, is not specifically denied

In the present case, however, Prabhu Sahu himself appeared as D W 3 and not only admitted, but specifically proved the due execution and the attestation of the document The genuineness of the document not having been questioned and the document having been proved in the aforesaid manner by the executant himself during his lifetime, it may be taken to have been only proved in accordance with law, (See Section 70, Evidence Act). The question is whether the second term thereof under which Prabhu Sahu purported to appoint Basant Lal as the trustee in his place as his legal representative after his death, could operate or be given effect to as the will of Prabhu Sahu

24. The question is not free from difficulty But it appears to me that with

the knowledge of the law applicable to the devolution of shebaitship of a deity, as interpreted by the Courts at the time when the document was executed. Prabhu Sahu and, his advisors must have adopted the device of purporting to appoint Basant Lal as trustee in execution of power, inasmuch as the validity of appointment of a shebait by will was considered extremely doubtful However, the document does in unequivocal terms express the intention of Prabhu Sahu to make Basant Lal a shebait of the deity in his place, in his lifetime and afterwards both Of course, so long as Prabhu Sahu was alive, the document did not confer on Basant Lal any title to the shebaiti, but Prabhu Sahu, having died in the course of pendency of the Second Appeal in this Court and his place as an appellant having been allowed to be taken by Basant Lal, mainly on the basis of the second term of appointment contained in that document, namely, that he was appointed shebait in place of and as the legal representative of Prabhu Sahu after his death, I may proceed on the assumption that the document is a will in so far as it appoints Basant Lal as the shebait in place of and as the legal representative or heir and successor of Prabhu Sahu after his death

25. In the case of the first document, namely, the will of Bechan Sahu and Ram Khelawan dated the 8th November, 1959, the only difficulty was that Ram Khelawan was still alive when the suit was filed and his appointee Mata Prasad could not have been said to be a trustee so long as he was alive, but Ram Khelawan, having also died during the pendency of the Second Appeal, in this Court, Mata Prasad could be said to have become a shebait in his place as his heir and successor under the said will The appointment of Raghunath Prasad as the shebait took effect on the death of Bechan Sahu in the year 1960 Indeed, he appears to have been the shebait in possession after and in place of Bechan Sahu.

26. I must here take account of the finding of the lower appellate court to the effect that Prabhu Sahu had not acted as a shebait for well over thirty years and that the only act which he purported to perform as a shebait was the act of execution of the deed of appointment of trustee in execution of power, which he did on the 13th October, 1965, and that act was not a bona fide act in the interest of the deity as its shebait but an act which was highly prejudicial to the interest of the deity The lower appellate court has held that Prabhu Sahu must be deemed not to have accepted the office of shebait and must in that view of the matter be deemed not to have become a shebait at all under the deed executed by Gopal Sahu

27. While it is true that a trustee must in order to become a trustee accept the trust to which he is appointed by the founder. There is, however, a difference between the office of shebait and a trustee Shebaitship is office coupled with property A trustee must perform the duties of his office himself and the office of a trustee is not heritable like secular property A shebait may delegate the performance of a part at least of the duties of his office such as sewa-puja and raghog of the deity to a pujari or some other person Similarly, a shebait may leave the management of the endowed property to his co-shebaits Indeed, a shebait may take no more interest in the endowment except to take the benefit of worshipping the deity and of receiving the Prasad like any other beneficiaries of the religious endowment It has already been noticed above that shebaitship is heritable property and is heritable like any other secular property of a Hindu

Under all these circumstances, I find it impossible to agree with the learned Judge of the lower appellate Court that Prabhu Sahu must be deemed to have not accepted the shebaitship on account of his proved inactivity for a period of over thirty years, although the lower appellate Court does appear to be right in saying that the act of appointment of Basant Lal as a trustee by the deed of 1965 was motivated not by a desire to benefit the deity, but by a desire to perpetuate the possession of Vishwanath who was Prabhu Sahu's brother-in-law (sister's husband) by appointing Vishwanath's son Basant Lal as a trustee, The action of Prabhu Sahu was prejudicial to the deity and the course of these proceedings also indicates that Prabhu Sahu was throughout more interested in saving the possession of Vishwanath over the two rooms in the endowed property which he took as a tenant from Bechan Sahu, rather than the endowed property.

Nevertheless, the result of that act could not be to automatically oust Prabhu Sahu from the shebaitship of the deity One result of this prejudicial act could be to hold that the suit for eviction of Vishwanath from the portion of the endowed property occupied by him was maintainable at the instance of Raghunath as the shebait in possession, and the further result of the prejudicial act of Prabhu Sahu could have been to have him removed from the office of shebait by an appropriate proceeding taken during his lifetime, but the rights of property held by Prabhu Sahu in the property in the nature of shebaitship could not be deemed to have come to an end by any such conduct

28. It is however, not necessary to pursue this matter further, for in spite of my finding that Raghunath Prasad and Mata Prasad have duly been appointed shebaits by the will of Bechan Sahu and Ram Khelawan respectively, and that the appointment of Basant Lal as a shebait by the Will of Prabhu Sahu cannot also be said to be invalid, I propose to refuse altogether the grant of any relief of declaration of shebaiti rights in this suit

29. In view of the findings arrived at, the relief of declaration as claimed in the plaint namely, that the plaintiffs Nos 2 to 4 are the sole managing trustees in the possession of the endowed properties on behalf of the first plaintiff deity and that the defendants Nos 2 and 3 have no concern or connection with the endowed properties, cannot be granted All that could be said at present is that the plaintiffs Nos. 2 and 3, namely, Mata Prasad and Raghunath Prasad along with the third defendant Basant Lal, who alone is now the appellant in this Court, are, in law, the co-shebaits of the endowment and of these co-shebaits Raghunath Prasad alone, or may be Mata Prasad also, are in possession as shebaits, Basant Lal is not in possession as a shebait of any part or portion of the endowed property, not granting them the relief of declaration will not prejudice their position, inasmuch as the decree for rent, ejectment and mesne profits against Vishwanath and even Basant Lal as one of his heirs, has been maintained.

30. And since there is a decree for recovery of arrears of rent, ejectment and mesne profits against Basant Lal as one of the heirs of his deceased father Vishwanath, and since there is no claim for relief of declaration or of possession by Basant Lal as a shebait, it would be improper in this suit to make any declaration in his favour Thus there will be no declaration about the shebaiti rights beyond confirming the finding of the two courts below to the effect that the suit for arrears of rent, ejectment and mesne profits against Vishwanath was maintainable at the instance of the plaintiffs Nos 1, 2 and 3 That part of the decree has already become final

31 I, therefore, allow the appeal in part The decree for arrears of rent ejectment and mesne profits against the deceased defendant Vishwanath now represented by his heirs and legal representatives, including Basant Lal the appellant stands and is maintained The decree of the lower appellate court declaring that Prabhu Sahu deceased and Basant Lal were not the shebaits of the endowed property and had no concern whatsoever with it, is set aside, and the relief of declaration, claimed in the plaint is altogether refused In the circumstances of the case, the parties shall bear their own costs in this Court

Appeal partly allowed.

1981 ALL. L. J. 1217

M. P. MEHROTRA, J.

Sia Ram and another, Petitioners v 4th Additional District Judge Hamirpur and others, Respondents.

Civil Misc. Writ Petn No 1778 of 1980, D/- 16-7-1981

(A) Constitution of India, Article 226 — Finding of fact — Finding as to genuineness of sale deed executed after 24-1-1971, by authorities under U. P. Ceiling Act — Interference in writ petition — (U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), Section 5 (8), proviso (b)).

Where a clear finding of fact was recorded by the lower courts that the transferees of the deceased tenure-holder were minors of very tender ages and that the possession was that of the transferors and some of the transferees were own grand-sons of the deceased tenure-holder and another transferee was grand-son of his brother the High Court refused to interfere with the findings of fact recorded by the lower courts It is

IY/KY/E35/81/SMA/SNV

for the ceiling authorities to consider genuineness of transactions of sale even when they are executed after 24-1-1971 and if it is held that such documents do not represent genuine transactions then the same can be ignored by the Ceiling authorities 1979 All WC 187 Rel on

(Para 3)

(B) U P. Imposition of Ceiling on Land Holdings Act (1 of 1961), Sec 5 (6) Expln. I — Order passed by consolidation authorities on 22-11-1978 holding brother of deceased tenure-holder to be a co-tenure holder along with the deceased — Declaration liable to be ignored by Ceiling authorities under S. 5 (1), the same being against Section 5 (6), Expln I. (Para 8)

Cases Referred Chronological Paras

1979 All LJ 166 AIR 1979 All 114 (FB) 5
1979 All LJ 1259 1979 All WC 217 4, 8
1979 All WC 187 3
1978 All LJ 1099 3
AIR 1977 NOC 354 1977 All WC 318 6

R R Shivahare, for Petitioners, Standing Counsel, for Respondents

ORDER — This petition arises out of the proceedings under the U P Imposition of Ceiling on Land Holdings Act, 1960

2 The facts, in brief are these

The petitioners are sons of one Machla to whom the notice under Section 10 (2) of the Act was issued Objections were filed by the said Machla and also by certain transferees in whose favour the lands had been sold by the said tenure-holder One objection was also filed by Chetram, who happens to be the real brother of Machla He claimed that in certain plots he was a co-tenure-holder with half share along with Machla and that his half share should not be included in the holding of the said tenure-holder Machla It seems that after the Prescribed Authority decided the objections the matter went to the appellate court and the case was remanded for a fresh decision Thereafter the Prescribed Authority decided the case by his order dated 17-11-77, a true copy whereof is annexure 1 to the petition The said tenure-holder Machla died on or about 25-11-1977 after the order of the Prescribed Authority Thereafter the petitioners, who are sons of said deceased tenure-holder filed an appeal before the District Judge The said appeal was decided by the appellate court by its judgment dated 24-11-79, a true copy whereof is annexure 3 to the petition A certified copy of the said judgment has also been filed The appeal was partly allowed and the case was remanded with certain directions about certain lands to be determined as to whether the same were irrigated or unirrigated On two points, however, the appellate court decided against the petitioners The first point was in respect of certain sale deeds executed by the deceased tenure-holder in favour of his grand-sons and in favour of a grand-son of his brother Chetram The other point was about the effect of the order passed by the Consolidation Authorities on 22-11-78 whereby Chetram was held to be a co-tenure-holder along with said Machla in respect of certain land which was included in the holding of the said tenure-holder On both these points, the appellate court decided against the petitioners and, therefore, they have come up in the instant petition and their learned counsel Sri R R Shivhare has contended before me that the Prescribed Authority and the appellate court were wrong in deciding the said two controversies against his clients

3 So far as the sale deeds are concerned, a clear finding of fact has been recorded that the transferees were minors of very tender ages and that the possession was that of the transferor As I have stated above, some of the transferees were own grand-sons of the said deceased tenure-holder and another transferee was grand-son of Chetram, a real brother of Machla In view of the Division Bench pronouncement in Yadunath Singh v State, (1979 All WC 187) it is now settled that it is for the ceiling authorities to consider such documents even though they were executed after 24-1-1971 and if it is held that such documents do not represent genuine transactions then the same can be ignored by the ceiling authorities Therefore, within my limited jurisdiction under Art 226 of the Constitution, it is not possible for me to interfere with the findings of fact recorded by the authorities below

4 Shri Shivhare next contended that the order passed by the Consolidation Authorities on 22-11-1978 holding Chetram to be a co-tenure-holder along with the deceased tenure-holder Machla of certain land was a binding order and the authorities below erred in not giving

effect to it Shri Shivhare in this connection placed reliance on a Division Bench pronouncement in Satya Pal Singh v State (1979 All WC 217) (1979 All LJ 1259) In particular, he placed reliance on the following observations occurring in the said judgment (at p 1260 of All LJ)

"Further, Section 38-B implies that findings or decisions given in any proceedings in any court, tribunal or authority will be binding upon the authorities under Ceiling Act, if they are given after October 10, 1975 This clearly leads to the conclusion that the decisions of the authorities under the U P Consolidation of Holdings Act are valid and are to be recognized in proceedings under the Ceiling Act, subject of course, to the effect of Section 38-B as explained above In this view, it is evident that Prescribed Authority under the Ceiling Act while determining the ceiling area of a tenure-holder cannot shut its eye or ignore the decisions given in proceedings under the Consolidation of Holdings Act."

5. Learned counsel contended that this pronouncement was of a date later to the date of the Full Bench pronouncement in Ram Charan v State (1979 All LJ 166) (AIR 1979 All 114) on which the appellate court has placed reliance on its judgment and, therefore, the observations in the Full Bench decision should be read subject to the observation made in the aforesaid subsequent Division Bench pronouncement He has further prayed that if there be some doubt about the respective spheres in which the Full Bench and the Division Bench decisions will operate, then it is a fit case where the controversy should go to a larger Bench.

6. I have given my anxious consideration to this submission but regret my inability to accept it The aforesaid Division Bench decision is to be read in its context Some land of a tenure-holder stood reduced in the consolidation proceedings before the ceiling authorities decided the case The reduction was undoubtedly after 8-6-1973 and the question that arose before the Division Bench was whether in view of the Full Bench decision the ceiling area and surplus land had to be determined with reference to 8th June, 1973 or whether it was open to the ceiling authorities to take into consideration such reduction in area in the consolidation proceedings Mr Justice R M Saha, in Jhandoo v State (1977 All WC 318) (AIR 1977 NOC 354) had held that in such a situation the ceiling authorities should take into consideration the reduced area and should not ignore the reduction brought about in the consolidation proceedings This view of the said learned Judge was upheld by the Division Bench It should be seen that the Full Bench decision was also referred to in the Division Bench case but it was held not to be applicable to the facts of that case

7. Now when we advert to the Full Bench decision it will be seen that there is a clear pronouncement in the same that when a matter is covered by S 5 (o) of the Act then the ceiling authorities have a complete jurisdiction to decide the controversy and any adjudication in respect thereof by the Consolidation Authorities will be absolutely unavailing This is clear from paragraph 35 of the Full Bench decision It was observed therein

"A declaration of a person as a co-tenure-holder made in consolidation proceedings after 24th Jan, 1971 is thus valueless, it was liable to be ignored, be it based on a genuine dispute or an admission etc made in a deed or instrument in such case also staying of ceiling proceedings would be of no avail Whatever adjudication of rights as a co-tenure-holder or in relation to any other form of transfer would be a waste paper"

8. It should be seen that the Division Bench pronouncement in Satyapal v State (1979 All LJ 1259) (supra) has nothing to do with a situation where a contest about title is involved between the rival persons It was a simple case where a tenure-holder got less land in the consolidation proceedings than what he had on the date relevant for the purposes of the ceiling law Such a reduction in area was not as a result of any adjudication of title by the consolidation authorities whereby the tenure-holder might have been deprived of some of his land The reduction was due to the change of plots allotted in the consolidation proceedings and/or due to some land being taken for public purpose under the Consolidation Act It should be seen that the order dated 22-11-78 passed by the Consolidation Authorities holding Chetram to be a co-tenure-holder along

with the deceased Machla was an order which would have been liable to be ignored under S 5 (6) and the way transfer has been defined in Explin I to the said sub-sec (6) of S 5 if the said order had been passed before 8-6-73 (see Kunwar Ranj Sushila Devi v State (1978 All LJ 1099) However, it cannot be argued that though an order which is passed between 24-1-71 and 8-6-73, by the consolidation authorities is liable to be ignored under Expl No I to S 5 (6) of the Act, a similar order passed after 8-6-73 is bound to be accepted by the ceiling authorities Such an approach will be absolutely unreal and against the scheme of the Ceiling Law Such declaration by the consolidation authorities is bound to be ignored by the ceiling authorities under S 5 (1) on the ground that it was made after the relevant date, i e 8-6-73 laid down in the said provision

9. This petition fails and is dismissed There will be no order as to costs

Petition dismissed

1981 ALL L. J. 1220

K M. DAYAL, J

Chandra Pal Singh and another, Petitioners v Deputy Director of Consolidation, Allahabad and others, Respondents

Civil Misc Writ Petn No 5627 of 1974, D/- 22-5-1981

Uttar Pradesh Consolidation of Holdings Act (5 of 1954) (as amended up to 1963), S. 48 and S 6 (2) — Revision — Cancellation of consolidation operations during pendency of revision before Deputy Director — Revision dismissed subsequent to cancellation — Proceedings not binding on parties — Fresh consolidation operations started — Authorities have to base their decision as per evidence adduced before them — Findings in earlier proceedings not binding on parties. (Para 2)

V. K S. Chaudhary, for Petitioners, M O K. Srivastava and Standing Counsel, for Respondents

ORDER :— The present petition had been filed challenging the orders of the consolidation authorities. The brief facts of the case are that the petitioners and Smt. Brijrani were co-tenure-holders in Khata No 7 In Khata Nos 2 and 9 they were co-tenure-holders with certain other persons The consolidation operations started under the U P Consolidation of Holdings Act, 1954 as amended up to 1963 earlier The case was decided by the Consolidation Officer Thereafter an appeal under Section 11 (1) of the aforesaid Act was decided by the Settlement Officer (Consolidation) on 16th March, 1964 Against that order of the Settlement Officer (Consolidation) a revision under Section 48 of the U P Consolidation of Holdings Act was filed by the petitioners which was pending before the Deputy Director of Consolidation. During the pendency of that revision the notification under Section 4 of the U P Consolidation of Holdings Act was cancelled under Section 6 thereof However, the Deputy Director of Consolidation in spite of the cancellation decided the revision on 16th July, 1964 Subsequently the matter seems to have remained as such whereupon fresh consolidation operations started in the year 1970 Again objections were filed by the petitioners claiming that Smt Brijrani had remarried in the year 1961, that after the remarriage she had left the village and she might have died or she had not been heard for 7 or 8 years and lastly that the petitioners have matured their rights by adverse possession against Smt Brijrani They led their evidence on the question of remarriage, on the question of abandonment/death of Smt Brijrani and adverse possession Their claim was that the present opponent was one Smt Rajo who was sister of Brijrani The Consolidation Officer and the Settlement Officer (Consolidation) decided the case against the petitioner A revision under Section 48 of the U P Consolidation Holdings Act was filed against that order. The Deputy Director of Consolidation held that the evidence led by the petitioners about re-marriage was futile and could not be looked into as in the previous litigation under the consolidation proceedings it was held that Smt Brijrani had not re-married in the year 1961, He did not decide the case on the basis of the evidence before him in that respect

2. So far as second question was concerned, he held that the lady who was contesting the case, was not Smt. Rajo but was Smt. Brijrani On the third question he held that ouster of co-tenure-holder Smt Brijrani was not proved as required by law, and therefore no adverse possession could be matured

by the petitioners So far the findings on the second and third question are concerned. there are the findings of fact and are binding in writ petition so far as the question about the binding nature of the decision in the previous consolidation operation is concerned in my opinion, the consolidation authorities have erred Sub-section (2) of Section 6 of the said Act reads as under —

"(2) Where a (notification) has been cancelled in respect of any unit under sub-section (1) such area shall, subject to the final orders relating to the correction of land records, if any, passed on or before the date of such cancellation, cease to be under consolidation operations with effect from the date of the cancellation"

According to this section if any final order was passed on or before the date of cancellation that would have been binding In the instant case I find that the order of the Settlement Officer (Consolidation) was passed on 16th March 1964 against which a revision was pending The cancellation itself having been made on 9th July, 1964 and the dismissal of the revision on 16th July 1964 was subsequent to the cancellation. therefore this proceeding could not be binding on the parties The Consolidation authorities were bound to decide the case of the parties on the basis of the evidence before them in that respect They could not have based their findings on the basis of the evidence led in the previous consolidation operations which had been cancelled before any final order, could be passed

3. In the result, the present petition is partly allowed The finding of the Deputy Director of Consolidation so far as it relates to re-marriage of Smt. Brijrani, is quashed. He is directed to decide the matter afresh on the basis of the evidence led in the present proceedings in accordance with law and observations made above In the circumstances of the case parties are directed to bear their own costs.

Petition partly allowed

1981 ALL. L. J. 1221

K N MISRA, J

Ram Sewak, Petitioner v D D C and others, Respondents

Civil Misc Writ Petn No 2946 of 1981, D/- 8-9-1981

(A) U. P. Consolidation of Holdings Act (5 of 1954), S. 21 — Alteration of valuation of plots — Jurisdiction of settlement officer (consolidation) — Settlement officer altering valuation of plots after inspecting plots — Decision about valuation of plots cannot be said to be factually incorrect or without any basis. 1967 All WR 75, Rel on and AIR 1975 SC 1716, Distinguished. (Para 9)

(B) U. P. Consolidation of Holdings Act (5 of 1954), S. 21 — Re-allotment of plots — Plot 'A' whose valuation was reduced, allotted to 'A' to whom it originally belonged — Plot 'B' whose valuation was increased, allotted to 'B' to whom it belonged — Held, 'A' could not be said to be prejudiced

Tenure holder 'A' had been allotted his own plot 'A' by the Deputy Director of Consolidation, the valuation of which had been reduced and he had not been allotted any portion of plot 'B' whose valuation was increased and the entire plot 'B' had been allotted to tenure-holder 'B' to whom it originally belonged

Held, 'A' tenure-holder could not be said to be put to any loss or injury by reduction in valuation of the plot 'A' as the Deputy Director of Consolidation had made adjustment in such a manner that plot 'A' which belonged to 'A' tenure-holder had been allotted to him and plot 'B' which belonged to 'B' tenure-holder had been allotted to him (Paras 3 10)

(C) Constitution of India, Art. 226 — Review of decision in writ petition — New ground — Question raised by applicant that he was deprived of irrigation facility as canal gool (channel) was shifted from plot A to plot B — Question neither averred in writ petition nor raised before Consolidation Authorities — Such question could not be raised for first time in review application. (Civil P. C. (1963), O. 47, R. 1). (Para 11)

Cases Referred: Chronological Paras

1981 All LJ 252 4
AIR 1975 SC 1716 1975 Rev Dec 252 6
1966 Rev Dec 101 1967 All WR 75 3. 5, 8

Sudama Ji Shandilya, for Petitioner

KY/KY/F53/81/PGS/SNV

ORDER — This is an application for review filed by the petitioner against the order dated 20-8-81 passed by this Court rejecting the writ petition of the petitioner

2 The petitioner has raised three grounds The first ground raised in this review application is that the petitioner has been totally deprived of the irrigation facilities by shifting of canal gool from plots Nos 929 and 928 to plot No 927 as the flow of water from new gool (nali) is on a higher level from chak No 262 of the petitioner It is further contended in para 3 of the review application that the gool as prescribed by the Deputy Director of Consolidation is situated at the remote distance of the petitioner's chak while earlier at the settlement stage this gool was situate on the plots Nos 928 and 929 The second ground that has been urged in this review application is that the Settlement Officer of Consolidation had no jurisdiction to reduce the valuation of the plots of the petitioner at the stage under S 21 or to increase the valuation of plot belonging to opposite party No 1 The 3rd ground is repetition of the second ground, wherein it is contended that the valuation of petitioner's plot No 928 has been reduced I do not find any merit in these submissions

3 Briefly stated, the facts of the case were as follows —

The opposite party No 2 who was holder of chak No 375 had filed an objection under S 20 against the allotment of the chak made to him He had claimed that entire plot No 928 belonging to him should be allotted in his chak This objection of its opposite-party No 2 was taken up along with certain other objections of other tenure-holders of the village and the Consolidation Officer by his order dated 27-1-79 contained in Annexure '3' made certain alterations in the chak of the opposite-party No 2 and also made certain adjustment in the chaks of the other tenure-holders The opposite-party No. 2 filed appeal against the said order Several other tenure-holders had also filed appeals Being aggrieved by the aforesaid order passed by the Consolidation Officer, the Settlement Officer of Consolidation visited the spot and heard the parties on merits. The petitioner was also party in the appeal filed by the opposite-party No 2 He was also given opportunity of hearing in the said appeal by the Settlement Officer of Consolidation The appeals were decided by the Settlement Officer of Consolidation by his judgment and order dated 17-2-79 contained in Annexure '2' The Settlement Officer (Consolidation) after inspecting the spot had found that the plot No 928 which belongs to petitioner was wrongly valued as was pointed out by the opposite-party No 2 He therefore, reduced its valuation from 12 annas to 11 annas in its exchanged ratio He also found that plot No 929 was wrongly valued at the exchange ratio of 12 annas and therefore has raised his valuation from 12 annas to 13 annas By this order the Settlement Officer of Consolidation made certain adjustment in the chak of the petitioner as well that of the opposite-party No 2 Several adjustments in chaks of other tenure-holders who had also filed appeals were made Aggrieved by the said order, the petitioner filed revision The opposite-party No 2 was also not satisfied by the orders passed by the Consolidation Officer as well as Settlement Officer of Consolidation He had, therefore also preferred revision Both these revisions were taken up together and heard and decided by the Deputy Director of Consolidation, the opposite-party No 1 vide his judgment and order dated 15-9-80 contained in Annexure '1' to the writ petition The revision filed by the petitioner was dismissed while the revision filed by the opposite-party No 2 was partly allowed and certain adjustments in the chaks were made On behalf of the petitioner it was urged before the Deputy Director of Consolidation that the valuation of plot No 929 which belongs to opposite-party No 2 was wrongly increased It was also contended that the valuation of plot No 928 belonging to the petitioner was wrongly decreased by the Settlement Officer Consolidation The Deputy Director of Consolidation after hearing the parties allowed the revision of the opposite-party No 2 and made certain adjustments in the chaks and allotted the entire plot No 929 to opposite-party No 2, the valuation of which was enhanced This plot belongs to opposite-party No 2 and entire plot has been allotted to him and as such by increasing its valuation the petitioner would not suffer any loss or injury as no portion of it has been allotted to him Plot No 928 the valuation of which was decreased by the Settlement Officer or Consolidation Officer

has been allotted to the petitioner This plot belongs to petitioner himself and as such the petitioner cannot be said to be put to any loss or injury by reduction in the valuation of the said plot by the Settlement Officer (Consolidation) Thus I find that no injustice has been done to the petitioner as the Deputy Director of Consolidation has made adjustment in such a manner that plot No 928 which belongs to the petitioner has been allotted to petitioner and plot No 929 which belongs to the opposite-party No 2 has been allotted to him So far as the question about the jurisdiction of the Settlement Officer of Consolidation in making alteration or valuation of the plots is concerned this court in the Division Bench case Badri Prasad v Smt Barko reported in 1966 Rev Dec 101 (1967 All WR 75) has observed —

"It cannot be the duty of every tenure-holder to file an objection to the valuation of any plot which is wrong according to him. It is obvious that a tenure-holder is expected to file an objection against the valuation of only the plots of his holding and not of other holding on the mere possibility that he might be affected by their incorrect valuation (if they are allotted to his chaks)

Sub-sec. (2) of S 13-C itself requires a tenure-holder to file an objection against the valuation of only those plots which are entered in the extract furnished to him Therefore. no tenure-holder is bound to file an objection against the valuation of any plot not belonging to him

Hence a person was not bound to file objection against the valuation of plots not belonging to him under S. 13-C (3) and that there is nothing to debar him from objecting to their valuation when according to the statement of proposals they were proposed to be given to him in chak. That is the stage when he can file an objection and he can file it within the time prescribed for an objection against the statement of proposals"

4 The learned counsel for the petitioner has referred to a single Judge decision of this Court reported in Hari Narain Mani v Deputy Director of Consolidation, 1981 All LJ 252 wherein it has been held that (at p. 354) —

"Where the Deputy Director of Consolidation purports to summon the records of proceedings under S. 20 at the instance of a party by invoking his revisional jurisdiction, he cannot, in exercise of his revisional power under S 48 without specifically summoning the record of the proceedings under Chapter II for his examination either correct any error occurring in the record of those proceedings, or test the legality or propriety of the order passed by the authorities therein on the basis that entries finalized under Chapter II were wrong"

This case is distinguishable In the aforesaid case the question was whether the Deputy Director of Consolidation could without summoning the record of the proceedings under Chapter II and without examining them and considering the legality and propriety of those orders could make alterations in valuation of the plots in the revision arising out of the proceedings under S 20 The provisions contained in S 11-A were considered in the aforesaid decision. of Hari Narain Mani (supra) and was observed that the filing of objection under S 20 shall be subject to the provisions contained in S 11-A. clearly implies that an objection the consideration of which shall have the effect of contravening the provisions of S 11-A of the Act cannot be taken notice of in proceedings under S 20 of the Act Accordingly an objection regarding valuation of the various plots in the village which could have been raised under Chapter II of the Act, but was not raised cannot be allowed to be raised at the stage of proceedings for allotment of chaks under Sec 20 of the Act and the chaks have to be carved out on the basis of the valuation of plots as mentioned in the records published and finalized under S 9 of the Act'

5 The aforesaid Division Bench case in Badri Prasad (1967 All WR 75) (supra) was not noticed in the aforesaid case as it was probably not placed before the learned Judge The provisions contained under S 11-A provide that no question in respect of —

(i) claims to land.

(ii) partition of joint holdings. and

(iii) valuation of plots, trees wells and other improvements, where the question is sought to be raised by a tenure-holder of the plot or the owner of the tree, well or other improvements recorded in the annual register under S. 10, relating to the consolidation area which might and ought to have been raised under S. 9 but has not been raised, shall not be raised or heard at any of the consolidation proceedings The afore-

said provision provides that if the tenure-holder has not raised any dispute with regard to the incorrect valuation made of his plots under S 9-A of the Act, he cannot at a subsequent stage be permitted to urge that the valuation of plot of his holding has been wrongly valued It may, however, be noted that an extract of C H Form 5, wherein the valuation of the plots of the holding of the tenure-holder is mentioned, is served only on the concerned tenure-holder The tenure-holder thereupon gets an opportunity to file an objection under S 9 in respect of valuation of plots of his original holding if wrongly made It cannot be expected of a tenure-holder to know as to what valuation has been fixed in respect of all other plots in the village belonging to other tenure-holders hence he cannot file an objection regarding the valuation of the plots of the holdings of the other tenure-holders In the circumstances it cannot be said that the tenure-holder had opportunity to know the valuation of plots, other than of his own holding and so it was not incumbent on him to have filed an objection against the wrong valuation which has been put to plots of other tenure-holders mentioned in C H Form 5, the extracts of which are only served upon concerned tenure-holder and not on others In this view of the matter I am of the opinion that the provisions contained in S 11-A will not operate as a bar against raising an objection at the stage under S 20 of the Act to incorrect valuation of the plots which has been allotted to him and which belongs to other tenure-holder

6. The learned counsel for the petitioner also placed reliance upon a decision of the Supreme Court in Gafoora v Deputy Director of Consolidation, 1975 Rev Dec 252 (AIR 1975 SC 1716), wherein it has been held that

"the principal question that was canvassed before the Deputy Director (Consolidation) was whether failure to prefer objection within the time limit prescribed under S 9 (2) of the Act would entitle an aggrieved party to agitate the matter beyond the prescribed period without explaining the cause of delay in preferring the objection and obtaining a proper order of condonation of delay from the appropriate authority It is clear from the records that no objection was preferred within the prescribed time The Deputy Director (Consolidation) refused, if we may say so, rightly to accept that the appellants had earlier lodged any objection on Nov 21, 1966 That being the position, there was no material whatsoever before the Settlement Officer (Consolidation) for exercising his jurisdiction to condone the delay in lodging objection under S 9 (2) of the Act S 11-A bars all objections in respect of claim to land, partition of joint holding and valuation of plots, etc, relating to the consolidation area which have been raised under S 9 or which might or ought to have been raised under that section but have not been so raised These questions under Section 11-A cannot be raised or heard at any subsequent stage of the consolidation proceedings That being the position there is no error of law in the order of Deputy Director (Consolidation) nor is there any excess of jurisdiction committed by him in disposing of the matter as he did in exercise of his revisional power under Section 48"

7. The Hon'ble Supreme Court in aforesaid decision has not expressed any opinion on the question whether a tenure-holder would or would not be entitled to raise objection to the valuation of plots contained in the holding of other tenure-holders, about which they could not file objection being unaware of their valuation This case is, therefore, distinguishable and cannot be applied to the facts of the present case

8. In view of what has been held in Badri Prasad's case (1967 All WR 776) (supra) I am of the opinion that the Settlement Officer (Consolidation) had jurisdiction to consider whether the plots in question were correctly valued or not in proceedings under S 20 of the Act

9. The Settlement Officer (Consolidation) had made spot inspection and thereafter altered the valuation of the above plots, which according to him were wrongly valued His decision about the valuation of plots, therefore, cannot be said to be factually incorrect or without any basis

10. The petitioner has been allotted his own plot No 928 by the Deputy Director of Consolidation, the valuation of which has been reduced and he has not been allotted any portion of plot No 929 whose valuation was increased

and this entire plot No 928 has been allotted in the chak of the opposite-party No 2, to whom it belonged Thus I find that the petitioner is not prejudiced by the impugned orders passed by the opposite-party No 1

11. The learned counsel for the petitioner pointed out that he has stated in the review application, that the petitioner has been deprived of irrigation facilities as canal gool (nali) from plots Nos 928 and 929 has now been shifted to plot No 927 This is a new ground that has been urged in the review application Thus fact about shifting of gool (nali) to the prejudice of petitioner from said plots was not averred in the writ petition This question also does not appear to have been canvassed before the Deputy Director of Consolidation nor before the Settlement Officer of Consolidation as those authorities have not mentioned anything about it This question therefore, cannot be urged at this stage The adjustments in chaks of the petitioners and the opposite-party No 2 have been done by the Deputy Director of Consolidation considering the desirability of making such adjustments The chaks of both the parties are situated by the side of canal on their respective original plots hence they cannot be said to have been deprived of irrigation facilities I, therefore, do not find any substance in the aforesaid submission of the learned counsel for the petitioner

12 In the result, I do not find any merit in the review application It is, accordingly dismissed

Application dismissed

1981 ALL. L. J. 1225

K M DAYAL J

Shanti Swarup Gupta, Appellant v Nagar Palika, Ghaziabad, Respondent

Second Appeal No 253 of 1974 D/- 18-9-1981 *

(A) U. P. Municipalities Act (2 of 1916), Secs 297, 301 (2) and 327 — Bye-laws framed u/s. 297 — Confirmation of — Delegation of power to Commissioners u/s. 327 — Notifiction delegating powers u/s. 301 (2) in respect of "municipalities in their respective divisions" — Delegation is not invalid — (Constitution of India, Art. 245).

The delegation of powers to Commissioners under Section 327 to confirm bye-laws framed under Section 297 in respect of "municipalities in their respective divisions" is valid and the absence of the names of municipal boards in the notification does not affect the validity of delegation (Paras 4, 5)

The powers for which there is a prohibition against delegation are mentioned in Sch. VII of the Act Secs 297 and 301 are not included in Sch. VII Under the circumstances, there was no bar and the Govt had a right to delegate its powers to the Commissioner (Para 3)

(B) U. P. Municipalities Act (2 of 1916), Section 297 — Bye-laws dated 13-3-1962 — Levy of projection fee — Projection existing from before commencement of bye-laws — Fee can be levied after commencement of bye-laws — (Constitution of India, Art 265)

Once there was a provision to charge fee for projection it will apply to a projection which continues to exist after the provision was made irrespective of the fact that the projection also existed before the commencement of that provision (Para 7)

N Lal and P Srivastava, for Appellant Gayan Chand Dewedi, for Respondent

JUDGMENT — This is a plaintiff's appeal arising out of a suit for declaration that the demand regarding the Projection Fee levied by the defendant, 'Nagar Palika' was invalid and a prohibitory injunction was sought restraining it from realising the same The brief facts of the case are that Projection Fee was levied by the Nagar Palika under the Bye-laws dated 13-3-1962 framed under Section 297 of the Municipalities Act

2. The learned counsel for the appellant firstly argued that the bye-laws have not been legally confirmed by the State Government as required by Section 301 of the Municipalities Act The bye-laws were sought to be framed under Section 297 of the Municipalities Act They were required to be confirmed by the State Government under Section 301 According to the learned Counsel for the appellant there was no confirmation The defendant relied upon confirmation by the Commissioner of the Division According to the learned

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*Against judgment and decree of S P Agarwal, Civil J., Meerut D/- 10-10-1973.

JV/KV/E753/81/AGM/MVJ

counsel, the State Government could not delegate that power as it was prohibited by Section 327 of the Municipalities Act The courts below have held that the State Government delegated the powers under Section 301 sub-sections (1) (2) (3) (4) and (5) to the Divisional Commissioners in respect of the Municipalities falling in their respective divisions

3. The learned counsel for the respondent has produced the Municipal Manual On page 336 of Part II therein it is mentioned that the powers of the State Government had been delegated to the Commissioners of the Divisions under Section 327 of the U P Municipalities Act 1916 That also mentioned the power under sub-section (2) of Section 301 to confirm the bye-laws made by the Boards of the municipalities within their respective Divisions' Under the circumstances it cannot be said that there was no delegation of the power under Section 301 of the Municipalities Act The powers for which there is a prohibition against delegation are mentioned in Schedule VII of the Act Sections 297 and 301 do not find place in the Schedule VII Under the circumstances there was no bar and the State Government had a right to delegate its powers to the Commissioners

4. The learned counsel for the appellant, however argued that the delegation under Section 327 could be made only in respect of 'any specified municipality or municipalities' The learned counsel argued that the municipalities which were to be governed by the delegation should have been specified in the order According to him the word 'specified' governs both the words 'Municipality' and 'Municipalities' For convenience of discussion Section 327 is reproduced below

"The State Government may, by notification, delegate to the prescribed authority in respect of any specified municipality or municipalities within its jurisdiction to any one or more of the power vested in it by the Act, with the exception of the powers detailed in Schedule VII"

According to the learned counsel municipalities have not been specified in the order The delegation would be invalid and will not be under Sec 327 I am unable to uphold that view. From the wordings of the 'notification' it appears that the municipalities for which the powers have been delegated are specified in it It reads —

"The power to confirm under sub-section (2) of Section 301 of the said Act, bye-laws made by the Boards of the Municipalities within their respective divisions"

This delegation is in favour of the Commissioners of the Divisions From this notification it is clear that the delegation is in respect of the Municipalities which specifically fall within the Divisions of the Commissioners The Municipalities are thus specified and it is also clear that the Commissioner of a particular Division will have jurisdiction only in respect of the municipalities specified in the notification i e those falling within his Division He cannot exercise the powers in respect of any Municipality outside his Division

5 I therefore, hold that the municipalities have been specified in the notification and the notification cannot be invalid on the ground that the names of Municipal Boards have not been mentioned

6 One thing is to be kept in view The Municipal Boards come into being, as smaller towns develop and local authorities are conferred with the powers under the Municipalities Act It would, therefore, not have been feasible to specify the Municipal Boards by their names They have been specified as Municipalities falling in particular territories Under the circumstances the best specification that could be made would be the power granted in respect of the municipalities falling within the territorial jurisdiction of a particular authority The specification is clear and unambiguous

7 The learned counsel lastly argued that the bye-laws framed would not affect the projections that existed before the framing of the bye-laws concerned I am unable to accept contention The bye-law is in the nature of a fee to be charged in respect of projection made in the buildings The fee is charged for the reason that the projection covers a portion of the municipal land As such the fee could be charged in respect of the buildings from the date of commencement of the bye-laws till the projection exists Once the projection is demolished or becomes non-existent no fee will be chargeable Similarly when there was no bye-law

to the effect, no fee could be charged Such fee can be validly charged in respect of projections which continue to cover the municipal land after the enforcement of the bye-law The levy is in the nature of rent for covering the municipal land It cannot be said that when the municipal land was covered no rent-fee was charged, it could not be charged at any time in future If there was no provision for charging any rent/fee at a particular time, it may not be charged for that period but once there was a provision, it will apply to the projections which continue after the provision was made Under the circumstances the Nagar Palika was entitled to charge the Projection Fee after the enforcement of bye-laws in question

8 In the result, the present appeal fails and is dismissed with costs

Appeal dismissed

1981 ALL L J. 1227

A N VARMA, J

Masuriya Din, Appellant v. Smt Geeta Malaviya Respondent

Second Appeal No 1860 of 1979, D/- 19-8-1981 *

(A) U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Sections 16, 18 — Order of allotment — Existence of vacancy is condition precedent — Question of vacancy being matter relating to jurisdiction of Rent Control authorities to allot accommodation, the Court can go into that question. 1970 All LJ 1066 (SC) Foll. (Para 9)

(B) U P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Sections 16, 18 — Order of allotment — Void and ineffectual because of non-existence of vacancy — Affirmance of that order in appeal would not affect inherent invalidity or nullity of the order.

Where an order is challenged as being totally ultra vires on the ground of being beyond the jurisdiction of the authority purporting to pass that order, the affirmance of that order in appeal would not affect the inherent invalidity or nullity of the order (Para 10)

*Against judgment and decree of V N Singh Addl Civil J., Allahabad, D/- 1-6-1979

(C) Civil P. C. (5 of 1908) Section 11 — Res judicata — Suit by 'A' claiming to be owner of disputed house for declaration of title and ejection of occupant 'B' — Another suit by 'B' for injunction restraining 'A' from interfering with B's possession on basis of allotment order in his favour — 'B's suit though decreed initially, set aside in appeal on ground of allotment order being a nullity — Appellate decree becoming final — A's suit fully decreed in appeal — In B's second appeal against appellate decision in A's suit appellate decree in B's suit that allotment order in B's favour was nullity would operate as res judicata irrespective of the fact whether a specific issue as to validity of the order was framed in his suit or not — Section 11 speaks of matter in issue and not of issue framed. (Para 12)

Cases Referred : Chronological Paras

1970 All LJ 1066 AIR 1970 SC 1727 9

S K Taneja for Appellant Chandra Prakash, for Respondent

JUDGMENT :— This second appeal by a defendant arises out of a suit No 762 of 1975 filed by Shrimati Geeta Malviya the plaintiff-respondent for a declaration that the plaintiff is the owner of the house in suit, namely, numbered 1015-A Daryabad Allahabad, and for the ejectment of Masuriya Din from that house The suit was tried and consolidated along with another Suit No 224 of 1975 which was filed by Masuriya Din (the appellant in this Second Appeal) against the plaintiff-respondent and one Brij Behari Shukla in respect of the same house for injunction restraining the defendants of Suit No 224 of 1975 from interfering with the possession of Masuriya Din over the house By a judgment, Suit No 224 of 1975 was decreed An injunction was issued directing the defendants of that suit not to eject Masuriya Din from the said house otherwise than in accordance with law By the same judgment Suit No 762 of 1975 was partially decreed Srimati Geeta Malviya was declared owner of that house The other relief namely, ejectment was, however, refused

2 Aggrieved by the aforesaid decrees three appeals were filed, Civil Appeal No 165 of 1978 was filed by Shrimati Geeta Malviya against the decree passed in favour of Sri Masuriya Din in Suit No 224 of 1975 Civil Ap-

peal No 164 of 1978 was filed by Shrimati Geeta Malviya against that part of the decree of the trial court in Suit No 762 of 1975 by which her remaining claim was dismissed, while Civil Appeal No 152 of 1978 was filed by Masuria Din against that part of the decree of the trial court in Suit No 762 of 1975 by which Shrimati Geeta Malviya was declared the owner By a judgment dated 1st June 1979, Civil Appeal No 166 of 1978 filed by Shrimati Geeta Malviya was allowed and her suit for ejectment of Masuriya Din was also decreed The appellate court while allowing the appeal and decreeing the suit declared that the allotment order dated 15-12-1973 passed in favour of Masuriya Din was illegal, ineffectual in law and without jurisdiction The decree passed by the trial court declaring Shrimati Geeta Malviya as the owner of the house was also affirmed

3 By another judgment delivered the same day, Civil Appeal No 152 of 1978 filed by Masuriya Din was dismissed and the decree passed by the trial court declaring Shrimati Geeta Malviya as the owner of the house was affirmed

4 By a third judgment, also delivered on 1-6-1979, Civil Appeal No 164 of 1978 was allowed and the suit of Masuriya Din being Suit No 224 of 1975 was dismissed It is not disputed that no second appeal was filed against this judgment of the lower appellate court dismissing Suit No 224 of 1975 The said judgment is between the parties and has become final The certified copy of this judgment was permitted to be brought on the record of this second appeal by my order dated 28-7-1981 and the same is marked Annexure "HC 3"

5. From a perusal of the pleadings of the parties in the two suits it is clear that what was the plaint case of Masuriya Din in Suit No 224 of 1975 was his defence in Suit No 762 of 1975 The same is true of the stand taken by Shrimati Geeta Malviya in the two suits

6. Shortly, stated, the plaintiff's case in Suit No 762 of 1975 was that the plaintiff Shrimati Geeta Malviya was the owner of the house, having purchased the same from its original owner under a registered sale deed Masuriya Din had illegally occupied the house in dispute and he was liable to be ejected therefrom

7 The defence of Masuriya Din in that suit was that Shrimati Geeta Malviya was not the owner of the house The sale deed upon which she founded her claim was fraudulent and no right had accrued in her favour under that deed Masuriya Din on the other hand, was in occupation in pursuance of a valid order of allotment issued by the Rent Control authorities He was therefore, not liable to be ejected from the house in question

8 The trial court decreed the suit in a part as mentioned above The appellate Court on appeal decreed the suit filed by Shrimati Geeta Malviya in toto The lower appellate court has held that the order of allotment passed in favour of Masuriya Din is clearly null and void, as there was no vacancy at the relevant time which might have authorised the Rent Control authorities to allot the accommodation in dispute to Masuria Din On the finding therefore, that Shrimati Geeta Malviya was the owner of the house in suit, and that the appellant Masuriya Din was not entitled to remain in possession over the house the order of allotment passed in his favour being void and ineffective in law, the suit of Shrimati Geeta Malviya for the ejectment of the appellant has been decreed It is relevant to mention here that the decree passed against Masuria Din in Suit No 224 of 1975 as well as in Civil Appeal No 152 of 1978 holding Shrimati Geeta Malviya to be the owner of the house in suit has become final

9. The only question, therefore, which remains to be considered is whether the plaintiff-appellant is liable to be evicted from the house in suit In his defence against the claim of the plaintiff to eject the appellant from the house in suit, the appellant Masuria Din relied solely on the order of allotment dated 15-12-1973 issued by the Rent Control & Eviction Officer In regard to this order of allotment the finding of the lower appellate court is that the same was invalid and inoperative in law as there was legally no vacancy in the house in suit at the relevant time. The lower appellate court has placed reliance on a Supreme Court decision reported in 1970 All LJ 1066 : (AIR 1970 SC 1727) in taking the view that the existence of vacancy being a condition precedent to the power vested in the Rent Control authorities to allot an

accommodation the order of allotment in favour of the appellant Masuria Din, was clearly ineffectual in law as there was no vacancy on the dates on which the order of allotment was passed in favour of the appellant The lower appellate court went into the question of vacancy and held that the accommodation was not vacant at the relevant time The lower appellate court rightly observed that the question whether there was a vacancy or not being a matter relating to the jurisdiction of the Rent Control authorities to allot the accommodation, it was open to the court to go into that question with a view to finding out whether the condition precedent for the exercise of power to allot, existed

10. Learned counsel for the appellant vehemently contended that the order of allotment was subjected to an appeal under Section 16 of U P Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972, and that the appeal, though filed by a third party, having been dismissed, it was not open to the court to consider the question whether the order of allotment dated 15-12-1973 was illegal or not I find no substance in this argument and if there was no vacancy, the order of allotment passed in his favour was wholly void and ineffectual in law The affirmance of the order in appeal could not infuse life into that order Where an order is challenged as being totally ultra vires on the ground of being beyond the jurisdiction of the authority purporting to pass that order, the affirmance of that order in appeal would not affect the inherent invalidity or nullity of the order The submission advanced by the learned counsel for the appellant thus fails The finding of the lower appellate court, therefore, that the order of allotment was null and void cannot be said to be vitiated by any error of law On the said finding, the suit of the plaintiff-respondent for the ejectment of the petitioner was rightly decreed

11. There is however a more fundamental obstacle in the way of the appellant The decree passed in Suit No 224 of 1975 dismissing the suit of the appellant for injunction has admittedly become final From a perusal of the pleadings of the parties in that suit, it is clear that the decree passed in that suit would operate as res judicata against the appellant In that suit the principal question which arose for determination was the same which is involved in the present second appeal The matter in issue in Suit No 224 of 1975 which directly and substantially arose for consideration was whether the order of allotment passed in favour of Masuriya Din was valid The lower appellate court in Civil Appeal No 164 of 1978 observed thus —

"Main point to be decided is whether at the time of allotment the accommodation in suit was vacant If it is decided that the accommodation in suit was vacant then in that case allotment order will be valid If it is decided that at the time of allotment, accommodation in suit was not vacant, then allotment will be invalid"

12 It would thus seem that the question whether the allotment order was valid or not has already been finally determined between the parties by the lower appellate court in Civil Appeal No 164 of 1978, and consequently, it is not open to the appellant to agitate the said issue Confronted with the decision of the lower appellate court in Civil Appeal No 164 of 1978, learned counsel submitted that there was no specific issue in Suit No 224 of 1975 as regards the validity of the order of allotment passed in favour of the appellant He argued that three issues were framed in that suit none of which mentioned anything about the validity of the order of allotment The submission is misconceived In the first place, the second issue namely "Whether the plaintiff is entitled to injunction sought for" directly covered the matter in issue as the very basis of the claim of the plaintiff in that suit was the order of allotment Secondly, Section 11 of the Civil P C speaks of matter in issue and not specific issue framed in the suit There is, as already mentioned, no manner of doubt that the validity of the order of allotment was a matter which was directly and substantially in issue in Suit No 224 of 1975 The decree passed against the appellant would therefore operate as res judicata

13. Thus in either view of the matter, this second appeal is liable to be dismissed

14. In the result the second appeal fails and is dismissed. There will be no order as to costs.

15. The appellant is, however, granted three months' time to vacate the accommodation in dispute He will hand over vacant possession of the accommodation in dispute to the plaintiff-respondent within this period

Appeal dismissed

1981 ALL L J 1230

A BANERJI, J

Ram Gopal and others, Petitioners v District Judge, Banda and others Respondents

Civil Misc Writ Petn No 8301 of 1979. D/- 13-8-1981

(A) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Section 3 (k) (i) (a) — 'Standard rent' — Fixation of — Tenant paying rent of Rs 20/- since 1961 — It could be said to be agreed rent — Enhancement of 25% applicable to it

Where the rent of Rs 20/- per month was being paid by the tenant from 1961 onwards it would be said that it was the agreed rent between the parties Consequently, the enhancement of 25% would be applicable to it and the standard rent fixed at Rs 25/- could not be said to be unjustified 1980 All LJ 34 and 1980 All LJ 179 Rel on

(Para 4)

The provisions of enhancement of 25% is applicable to both the case of agreed rent and the reasonable annual rent If it was only confined to reasonable annual rent that situation is provided by cl (b) itself In that event cl (a) of Section 3 (k) (i) of the Act would be rendered meaningless A provision of the Act has to be reasonably interpreted One cannot interpret the provision of a statute in a pedantic manner From a reading of the provisions of Section 3 (k) (i) with cls (a), (b) and (c) together it is clear that there is a provision for the enhancement of rent by 25% whether it is the agreed rent or the reasonable annual rent Enhancement applies to both but whichever is greater, is the standard rent (Para 4)

(B) U P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Sections 3, 8 and 5 — Notice under Section 5 given by landlord for enhancement of rent — Tenant disputing enhancement — It is the tenant who has to make application under Section 8 for settlement of dispute and not the landlord

The words "the rent so enhanced shall be payable" make it clear that the enhanced rent i e a rent not exceeding the standard rent is payable by the tenant from the commencement of the Act In other words, the tenant is liable to pay the said rent If the tenant raises a dispute about the rent payable the forum for determination of such a dispute is the District Magistrate under Section 8 of the Act An application has, in that case, to be moved before the District Magistrate It cannot be said that the landlord has to go to the District Magistrate for the determination of the standard rent It is clear that enhanced rent is payable on compliance of the requirements of S 5 The Act empowers the landlord to enhance the rent unilaterally It does not require any consent of the tenant If the tenant disputes that rent, it is the tenant who has to go to the District Magistrate to raise the dispute by making an application (Para 5)

(C) U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Section 3 — 'Standard rent' — Fixation of — Tenant raising plea for reduction of rent on allegation that portion of premises was demolished by landlord — Failure to establish allegation — He could not claim reduction

(Para 6)

Cases Referred · Chronological Paras	
1980 All LJ 34	4
1980 All LJ 179	4

R P K Trivedi for Petitioners, Standing Counsel for Respondents

ORDER :— This is a petition by the tenant Ram Gopal and his brother challenging the order of the District Judge, Banda, dated 21st November, 1975 passed in revision against the order of the learned Munsif acting as Judge Small Causes Court, Banda

2 The relevant facts briefly stated are as follows — The petitioner No 1 was the tenant of the house in dispute @ Rs 20/- per month Respondent No 3 Kamal Kishore the landlord of the house had given a notice under Section 5 of the U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the Act) for enhancing the rate of rent by 25% The tenant did not pay the rent since 1-7-1972 The landlord also alleged that the tenant had sublet the house in

dispute in favour of the petitioner No 2 and had also damaged a part of the house in dispute He also terminated the tenancy by a notice dated 25-4-1973 under Section 106 of the Transfer of Property Act In their reply the tenant and his brother denied the right of the landlord to enhance the rent by 25%. The notice dated 4-10-1972 was duly replied and a bona fide dispute was raised as a part of the accommodation had fallen down which had not been repaired by the landlord In other words, the right of the landlord to enhance the rent was disputed The rent due had been sent by money order which was refused by the respondent No 3 and thereafter it was deposited in the court under Section 30 of the Act The tenant thus pleaded that he had not committed any default He also denied to have sublet the house or damaged the house

3. The learned Munsif who tried the case as the Court of Small Causes, held that the petitioner No 1 had committed default in payment of rent but he had neither caused any damage to the building nor sublet the house in dispute In view of its finding on the question of default the court decreed the suit for recovery of Rs 267-60 from 1-7-1972 to 25-5-1973 @ Rs 25/- per month and for damages for use and occupation from 26-5-1973 to 2-7-1973 at the rate of Re 1/- per day and also for ejectment of the tenant from the house in dispute together with costs and pendente lite and future damages for the use and occupation at the rate of Re 1/- per day A revision against the above decision was heard by the Learned District Judge The revision was dismissed and the judgment of the trial court was affirmed It is against the above decision that the present writ petition has been filed.

4. Mr R R K Trivedi, Learned counsel for the petitioners raised three contentions His first contention was that in Section 3 (k) (i) (a) of the Act the 25% enhancement is applicable only to be the reasonable annual rent and not to the agreed rent In other words, his contention was that there could be no enhancement of 25% of the rent in case of a building where there was an agreed rent This contention has no substance "Standard rent" has been defined in Section 3 (k) of the Act In the case of a building governed by the old Act, and let out at the time of the commencement of the Act it is the agreed rent or the reasonable annual rent plus 25% thereon, whichever is greater which is the standard rent Secondly, where there is no agreed rent and there is a reasonable annual rent then the reasonable annual rent plus 25% thereon would constitute a standard rent Thirdly where there is neither an agreed rent nor the reasonable annual rent, the standard rent would be one as determined under Section 9 of the Act In the present case it is admitted between the parties that the rent of Rs 20/- per month was being paid from 1961 onwards by the tenant It would, therefore, be correct to draw an inference that the agreed rent was Rs 20/- per month The contention that the enhancement of 25% was not applicable to agreed rent is wholly misconceived The provisions of Section 3 (i) (a) came up for consideration in several decisions of this court In the case of Sant Narain v Ram Kishan (1980 All LJ 34) a learned single Judge held that it was not possible to read the words "plus 25%" as being addressed only to reasonable annual rent for the words "whatever is greater" indicated that the standard rent is the agreed rent plus 25% or the reasonable annual rent plus 25% whichever is greater In the decision of Ram Dutt v Dist Jugdc, Nainital (1980 All LJ 179) another learned single Judge was called upon to determine if the words "whichever is greater" are surplus The answer was in the negative I am in respectful agreement with the above views expressed in the above decisions The provisions of enhancement of 25% is applicable to both the case of agreed rent and the reasonable annual rent If it was only confined to reasonable annual rent that situation is provided by Clause (b) itself In that event clause (a) of Section 3 (k) (i) of the Act would be rendered meaningless A provision of the Act has to be reasonably interpreted One cannot interpret the provision of a statute in a pedantic manner From a reading of the provisions of Section 3 (k) (i) with clauses (a), (b) and (c) together it is clear that there is a provision for the enhancement of rent by 25% whether it is the agreed rent or the reasonable annual rent. Enhancement applies to both but whichever

is greater, is the standard rent In the present case the court below was justified in holding that the standard rent was Rs 25/- per month after enhancement

5. The second contention was that the landlord could not enhance the rent unilaterally and when a dispute had been raised by the tenant it was for the landlord to get the dispute settled by making an application under Section 8 of the Act to the District Magistrate I find no substance in this argument as well Section 5 provides for the rent payable in the case of old building It reads as follows —

"5 Rent payable in case of old buildings In the case of a tenancy continuing from before the commencement of this Act, in respect of a building to which the old act was applicable, the landlord may, by notice in writing given within three months from the commencement of this Act enhance the rent payable therefore to an amount not exceeding standard rent, and the rent so enhanced shall be payable from the commencement of this Act"

The provision makes it clear that a tenant of a building which was governed by the old Act, (U P Act III of 1947) is also liable to pay an enhanced rent from the date of the commencement of this Act Four conditions had to be satisfied (1) it must be a building which was governed by the old Act (2) the tenancy was continuing on the commencement of the Act, (3) the landlord had given a notice in writing, to the tenant enhancing the rent and (4) that amount does not exceed the standard rent If all these conditions were fulfilled then the tenant would be liable to pay the said rent from the date of the commencement of the Act, i e 15th July, 1972. The words "the rent so enhanced shall be payable" make it clear that the enhanced rent i e rent not exceeding the standard rent is payable by the tenant from the commencement of the Act. In other words, the tenant is liable to pay the said rent, If the tenant raises a dispute about the rent payable the forum for determination of such a dispute is the District Magistrate under Section 8 of the Act. An application has in that case, to be moved before the District Magistrate. The contention of the learned counsel that it was the landlord who had to go to the District Magistrate for the determination of the standard rent is wholly misconceived It is clear that enhanced rent is payable on compliance of the requirements of Section 5 of the Act The Act empowers the landlord to enhance the rent unilaterally It does not require any consent of the tenant. If the tenant disputes that rent, it is the tenant who has to go to the District Magistrate to raise the dispute by making an application In the present case the tenant had not made any application under Section 8 of the Act to the District Magistrate If he had made such an application he could have raised the question of the accommodation having fallen down or such other pleas as were open to him for the settlement of the amount of standard rent. He having not done so, the landlord was entitled to charge the standard rent as determined under Section 3 (k) and demanded under Section 5 of the Act.

6 The third contention was that a portion of the house had fallen down and the court below had committed an error in not reducing proportionately the rent payable I find no merits in this contention whatsoever The matter regarding the damage to the portion of the house was considered by the trial court and it was observed that this version of the defendant Ram Gopal does not appeal, nor it is supported by any convincing piece of evidence The learned District Judge had also considered this matter and ultimately came to the conclusion that there was oath against oath in regard to the question as to how the Chhappar got demolished Since the tenant alleged that the Chhappar was demolished by the landlord the burden was clearly on him to establish the same He having failed to do so, cannot claim that the rent should have been proportionately reduced.

7. For the reasons indicated above, I find no merits in this petition It is accordingly dismissed with costs

Petition dismissed.

1981 ALL. L. J. 1233

K. N. MISRA, J.

Pheku, Petitioner v. Joint Director of Consolidation, Varanasi and others, Respondents

Civil Misc. Writ Petn. No. 6433 of 1980 D/- 18-9-1981

(A) U. P. Consolidation of Holdings Act (5 of 1954), Ss. 11 and 9-A — U. P. Land Revenue Act (3 of 1901), S. 201 — Appeal — Maintainability — Order dismissing for default an objection under S. 9-A — Appeal lies under S. 11 — S. 201 of Land Revenue Act not applicable. 1968 All L. J. 205. Foll. (Para 5)

(B) U. P. Consolidation of Holdings Act (5 of 1964), Ss. 11, 9-A — U. P. Land Revenue Act (3 of 1901), S. 201 — Appeal — Maintainability — Objection under S. 9-A dismissed for default — Application for restoration — Order dismissing the application — Appeal against the order lies under S. 11 — S. 201 of L. R. Act does not apply.

If an objection under the provisions of the U. P. Consolidation of Holdings Act is dismissed in default or is decided ex parte, an application for its restoration or for setting aside the ex parte order would be maintainable in view of the provisions contained under S. 41 but such an application would in fact be an application seeking revival of the objection itself. It cannot be treated to be a separate proceedings under S. 201 of the U. P. Land Revenue Act detached from the objection under S. 9-A itself. The order dismissing the application for restoration would be an order passed by the Consolidation Officer and would be treated to be confirming the order passed by him dismissing the objection in default or on merits ex parte (Para 7)

Under S. 11 there is no categorisation of the kind of order which alone is appealable. All orders of the Consolidation Officer are appealable. In this view of the matter the order passed by the Consolidation Officer refusing to restore the case would be a final order passed in relation to the proceedings under S. 9-A and hence it would be appealable under S. 11. 1971 All. W. R. (H. C.) 755, Rel. on. 1970 All. J. J. 1324, 1980 All. L. J. 941 and 1967 All. L. J. 463 Dist. (Para 7)

Even if the application for restoration be treated to be a separate proceeding under S. 201 of the U. P. Land Revenue Act, it will be a proceeding arising out of an objection under S. 9-A and an appeal would lie under S. 11 against the order dismissing the application for restoration. (Para 9)

Even in proceedings under the U. P. Land Revenue Act itself, the orders passed dismissing a restoration application under S. 201 of the Act are appealable under S. 210 of the said Act. Thus in this view of the matter also the order passed by the Consolidation Officer dismissing the application for restoration even if it be treated to have been passed in separate proceedings under S. 201 would be appealable. (Para 10)

The words "unless otherwise expressly provided by or under this Act" in S. 41 leave no room for doubt that an order passed by the Consolidation Officer dismissing an application for restoration and refusing to restore the objection under S. 9-A will be appealable under the provisions of the U. P. C. H. Act, wherein a provision for filing appeal has been provided under S. 11. (Para 11)

Cases Referred: | **Chronological Paras**

1980 All. L. J. 941 | 1980 All. W. C. 547 | 8
1971 All. W. R. (H. C.) 755 | 7
1970 All. L. J. 1324 | 1970 All. W. R. (H. C.) 717 | 8
1968 All. L. J. 205 | 1968 Rev. Dec. 123 (3, 4, 7
1967 All. L. J. 463 | 1967 All. W. R. (H. C.) 220 | 8

K. C. Srivastava, for Petitioner

ORDER:— This petition under Art. 226, Constitution is directed against the order dated 14th July 1980 passed by the joint Director of Consolidation allowing the revision and remanding the case of the Settlement Officer (Consolidation) directing him to decide the appeal on merits.

2. Briefly stated the facts giving rise to this petition are that the disputed khata No. 40 situate in village Chak Tal Pareva district Varanasi was recorded in the basic year khataun in the name of the petitioner and opposite party No. 4 Smt. Mokah. An objection was filed within limitation under S. 9-A (2) of the U. P. Consolidation of Holdings Act, hereinafter to be referred as the Act, by opposite parties Nos. 2 and 3 claiming co-tenancy rights in the land in dispute to the extent of 5/9th share in the holding. The objection was contested by the petitioner and opposite party No. 4 asserting that they are the sole tenure holders. This objection was dismissed in default on 20th July 1977 as none appeared on behalf of

opposite parties Nos 2 and 3 at the time the case was called for hearing and the basic year entry in the names of the petitioner and opposite party No 4 was maintained and directed to continue An application for restoration was filed by opposite parties Nos 2 and 3 on 7th Sept 1977 They alleged that they had no knowledge about the date fixed for hearing the objection An application under S 5 Limitation Act was also filed seeking condondation of delay in filing the restoration application wherein it was mentioned that they reside in village Dehli Ka pura, district Mirzapur, and the summonses which were issued against them with regard to the date of hearing in the case were wrongly got served through affixation made in village Chak Tal Pareva and on coming to know of the dismissal of their case in default the application for restoration is presented This application was opposed by the petitioner and the Consolidation Officer vide order dated 9th Nov 1977 dismissed the application for restoration by holding that the opposite parties Nos 2 and 3 are not entitled to get the benefit of S 5, Limitation Act as no sufficient cause has been shown for extending the benefit of S 5, Limitation Act Aggrieved by the said order the opposite parties Nos. 2 and 3 filed an appeal which was allowed by the Settlement Officer (Consolidation) on Ist Sept 1978 setting aside the orders dated 20th July 1977 and 9th Nov 1977 and the case was remanded to the Consolidation Officer for decision on merits Aggrieved by the said order the petitioner filed a revision which was allowed by opposite-party No 1 vide order dated 6th June 1979 on the sole ground that Smt Sukhia opposite-party No 4 was not impleaded in the appeal hence the Settlement Officer (Consolidation) was directed to decide the appeal on merits after impleading Smt. Sukhia After remand Smt Sukhia was impleaded in the appeal which was ultimately heard and dismissed by the Settlement Officer (Consolidation) by his order dated 7th Nov 1979 on the sole ground that the appeal was not maintainable against the aforesaid order dated 9th Nov 1977 passed by the Consolidation Officer and revision lies against that order Opposite parties Nos 2 and 3 thereupon filed a revision against the said order dated 9th Sept 1979 passed by the Settlement Officer (Consolidation). This revision was heard and allowed by opposite party No 1 vide order dated 14th July 1980 holding that the appeal was maintainable against the said order and he remanded it to the Settlement Officer (Consolidation) for deciding it on merits The petitioner has challenged this order in this petition

3. The main question which crops up for consideration in this petition is whether an appeal could be filed against the aforesaid order dated 9th Nov, 1977 or a revision lay against it It is not disputed in the present case that opposite parties Nos 2 and 3 had filed the objection under S 9-A of the Act claiming co-tenancy rights in the holding in dispute and this objection was filed within the prescribed period of limitation The said objection was dismissed in default by order dated 20th July, 1977 passed by the Consolidation Officer Two remedies were available to the objectors, opposite parties Nos 2 and 3, against this order They could file an appeal under S 11 of the Act as the said order dismissing their objection was an order under S 9-A of the Act as held by this Court in Mst Isharaji v Commr Varanasi Division Varanasi, 1968 Rev Dec 123 (1968 All L J 205) Opposite parties Nos 2 and 3 could also file an application for restoration as was provided under S 201 of the U P Land Revenue Act and they in fact moved an application for restoration of their objection on 7th Sept 1977 along with an application seeking condonation of delay The Consolidation Officer dismissed the application for restoration on 9th Nov 1977 and thus the order dated 20th July 1977 dismissing the objection under S 9-A of the Act was maintained The Consolidation Officer has passed the aforesaid two orders in exercise of his powers under S 9-A of the Act The proceedings for seeking restoration of the objection dismissed in default were in relation to the objection under S 9-A of the Act which was dismissed in default

4. Learned counsel for the petitioner contended that an order dismissing the objection in default was not appealable in view of the specific bar contained in S 201 of the U P. Land Revenue Act which is also applicable to the present proceedings. In Mst Isharaji's case (supra) Satish Chandra, J (as he then was) held that

"A decision of the objections results in an order which has been made appealable under S 11 without any distinction Disposal of an objection ex parte or by default would also be an order under S 10 and would hence be appealable under S 11 The provisions of S 41 read with S 201, Land Revenue Act will hence not be attracted. Section 11 is made subject to S 41 of the U.P.C.H. Act

5. In this view of the matter it cannot be accepted that the order dated 20th July 197

dismissing the objection in default was not an appealable order as the said order was passed in proceedings arising out of an order under S 9-A of the Act itself

6. The next question for consideration in this context is whether the order dated 7th Sept., 1977 passed by the Consolidation Officer dismissing the application for restoration would be appealable or a revision will lie against it. The provisions of Chapters IX and X of the U P Land Revenue Act have been made applicable to all proceedings including appeals and applications under the Act unless otherwise expressly provided by or under the Act, viz U P C.H Act Under S 11 of the Act there is no categorisation of the kind of orders which alone are appealable All orders of the Consolidation Officer are appealable Learned counsel for the petitioner contended that the application for restoration filed by opposite parties Nos 2 and 3 seeking restoration of the objection under S 9-A of the Act would be taken to be one under S 201 of the U P Land Revenue Act as there is no separate provision providing filing of the application for the restoration of the case dismissed in default or for setting aside an ex parte order passed in the objection under S 9-A or under other provisions of the Act or in appeal or revisions arising therefrom He thus contended that the order which would be passed by the Consolidation Officer on the said application would not be an order passed by him under S 9-A of the Act hence it would not be appealable under S 11 of the Act wherein only orders under S 9-A of the Act are made appealable I am unable to agree with this contention

7. If an objection under the provisions of the U. P Consolidation of Holdings Act is dismissed in default or is decided ex parte an application for restoration of it or for setting aside the ex parte order would be maintainable in view of the provisions contained under S 41 of the Act but such an application would in fact be an application seeking revival of the objection itself It cannot be treated to be a separate proceedings under S 201 of the U P Land Revenue Act detached from the objection under S 9A of the Act itself If the application is allowed condoning the delay in moving an application for restoration, the objection under S. 9A of the Act would be revived but if it is dismissed the proceedings under S 9A of the Act would not review and the objection would not be treated to be pending before the Consolidation Officer The order dismissing the application for restoration would be an order passed by the Consolidation Officer and would be treated to be confirming the order passed by him dismissing the objection in default or on merits ex parte In Mst. Isharaji's case (1968 All L J 205) (supra) it has been held that S 11 provides an appeal against the order of Consolidation Officer within 21 days of the date of the order Under S 11 there is no categorisation of the kind of order which alone is appealable All orders of the Consolidation Officer are appealable In this view of the matter I am of the opinion that the order passed by the Consolidation Officer refusing to restore the case would be a final order passed in relation to the proceedings under S 9A of the Act itself hence it would be appealable under S 11 of the Act In taking this view I am fortified by the decision of this Court in Sahab Singh v Rameshwar, 1971 All W R (H C) 755, wherein R B Misra, J, (as he then was) held that where an objection under S 9(a) of the Act along with an application under S 5, Limitation Act for condonation of delay was dismissed on two grounds (1) that the objection was filed much after the expiry of the period of limitation prescribed for filing an objection and (2) also on the ground that there is no merit in the objection, such an order would be an order falling within the purview of S 9A (2) of the Act, and an appeal against such an order has been provided under S 11 of the Act

8. Placing reliance on the undernoted authorities learned counsel contended that the order passed by the Consolidation Officer on the application for restoration would be open to revision and not to an appeal. (1) Sita Ram Singh v State of U P 1970 All L J 1324, (2) Gaon Sabha Rakshaha Ghazipur v D D C 1980 All W C 547 (1980 All L J 941), and (3) Samharoo v State 1967 All W R (H C) 220 (1967 All L J 463). In the aforesaid cases it has been held that the order condoning the delay on an application under S 5, Limitation Act in filing the objection under S 9A of the Act is not an order under that section of the Act. If delay is condoned in filing the objection under S 9A of the Act the objection remains pending before the Consolidation Officer and hence the order condoning the delay in filing the objection itself cannot be treated to be an order under S. 9A of the Act and as such it would not be appealable. In this view of the matter it was held that no appeal was maintainable against the said order condoning the delay and such an order would be open to revision under S. 48 of the Act. These cases, therefore, do

not apply to the present case It is not disputed that the objection filed by opposite parties Nos 2 and 3 under S 9A of the Act was within limitation and was also registered as such The order dismissing the objection in default was appealable as it was an order under S 9A of the Act The proceedings in the objection did not revive as the application for restoration was dismissed being time barred and benefit of S 5, Limitation Act was refused Thus, in the present case no objection remains pending under S 9A of the Act before the Consolidation Officer The orders passed by the Consolidation Officer dismissing the objection under S 9A of the Act and refusing to restore it would be deemed to be orders passed under the aforesaid section itself as he exercised jurisdiction to entertain and decide objections in the matters with regard to title etc raised in proceedings under S 9A of the Act under that provision alone The application for restoration or for setting aside the ex parte decree passed on such objections is maintainable in view of the provisions contained in S 41 of the Act in that regard Even if the application for restoration of the case be treated to be separate proceeding under S 201 of the U P Land Revenue Act, the Consolidation Officer would be deciding it in exercise of powers under the provisions of the Act itself Sub-clause (3) of S. 3 of the Act provides that —

" 'Consolidation Officer' means a person appointed as such by the State Government to exercise the powers and perform the duties of a Consolidation Officer under this Act or the rules made thereunder and shall include a Reetangulation Officer "

9. Thus the Consolidation Officer exercises powers under the provisions of the Act itself The provisions contained in S 41 of the Act only makes the provisions of S 201, L R. Act applicable in the case, for seeking restoration of the objections dismissed in default or for setting aside the order passed ex parte thereon The Consolidation Officer while passing the order either allowing or dismissing such an application exercises powers under the Act itself and, therefore, such orders would be deemed to be passed by him under the provisions of S 9A (2) of the Act and would be appealable under S 11 of the Act because there is no categorisation of any kind of order which alone is appealable under S. 11 of the Act All orders passed by the Consolidation Officer in proceedings arising out of S 9A (2) of the Act will be appealable under S 11 of the Act An application for restoration moved against the order dismissing the objection for default would be a proceeding arising out of the order passed under S 9A of the Act Hence the order passed by the Consolidation Officer thereon would be appealable under section 11 of the Act Even if the application for restoration be treated to be a separate proceeding under section 201 of the U P. Land Revenue Act it will be a proceeding arising out of an objection under S 9A of the Act and an appeal would lie under section 11 of the Act against the order dismissing the application for restoration

10. Even in proceeding under the U P Land Revenue Act itself, the orders passed dismissing a restoration application under S 201 of the Act are appealable under S 210 of the said Act Thus, in this view of the matter also the order passed by the Consolidation Officer dismissing the application for restoration even if it be treated to have been passed in separate proceedings under S 201 of the U P Land Revenue Act, would be appealable It cannot be urged that against the order refusing to condone the delay passed by the Consolidation Officer an appeal would lie under S 201 of the U P Land Revenue Act before the authorities enumerated therein The appeal as a matter of fact will lie under the provisions of the U P C H Act itself and not under the provisions of the U P Land Revenue Act against the orders passed by the Consolidation Officer The provisions of Chapters IX and X of the U P Land Revenue Act, have been made applicable in the proceedings under the U P C H Act by virtue of S 41 of the Act, which reads as follows

"Unless otherwise expressly provided by or under this Act, the provisions of Chapters I and X of the U P Land Revenue Act, 1901, shall apply to all proceedings including appeal and applications under this Act." (Underlined by me)

11. The words 'unless otherwise expressly provided by or under this Act' in S 41 leave no room for doubt that an order passed by the Consolidation Officer dismissing an application for restoration and refusing to restore the objection under S 9A of the Act will be appealable under the provisions of the U P C. H Act, wherein a provision for filing appeal has been provided under S. 11 of the said Act In this view of the matter also, I am of the opinion that the order dated 9th Nov. 1977 passed by the Consolidation

Officer was appealable and the order passed by the Deputy Director of Consolidation does not suffer from any error of law or jurisdiction

12. In the result the writ petition fails and is accordingly dismissed In the circumstances I, however, make no order as to costs.

Petition dismissed

1981 ALL. L. J. 1237

K. N MISRA, J

Jaggu and another, Petitioners v Deputy Director of Consolidation, Jaunpur and others, Respondents

Civil Misc Writ No 5689 of 1974, D/- 16-9-1981

Limitation Act (9 of 1908), Art. 144 – Adverse possession – Joint property – Possession of one co-sharer when adverse to other – Consolidation proceedings – Co-sharer raising no plea of adverse possession – Finding of consolidation officer that co-sharer has acquired right over entire joint property by adverse possession – Validity – [U. P. Consolidation of Holdings Act (5 of 1954), S. 9A (2).]

There can be no adverse possession against co-sharer in absence of evidence of open assertion of a hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other A co-sharer or co-tenant is not ousted if he is merely kept out of benefits unless such exclusion is in assertion of a denial of his rights brought to his knowledge It is well settled that the possession of one co-sharer is possession of all unless a plea of acquisition of right by adverse possession is pleaded A specific plea of adverse possession has to be made, and a mere suggestion that there was an uninterrupted possession by the party for several years is not enough Case law discussed (Paras 6, 8)

Where the co-sharer in the joint property enjoying exclusive possession of the entire property for long time was held to have acquired right over the entire joint property by adverse possession by the consolidation officer, in proceedings under S 9A (2) of U P Act (5 of 1954), even though no specific plea of adverse possession was raised by the co-sharer, the order of consolidation officer was bad (Paras 6, 9)

KY/KY/F65/81/VVG

Cases Referred : Chronological Paras

AIR 1971 S C 1337 (1971) 2 SCJ 650 8
1970 All L J 242 1970 Rev Dec 103 8
1969 All L J 766 7
AIR 1964 S C 1254 6
AIR 1930 P C 57 (1) 58 Mad L J 7 7

Mohan Srivastava, for Petitioners, K D Pandey and Standing Counsel, for Respondents

ORDER :– This writ petition under Art 226 of the Constitution is directed against the order dated 12th July 1974 passed by the Deputy Director Consolidation in revision arising out of proceedings under S 9A (2), U P Consolidation of Holdings Act, hereinafter referred to as the Act

2. The dispute relates to plots 2088/0 16 2097/0 27 of khatam 160B and 2129/0 29 of khata 21 situate in village Datun, district Jaunpur The names of the petitioners were recorded in the basic year khatauni Opposite parties 4 to 8 filed objection claiming 2/3rd share in the land in dispute Opposite parties 4 to 7 based their claim on the basis of sale deed dated 15th April 1956 said to have been executed by Surya Bans and seven other persons in respect of one third share in the aforesaid plots Opposite party 8 Sheo Prasad based his claim on the basis of sale deed dated 30th Jan 1959 executed by Dwarika Singh, Mahadeo and Basdeo in respect of their one third share in the disputed plots The petitioners contested the case and asserted that they have purchased the entire plots in question from Sarv Din, Ram Deo Prabhu, Gauri Shanker, Ram Shanker, Janki and Churi through registered sale deed dated 30th April 1951 executed in their favour By the aforesaid sale deed the petitioners purchased the entire plots in question Their names were also mutated vide order dated 22nd Oct 1955 and they alone are recorded as sole Bhumidhars of the land in question They further asserted to be in exclusive possession and in para 4 of their objection it was specifically pleaded that the other co-sharers were aware of their continuous possession over the land in question ever since they have purchased it and their names are also recorded as such in revenue records

3. The Consolidation Officer after taking evidence of parties allowed the objection vide order dated 31st July 1972 and held that opposite parties 4 to 8 are co-tenure holders along with the petitioners to the extent of 2/3rd share in it He recorded a finding that Sarv Din and others, the vendors of the

petitioners, were entitled to 1/3rd share in the land in question and, therefore, they could not sell the entire plots in favour of the petitioners Taking this view the Consolidation Officer held the petitioners to be entitled to only 1/3rd share in the land in dispute Aggrieved by the said order the petitioners filed an appeal, which was heard and allowed by the Settlement Officer (Consolidation) vide order dated 14th Oct 1972 The Settlement Officer (Consolidation) found that the vendors of the petitioners were co-sharers to the extent of 1/3rd share in the land in dispute but he held the petitioners to have acquired rights by adverse possession over the entire plots in question on the basis of their continuous adverse possession ever since the execution of the sale deed in their favour in the year 1951 He also found that their names alone are recorded during this period Aggrieved by the said order opposite parties 4 to 8 filed a revision which was allowed by the Deputy Director of Consolidation vide order dated 12th July 1974 holding that the vendors of the petitioners were entitled to 1/3rd share in the land in dispute and as such the sale deed executed by them in respect of the entire plots was invalid The petitioners would only get right to the extent of 1/3rd share for which alone the sale deed was valid as their vendors were entitled to only 1/3rd share in the land in question On the question of acquisition of right by adverse possession over 2/3rd share the Deputy Director of Consolidation rejected the claim of the petitioners merely on the ground that the plea of adverse possession has not been taken by them and as such their case of adverse possession cannot be considered and the Settlement Officer (Consolidation) committed a manifest error of law in granting them rights by adverse possession Aggrieved by this order the petitioners have filed this writ petition

4. Learned counsel for the petitioners argued that the Deputy Director of Consolidation has erred in rejecting the claim of the petitioners about adverse possession merely on technicalities Referring to plea contained in para 4 of his objection learned counsel for the petitioners urged that the plea about adverse possession has been stated therein although not in clear words but it has been asserted that the petitioners are in possession ever since the execution of the sale deed to the knowledge of other co-sharers Learned counsel further contended that when the parties knew fully well the case of each other the absence of specific plea or issue on the point will not adversely affect their claim and the Deputy Director of Consolidation erred in not considering that plea In reply learned counsel for the opposite parties argued that since no specific plea of adverse possession was taken by the opposite parties their claim with regard to acquisition of rights by adverse possession over 2/3rd share in the land in dispute could not be considered and the Deputy Director of Consolidation has thus rightly refused to consider that case Learned counsel further contended that since it is not disputed that the vendors of the petitioners were entitled to only 1/3rd share in the land in dispute hence the sale deed could be valid only to the extent of 1/3rd share and the petitioners have been rightly given 1/3rd share by the Deputy Director of Consolidation in the land in dispute. He further urged that all the three consolidation authorities have recorded a concurrent finding holding that there had been no private partition amongst the co-sharers of the petitioners and the land in dispute was not partitioned at all The result of this finding would be that possession of the petitioners cannot be treated to be adverse unless a specific plea with regard to adverse possession and ouster is pleaded and proved

5. I have considered the aforesaid arguments of the learned counsel for the petitioners and I am of the opinion that there is no substance in the contentions of the learned counsel for the petitioners

6. It is not disputed that the vendors of the petitioners had held only 1/3rd share in the land in dispute and, therefore, the sale deed could be valid only to the extent of 1/3rd share The transfer of the entire plot will be invalid to the extent of the share of other co-sharers and it would be valid qua the interest of the transferors and the vendee i e the petitioners became co-tenant in the land in dispute along with opposite parties 4 to 8 on the basis of the aforesaid deed which could only be valid to the extent of 1/3rd share and not beyond it It is well settled that the possession of one co-sharer is possession of all unless a plea of acquisition of right by adverse possession is pleaded The petitioners in para 4 of their writer statement if have averred that they are in possession as vendees of the land in question in the knowledge of the opposite parties They have not specifically pleaded that they have been holding the land in question in adverse possession against the other co-sharers There is neither any averment or evidence to the effect that the petitioners or their vendors

had ousted the other co-sharers and had held the land in question in hostile adverse possession The plea of private partition, which was set up by the petitioners has been repelled by all three consolidation authorities by concurrent finding on this question of fact. The raising of this plea about private partition amongst the vendors of the petitioners and other co-sharers clearly shows that the vendors of the petitioners had not held the land in question adversely against the other co-sharers They had held it exclusively, if at all, only on the basis of private partition as claimed by them This plea of private partition amongst the co-sharers of the vendors has not been accepted and as such the possession of the vendors even if it was exclusive on the land in question will not operate to extinguish the right of other co-sharers, it has been held by the Supreme Court in S M Karim v Bibi Sakina, AIR 1964 S C 1254 (at p 1256)

"The alternative case that the title of the person purchasing benami in Court auction was extinguished by long and uninterrupted adverse possession of real owner is open to the latter to claim if his possession is disturbed. If the possession of the real owner ripens into title under the Limitation Act and he is dispossessed, he can sue to obtain possession, for he does not then rely on the benami nature of the transaction But the alternative claim must be clearly made and proved Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found A mere suggestion in the relief clause that, there was an uninterrupted possession for several 12 years or that the plaintiff had acquired an absolute title was not enough to raise such a plea Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea"

7. This Court in P S Lal v Gaya Din, 1969 All L J 766 has held that no court can cull out a new case for a party The Settlement Officer (Consolidation) in the absence of a plea of adverse possession being raised by the petitioners should not have made out a new case for the petitioners that they have acquired rights by adverse possession in respect of 2/3rd share in the land in dispute. The Privy Council in Siddik Mahomed Shah v. Mt. Saran, AIR 1939 P C 57 (1), has held that :—

"Where a claim has been never made in the defence presented no amount of evidence can be looked into upon a plea which was never put forward"

8. Thus the evidence even if led by the petitioners on the question of their exclusive possession over the land in question could not be considered for determining whether they have acquired rights by adverse possession in the absence of a specific plea being raised on that point by them The Supreme Court in Shambhu Prasad v. Phool Kumari, AIR 1971 S C 1337, has held that there can be no adverse possession against co-sharer in absence of evidence of open assertion of a hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other In Sheo Charan v. Tota Ram, 1970 Rev Dec 103 (1970 All L J 242 at p 244), M H Beg, J , (as he then was) held that co-sharer or co-tenant is not ousted if he is merely kept out of benefits unless such exclusion is in assertion of a denial of his rights brought to his knowledge

9. No such assertion or denial of rights of the other co-sharers has been pleaded by the petitioners nor any evidence has been led to that effect. In this view of the mater I do not find any infirmity in the order passed by the Deputy Director of Consolidation nor it suffers from any error of fact, law or jurisdiction

10. No other point is pressed

11. In the result the writ petition fails and is accordingly dismissed. I, however, make no order as to costs.

Petition dismissed

1981 ALL L. J. 1239

K N MISRA J

Banwari Lal, Petitioner v Assistant Director of Consolidation, U P., Lucknow and others, Respondents.

Civil Misc Writ No 6057 of 1974, D/- 6-8-1981

(A) U. P. Consolidation of Holdings Act (5 of 1954), S. 5 (1) (c) (ii) — Post-facto permission — Grant of — Permission granted by Settlement Officer prior to execution of sale deed — Sale could not be invalid on ground of post-facto permission. 1970 Rev Dec 311 (B R), Distinguished. (Para 6)

KY/KY/F57/81/PGS

(B) U. P. Consolidation of Holdings Act (5 of 1954), S. 5 (1)(c)(ii) — Permission to sell entire holding — Any part of holding can validly be transferred.

If permission to sell entire holding or entire share or chacks in one tenure has been granted by the Settlement Officer (Consolidation), the prohibition in making transfer would stand removed and any one, or more of plots or chaks or entire share therin belonging to transferor can be validly transferred. Therefore the transfer of part of land after obtaining permission to transfer whole cannot be said to defeat the purpose of the Act nor it will invalidate the sale so effected (Para 10)

(C) T. P. Act (4 of 1882), S. 54 — Transfer by exchange — Mere mentioning sale consideration in sale deed would not necessarily mean that transaction was not one of exchange but of sale

Where the parties had decided to transfer their rights in the respective plots situate in two villages apparently for the sake of convenience in cultivating those plots by them, they had effected the transfer by exchange of their respective plots, mere mentioning the sale consideration in the sale deed in question would not necessarily mean that the transaction was not one of exchange but of sale (Paras 13, 14)

Cases Referred : Chronological Paras

1981 U P L T NOC 63 (All) 1980 Rev Dec 202 9
1971 U P Revenue Cases 116 (B R) 8, 10
1970 Rev Dec 311 (B R) 5
1950 All L J 467 AIR 1950 All 632 11
1938 All L J 52 AIR 1938 All 229 1938 All W R 86 13
(1916) 14 All L J 65 (1916) ILR 38 All 154 AIR 1916 All 366 11
(1908) 5 All L J 96 (1908) ILR 30 All 125 11
(1889) ILR 11 All 244 1889 All W N 96 11
(1899) ILR 23 Bom 525 (1899) 1 Bom L R 5 11

R K Dwivedi, for Petitioner, A K Yog and Standing Counsel, for Respondents

ORDER :— This writ petition is directed against the order dated 11-6-74 passed by the Assistant Director Consolidation, Lucknow, Camp Mainpuri (annexure 5) and order dated 3-8-1972 passed by the Settlement Officer (Consolidation), Mainpuri contained in Annexure 3 by which opposite parties 1 and 2 have ordered the name to be effected in the name of opposite party 3 on the basis of sale deed dated 5-4-1972 executed by the petitioner Banwari Lal

2. Briefly stated the facts of the case are that opposite party 3 Gajadhar filed an application for mutation of his name over plots 747 and 748 situate in village Midhauli, district Mainpuri on the basis of sale deed dated 5-4-1972 executed by the petitioner Banwari Lal. The mutation application was opposed by the petitioner on the allegations that he had not executed the aforesaid sale deed and he was defrauded by opposite party 3 who obtained fictitious sale deed without making any payment of sale consideration. It was also averred that no permission was obtained for executing the sale deed from the Settlement Officer (Consolidation) as was required under S. 5, Sub-sec (1), sub-cl (c) (ii), U P Consolidation of Holdings Act, hereinafter referred to as the Act, and as such the sale deed is void and mutation should not be effected on its basis. Opposite party 3 refuted the allegations made by the petitioner and asserted that on that very date i e 5-4-1972, he had executed a sale deed for the same amount of sale consideration of Rs 1,500/- in favour of the petitioner and his wife Jai Devi and two sons Ram Kishan and Babu Ram in repect of his plot 271/0.89 situate in village Mohanpur, district Mainpuri. It is not denied by the petitioner that he has obtained mutation over the said plot on the basis of the aforesaid sale deed in his name as well as in the names of his wife and sons

3. The Consolidation Officer, after taking evidence of parties, rejected the mutation application filed by opposite party 3 merely on the ground that requisite permission of the Settlement Officer (Consolidation) for effecting the transfer has not been produced and in its absence mutation cannot be ordered. Aggrieved by the said order opposite party 3 filed an appeal and also produced a certified copy of the permission granted by the Settlement Officer (Consolidation) on 3-3-1972. In the said permission the name of the village where the plots in respect of which permission was granted were situated was mentioned as village Laloopur but the order was subsequently corrected and village Midhauli was noted down in the order. In the copy of the permission that was filed by opposite party 3 the plots in question were mentioned to be situate in village Midhauli. The petitioner also presented a certified copy of the permission before the appellate court wherein the name of the village was

mentioned as Laloopur It appears that in the copy which was issued to the petitioner the error in wrongly mentioning the name of the village Laloopur, which was subsequently corrected, was not noted The Assistant Settlement Officer (Consolidation) summoned the record of the said case to resolve the said dispute but the file was reported to be missing hence the village map of village Laloopur was summoned and perused and it was found that there were only 371 plots hence in the permission in question which was in respect of plots 566, 592, 747 and 748, could not relate to village Laloopur and the Assistant Settlement Officer (Consolidation) found that permission was in fact granted in respect of the aforesaid plots which were situate in village Midhauli The Assistant Settlement Officer (Consolidation) after considering the arguments advanced on behalf of the parties, allowed the appeal filed by opposite party 3 vide order dated 12-6-1973 Aggrieved by the said order the petitioner filed a revision which was dismissed by the Assistant Director of Consolidation vide order 11th June 1974 These two orders have been challenged by the petitioner in this writ petition

4. I have heard Learned counsel for the petitioner and opposite party 3 I have also gone through the impugned orders passed by opposite parties 1 and 2

5. Learned counsel for the petitioner argued that since the permission in this case was granted on 3-8-1972 hence on the basis of this post facto permission granted by the Settlement Officer (Consolidation) under S 5 (1) (c) (ii) of the Act the sale deed could not be held to be valid because the aforesaid provision requires that prior permission should be obtained for making the transfer of the land In support of his contention learned counsel for the petitioner placed reliance upon a case decided by the Board of Revenue reported in Daya Shanker v Jagan, 1970 Rev Dec 311, where it was held that

"The wordings of sub-cls. (i) and (ii) of cl. (c) of S. 5 are different. In sub-cl. (i) there is limitation on the uses not connected with agriculture etc but specified agricultural purposes are not prohibited. In sub-clause (ii) any part of holding will include even the entire holding. The permission of the S O C therefore was mandatory previous to the execution of a sale deed and even ex post facto sanction does not validate it."

6. There is no dispute so far as the law propounded in the aforesaid authority about ex post facto sanction is concerned It is true that no sale deed could be executed at that relevant time in respect of part of the holding without obtaining prior permission of the Settlement Officer (Consolidation) under the aforesaid provision but here the facts are otherwise. The permission was in fact granted on 3-3-1972, i e prior to the execution of the sale deed on 5-4-1972 In para 6 of the writ petition the petitioner mentioned that the permission was granted on 8-8-1973 but in that very para he mentioned the date of permission to be 3-3-1972 The petitioner has annexed a copy of the permission as Annexure 3 to the writ petition, according to which the permission was granted on 3-8-1972 In view of these differences in the mentioning of the date of the permission in para 6 of the writ petition I required learned counsel for the petitioner to produce a certified copy which was issued to the petitioner in order to verify the date of grant of permission by the Settlement Officer (Consolidation) and he produced the same and it has been brought on record. A perusal of the said copy reveals that the permission was granted on 3-3-1972. Thus the argument of the learned counsel, which he had tried to build up on the basis of wrong averments in the writ petition fails. In the present case the permission was granted on 3-3-1972 and the sale deed was executed on 5-4-1972. Hence it cannot be said to be invalid on the ground that post facto permission was granted. The aforesaid case cited by the petitioner does not apply to the present case.

7. Learned counsel for the petitioner next argued that the permission in the present case was obtained in respect of four plots, viz No 566, 591/1, 747 and 748 and it was in respect of half share therein but in fact half share only in two plots viz. 747 and 748, was transferred through the aforesaid sale deed. He, therefore, argued that the sale deed having not been executed in respect of half share of the aforesaid four plots the sale deed would be invalid. I do not find any substance in this argument. If permission is granted for transferring half share in four plots the bar stood removed for making transfer in respect of those plots. It cannot be said that if out of four plots half share only in two plots was sold the permission would automatically cease and the sale deed on that ground would become void When permission to transfer half shre in four plots was granted, the tenure-holder could transfer half share in any of those plots as the legal bar, which stood in the way for making transfer without obtaining

prior permission, stood removed by the grant of the permission itself No doubt it is true that since only half share in two plots was transferred the transfer was only in respect of part of the holding of the petitioner but since permission was granted the legal bar envisaged in S 5 (1) (c) (ii) of the Act for making transfer stood lifted by grant of the aforesaid permission and the part of the holding which stood transferred by the sale deed in question would be perfectly valid

8. Learned counsel for the petitioner placed reliance on a decision of the Board of Revenue in Pooran Singh v Mukhtyara Singh, 1971 U P Revenue Cases 116, wherein it has been held that

"S 5 (c) (ii) of C H Act lays down that no tenure-holder except with the permission of the SO(C) previously obtained shall transfer by sale, gift or exchange any part of his holding in the consolidation area In the present case, the vendor has sold the part of the chak when he took the permission of the SO(C) to sell the whole chak This defeats the purpose of the C H Act The fragmentation should be avoided as defined in S 168A of ZA and LR Act No part of the holding can be sold under the CH Act As such the sale deed cannot be held to be void

9. This court in Sheo Narain Singh v Sudama Singh 1980 Rev Dec 202 (1981 U P L T NOC 63), has held that

"The expression 'any part of his holding occurring' in sub-clause (ii) is the whole holding of that tenure-holder Before execution of the sale deed in question in respect of her entire share in the holding, the respondent No 3 was not required to obtain prior permission for transfer under S 5 (c), U P Consolidation of Holdings Act, and the sale deed cannot be held to be void on this ground which is otherwise valid "

10. It may be mentioned that according to the petitioner himself he had only aforesaid four plots in his holding and he had only half share in the said plots If half share in the entire four plots was to be transferred by him no permission was required of the Settlement Officer (Consolidation) in accordance with the aforesaid provision which then existed Permission was only required to be obtained if he wanted to transfer only his share in one or more of those plots Therefore, the intention in obtaining the permission was implicit By grant of permission to make transfer of half share in four plots in question the bar in making transfer by way of sale gift or exchange of any part of his holding in the consolidation area stood removed and the petitioner, therefore, could validly make transfer of his half share in any part of his holding, i e he could transfer his share in any one or more of the aforesaid plots of his holding The Board of Revenue's decision in Pooran Singh's case (supra), in my opinion, does not lay down correct law The Board of Revenue failed to notice that no permission was needed at that relevant time for making transfer of entire holding and it was only for transferring a part of holding that the permission of the Settlement Officer (Consolidation) was required If permission has been granted for making transfer of whole, the same would ensure for making transfer of a part thereof unless expressly forbidden to do so under law or by any such condition mentioned in the order itself to the effect that the entire holding can be transferred and not any part thereof But no such condition exists in the present case There also exists no such bar in the statute nor the provision contained in S 5 (c) (ii) of the Act can be interpreted as such If permission to sell entire holding or entire share in the holding consisting of several plots or chaks in one tenure has been granted the prohibition in making transfer would stand removed and any one or more of plots or chaks or entire share therein belonging to transferor can be validly transferred The Board of Revenue in the aforesaid case of Pooran Singh (supra) has wrongly overlooked the provision of S 168A, U P Zamindari Abolition and Land Reforms Act, which applies to transfers after the close of consolidation operations in the unit and it will not govern transfers made during continuance of consolidation operations in the unit The decision of the Board of Revenue being based on consideration of the provisions of S 168A, U P Zamindari Abolition and Land Reforms Act is therefore, altogether erroneous The transfer of part of land after obtaining permission to transfer whole cannot be said to defeat the purpose of the Act nor it will invalidate the sale so effected I, therefore find no substance in the aforesaid argument of the learned counsel for the petitioner

11. Lastly, learned counsel for the petitioner argued that the sale deed in question was void as no sale consideration was paid to him It is well settled that the sale deed cannot be treated to be void simply on account of non-payment of sale consideration. Sahdeo Singh v. Kuber Nath

AIR 1950 All 632, a Division Bench of this Court held that the sale would be complete even though full price was not paid It has been further observed that (at p 634)

"Neither the fact that the consideration had not been paid, nor the fact that the vendors were not in actual possession, could prevent the transaction from operating as a sale. Any number of authorities may be cited in support of the proposition that a sale may be complete even though the full price has not been paid I would ' satisfy myself with quoting only Bajnath Singh v Paltu (1908) ILR 30 All 125 ((1908) 5 All L J 96), Sagaji v Namdev, (1899) ILR 23 Bom 525 ((1899) 1 Bom L R 5) and Sib Lal v. Bhagwan Das (1889) ILR 11 All 244 1889 All W N 96) In Naram Das v Mt Dhanu, (1916) ILR 38 All 154 (AIR 1916 All 366), Banerjee, J with whom Walsh J agreed, stated that the only right of an unpaid vendor is to retain the title deeds and to charge the property with the unpaid price and that he cannot retain possession on the ground that the price has not been paid The large number of decrees for possession passed in suits brought by vendors against their vendees supports the proposition that ownership can be transferred even without delivery of possession or by an owner who himself is not in possession '

12. Learned counsel in the end argued that opposite parties 1 and 2 in the impugned order have observed that actually there was transfer by exchange between the parties and for coming to that conclusion they have referred to the sale deed executed by opposite party 3 in favour of the petitioners in respect of plot 271 situate in village Mohanpur on that very date, i e 5-4-1972 Learned counsel argued that since in the sale deeds in question there was no such mention regarding exchange of the land and the consideration having been passed through the exchange of land hence the finding recorded by opposite parties 1 and 2 stands vitiated in law I do not find any substance in this contention

13. It is not denied that opposite party 3 had on the said date, i e 5-4-1972, executed a sale deed of his land, plot 271, situate in village Mohanpur, wherein the sale consideration is mentioned as Rs. 1,500/- and on that very date simultaneously the petitioners had executed the sale deed in respect of his half share in plots 747 and 748 situate in village Madhauli for the same amount of sale consideration mentioned in the sale deed, i.e Rs. 1,500/- The petitioner has admittedly obtained mutation order in his favour on the aforesaid plot 271 of village Mohanpur He is trying to contest and non-suit the opposite party 3 on the aforesaid technical ground which, as already mentioned above, is devoid of merit. The facts and circumstances of the case, as mentioned above, would lead to one conclusion that the parties had decided to transfer their rights in the respective plots situate in two villages apparently for the sake of convenience in cultivating those plots by them. In these circumstances opposite parties 1 and 2 legitimately came to the conclusion that in fact they had effected the transfer by exchange of their respective plots The sale consideration is the same as mentioned in both the sale deeds Merely by mentioning the sale consideration in the sale deed the deed in question cannot be branded merely to be a sale deed and not a deed of exchange It has been held by this Court in Ram Badan Lal v Kunwar Singh, AIR 1938 All 229, that

"No hard and fast rule can be laid down as to when two transactions amount to a sale or to an exchange If the consideration for a transfer is not paid in cash but is paid by the transfer of ownership of some property it would only be an exchange and not sale The mere fact that the value of the property transferred has been fixed does not convert the transaction into one of sale It is not the name of form of the transaction but the nature of the consideration paid for the transfer which determines the nature of the transfer itself "

14. In this view of the matter mere mentioning the sale consideration in the two sale deeds referred to above would not necessarily mean that the transaction was not one of exchange but of sale Even though the transaction be treated to be that of a sale it would not make any difference so far as the present case is concerned By sale or exchange the property stands transferred and on its basis opposite party 3 could obtain mutation in his name on the land in question. I, therefore, do not find any infirmity in the impugned orders passed by opposite parties 1 and 2.

15. The writ petition, therefore, fails and is accordingly dismissed I, however, make no order as to costs

Petition dismissed

1981 ALL. L. J. 1244

SATISH CHANDRA, C J AND R R RASTOGI, J

Dr Rakesh Kumar Gupta and others, Petitioners v The Principal, Moti Lal Nehru Medical College, Allahabad, and others, Respondents

Civil Misc Writ Petns Nos 10415 and 10459 of 1980, D/- 29-9-1981

(A) Medical Council Act (102 of 1956), S. 33 — Regulations under — Regulations 1 to 8 (General) — Requirements of — Post Graduate students in Medicine appearing for examination — Eligibility for — Students joining service during degree course are ineligible for appearing in final examination.

Reg 8 emphasises the nature of the training and the fact that a student of a post Graduate course has to be a full time resident It cannot be contemplated that at any stage during the course of this training the student can take a job outside the Institution The two regulations, namely Regns 6 and 7 clearly contemplate that the training of Post Graduates for Degree Courses is to be on the Residency pattern and the candidates are required to work in the concerned department of the Institution for the full period In other words, these provisions totally exclude the possibility of a candidate joining a private or Government service during the course of this training for Post Graduate degree courses The petitioners in the instant case admittedly joined Government Service during the course of their training for post Graduate degree course and certainly rendered themselves ineligible for appearing in the final examination Under Regulation given under the head 'Method of training' again there is emphasis on in-service training and further that the candidate has to remain in the institution for the entire period of the course of training Further, the recommendations of the Post Graduate Committee dated 8th Aug 1978 as well contemplate that for post graduate courses the training is entirely on the Residency pattern and the student has to remain in the campus for the full term of the training. (Paras 12, 14, 15, 16)

(B) Medical Council Act (102 of 1956), S. 33 — Regulations under — Regulations 1 to 8 (General) — Post Graduate degree course — Eligibility for appearing for examination — Requirement of 90% of attendance — Students absent on account of joining services elsewhere after submission and acceptance of their thesis — Shortage of attendance occurring for period after submission of thesis — They become ineligible to appear at examination.

(Para 18)

(C) Constitution of India, Art. 226 — Natural justice — Post graduate Medical Students debarred from appearing for final examination on account of shortage in attendance — No attempt made by students to explain shortage — Some students joining services elsewhere during period of their training, contrary to rules — No breach of principles of natural justice in not giving them opportunity of hearing.

Every person or authority empowered to decide a matter which may affect the rights of another is under a duty to hear that person There are however certain exceptions to this rule If there is an express provision in the legislation or the relevant Regulations in regard to a particular requirement and that has not been fulfilled it is doubtful that the rule of opportunity would come in the picture (Para 19)

Where the Post Graduate Medical Students were debarred from appearing for final examination on account of shortage in their attendance which was required by Regulations framed under the Medical Council Act and there was no attempt made by the students to explain the shortage and some students also joined services during the period of their degree course in contravention of the rule there could be no breach of principles of natural justice in not giving them opportunity of hearing AIR 1970 S C 1039 and AIR 1979 Delhi 101 Distnd

(Para 19)

(D) Medical Council Act (102 of 1956), S. 33 — Regulations under — Regulations 1 to 8 (General) — Eligibility to appear for Post Graduate Medical examination — Conditions precedent for — Submission and acceptance of thesis is not enough — Candidates must undergo prescribed course of training subsequently.

There are three stages in the examination of Post Graduate courses The first stage is of submission of thesis The acceptance of the thesis is a pre-condition for admission to sit at the test of examination The rest of the examination consists of four theory papers and the clinical examination It is no correct

to say that the process of the examination starts with the submission of the thesis and if the thesis is accepted, then the candidates cannot but be allowed to take the theory and clinical tests even though otherwise they may not have satisfied the other requirements of the training. What the Regulation and the relevant provisions of the prospectus of Allahabad University in this behalf require is that after the acceptance of the thesis the candidate shall take in resident training and appear at four theory papers and at the clinical examination In other words, in order to entitle himself to a degree in the post graduate course, the candidate is first required to submit a thesis and if it is accepted then he has to pass in the theory and clinical examination The acceptance of the thesis ends one part of the examination. For the other part of the examination, namely, the written papers etc the mandatory requirement is to attend the classes in the institution for one more year Without this training a candidate is not eligible to appear at the written examination. AIR 1976 S C 376, Disting (Para 20)

Cases Referred : Chronological Paras

AIR 1979 Delhi 101 19
AIR 1976 S C 376 (1976) 1 SCC 311 21
AIR 1970 S C 1039 (1970) 1 SCC 121 19

G N Verma and Rajiv Srivastava, for Petitioners, Standing Counsel, for Respondents

R. R. RASTOGI, J. :— These two writ petitions are directed against the order passed by the Principal, Moti Lal Nehru Medical College, Allahabad, respondent No 1 on 12-11-1980 debarring the petitioners from appearing at the Post Graduate examinations which were to start from 27-11-1980

2. The facts may be noted in some details so as to bring out the controversies involved in these petitions. In the first petition the petitioners are Dr. Rakesh Kumar Gupta, Dr S M Lal and Dr Rajiv Kumar, Dr Rakesh Kumar Gupta passed his M.B B S Examination in 1976 and completed his statutory internship from 19-1-1977 till 30-12-1977 Dr S M Lal and Dr Rajiv Kumar passed their M.B.B.S Examination in 1975 and completed their statutory internship by 31-12-1976 Thereafter all the three petitioners took admission in Post Graduate courses, petitioner Dr Rakesh Kumar Gupta in M D (T D.), Dr S. M. Lal in M.D. (Radiology) and Dr Rajiv Kumar in M.S. Ophthalmology The later two first took admission for Diploma course Each of them completed their Housemanship. Dr Gupta from 1-1-1977 to 31-12-1978 and the other two from 1-1-1977 to 31-12-1977 The later two completed their Diploma course as well towards the end of 1978 and all the three petitioners made applications for registration in Nov , 1978 Those applications were accepted for admission in the Post Graduate degree course of M D /M S respectively The session started from 1-1-1979

3. As required under the Rules all the three petitioners submitted their theses in March, 1980 The theses of each one of the three petitioners were accepted In the meantime Dr Gupta took an appointment in Uttar Kashi from 1st April, 1980 Dr S M Lal joined as P M S Officer at Balrampur Hospital, Lucknow from 5-10-1979 and Dr Rajiv Kumar was selected as eye specilist in B D Pandey (Male) District Hospital Nainital on 14-11-1979

4. The post Graduate degree examinations were scheduled to start from 27-11-1980 On 12-11-1980 the respondent No 1 made the impugned order and sent it to the Heads of Departments concerned for information to the various candidates whose names were mentioned therein This order was in regard to 32 candidates of Post Graduate courses The name of Dr Rakesh Kumar appears at Sl No 1 of Dr S M. Lal, at Sl No 20 and of Dr Rajiv Kumar at Sl No 29 These petitioners along with other candidates mentioned in this order were found 'not eligible to appear in the ensuing University examination on account of the reasons marked 'X' given against the name of each candidate'

5. Briefly stated, so far as the aforesaid three petitioners are concerned, the reasons were that they failed to fill in the required bonds, that they had not obtained certificate from their employers for a period of two years and lastly that their attendance was short

6. The petitioners claim to have come to know of the impugned order on 18-11-1980 and they seek the quashing of this order in this writ petition on various grounds

7. Dr Dhruva Banerji is the petitioner in the other writ petition. His name did not figure in the order dated 12-11-1980 However, on Nov 24/25, 1980, the respondent No 1 sent a communication to the Registrar, University of Allahabad enclosing therewith the applications of 13

candidates for Post Graduate degree and Diploma examinations who were not found eligible for admission to the various examinations In this list the names of 13 candidates were mentioned including those of the three petitioners of the first writ petition as also of Dr Dhruva Banerji When Dr Dhruva Banerji came to know that he had been debarred from appearing at the examination, he filed the writ petition before this Court for quashing the order dated 24/25-11-1980

8. The respondents in the writ petitions are the Principal, Moti Lal Nehru Medical College, The State of Uttar Pradesh, the Director, Medical Health Service and Family Welfare, U P Lucknow and the University of Allahabad through the Principal, Medical College which is a constituent college of the University of Allahabad

9. Counter and rejoinder-affidavits have been filed In the counter-affidavit which has been filed on behalf of respondent No 1 is Dr Dhruva Banerji's petition, it has been stated in para 4 that the list prepared on 12-11-1980 was in regard to those candidates who had joined Government service and for that reason had not been able to attend their classes Subsequently, a separate list was prepared and communicated to the Registrar which contained the names of those candidates whose attendants had fallen short. The main question for consideration in these writ petitions, therefore, would be the meligibility of all the 4 petitioners for the reason that their attendance had fallen short of the requirements

10. On behalf of the petitioners the following contentions were urged before us by Sri G N Verma that no opportunity was given to the petitioners to explain the alleged reasons given for holding that the petitioners were not eligible to appear at the aforesaid examination, (2) that the examination process for Post-Graduate course had started with the submission of the theses by the petitioners and after the acceptance of the same they could not be detained till this process of examination came to an end, and lastly that the Principal of the Medical College, respondent No 1, has no power to detain the candidates from appearing at the relevant examinations.

Before taking up these contentions it would be useful to refer to the Rules and Regulations The Medical Council of India have made certain recommendations on Post Graduate Medical Education Its recommendations were adopted by the Medical Council of India in Feb 1971 and subsequently there was some revision made in 1976 and further they have been approved as Regulations under S 33 of the Medical Council Act, 1956, by the Government of India Under the head 'General' there are 8 Regulations Reg No 1 says that for M D /M S degrees in clinical subjects, there shall be proper training in basic medical sciences related to the disciplines concerned as well as paper in these subjects at the examination In the case of M D & M S in basic medical sciences there should be training in applied aspects of the subject and a paper on the subject Regulation 2 says that in all post-graduate courses, whether clinical or basic medical sciences, preventive and social aspects should be emphasised Regn 3 says that thesis should be a part of the examination in the degree courses as this gives training in research methodology It would be seen that thesis is only a part of the examination and the purpose is to give the candidate a training in the mode of research Then comes Regulation 4 which restricts the student teacher ratio for the reason to enable the Post-Graduate student to have a proper training

11. Regn 5 provides for selection of Post-Graduates both for degree and diploma courses strictly on the basis of academic merit Regn 6 is very important and it reads

"The training of post-graduates for degree courses should be of Residency pattern with patient care Both the in-service candidates and the stipendiaries should be given similar clinical responsibility The participation of the students in all facets of the educational progress should be insisted upon and training in basic medical sciences and laboratory and experimental work emphasised In Basic Sciences adequate number of training posts of Demonstrator, Tutors etc., should be provided for."

Regn 7 says that the candidates pursuing Degree or Diploma courses should work in the concerned department of the Institution for the full period.

12. These two regulations, therefore, clearly contemplate that the training of Post Graduates for Degree Courses is to be on the Residency pattern and the candidates are required to work in the concerned department of the Institution for the full period. In other words, these provisions totally exclude the possibility of a candidate joining a private or Government service during the course of this training for Post

Graduate degree courses The petitioners in the first petition admittedly joined Government service during the course of their training for post Graduate degree course and certainly rendered themselves ineligible for appearing in the final examination

13. Regn 8 provides for the number of Examiners and the number of candidates to be examined per day Then follow minimum requirements for a Post Graduate Teaching Centre Reference may be made to 'Facilities for Post Graduates Students' also because the Regulation in that behalf goes to show that for the training to Post Graduate course the candidate cannot go out of the Department of the Institution in which he has taken the admission This Regulation reads —

"There would be two types of post graduate students

(a) Those holding posts in the same Department like Resident, Registrar, Demonstrator etc Adequate number of paid posts should be created for this purpose

(b) Those receiving stipends The stipends should normally be Rupees 300/- per month payable for the duration of the course

The students for both the categories (a) and (b) above shall be full time Resident "

This regulation, therefore, further emphasises the nature of the training and the fact that a student of a Post Graduate course has to be a full time resident It cannot be contemplated that at any stage during the course of this training the student can take a job outside the Institution

14. We may omit the regulations in regard to clinical subjects and criteria for the selection of candidates except for saying that a student for Post Graduate training is to be selected strictly on merit judged on the basis of his academic records in the undergraduate course, that he should have obtained full registration, that he must have completed satisfactorily one year of compulsory rotating internship after passing the final M B B S examination and must have full registration with State Medical Council and lastly, subsequently he should have done one year's housemanship prior to the admission to the post graduate degree or diploma course In the alternative criteria mention may be made of cl (ii) which says that a student, who has worked in State Medical Services, Armed Forces Medical Services or other equivalent services of public undertkings, local bodies, etc for a period of three years after full registration can also be admitted to the Post Graduate degree or Diploma course This criterion is in the alternative to cl (c) referred to above which requires completion of one year's housemanship

15. Reference may next be made to the Regulation given under the head 'period of training' It says that the period of training for M.D., M S shall be 3 years after full registration including one year of house job or equivalent thereof and for Diploma courses, 2 year after full registration including one year of house job In other words a student after passing the final M B B S examination and completing one year of compulsory rotating internship and after obtaining full registration with the State Medical council can complete the Post Graduation courses in a period of three years which includes one year of house job For Diploma courses such period is two years If a student after doing his diploma course wants to join Post-Graduate course, again he will have to put in training for two years

16. Under the head 'Methods of Training' it has been stated

'The emphasis should be on in-service training and not in didactic lectures The candidate should take part in Seminars Group Discussions, Clinical meetings etc The candidate should be required to write a thesis or dissertation with detailed commentary which should provide the candidate with necessary background of training in research methods and techniques along with the art of writing in research papers and learning the use of library The in-service training requires a candidate to be a resident in the campus and he should be given graded responsibility in the management and treatment of patients entrusted to his care Adequate number of post of clinical residents or tutors should be created for this purpose "

Again, there is emphasis on in-service training and further that the candidate has to remain in the institution for the entire period of the course of training It is not necessary to refer to the other Regulations except that a brief reference may be made to the recommendations of the Post Graduate Committee dated 8th Aug , 1978 In respect of Post-Graduate Medical Education, it was emphasised that the post-graduate training be de-linked from housemanship, that the post-graduate training for the post-graduate degree under the category "Broad

Specialities" and General Medicine and General Surgery shall be for three years and for diploma two years after the completion of the compulsory pre-registration training and obtaining the degree and full registration with the State/Central Medical Council Paragraph 3 says that the candidates who are admitted to the post-graduate courses and who have done housemanship or equivalent training will be entitled to an exemption upto a maximum period of one year in the duration of training for the post graduate course The number of admission to the post-graduate courses should be based on the number of recognised post-graduate teachers, the number of teaching beds available for the training of the students in the subject of training and the out-patient attendance These recommendations as well contemplate that for post-graduate courses the training is entirely on the Residency pattern and the student has to remain in the campus for the full term of the training

17. A brief reference may be made to the relevant provisions contained in the prospectus of the Faculty of Medicine of the University of Allahabad As for the subjects, the mode of selection of candidates, preparation and submissions of thesis, pattern of training etc the provisions are the same and it is not necessary to refer to them Reference may be made only to regulation 12 given under the head "General" It says –

"12 A candidate whose thesis has been accepted shall appear in

(i) A written examination consisting of four papers (details of papers are not necessary here),

(ii) An oral or practical examination,

(iii) Clinical Examination for candidate appearing in clinical subjects

These are the three stages of the examination for Post-Graduate courses It is not necessary to mention the other provisions which are in regard to the duties of the Examiners and the amount of fee required Under the Head 'Transitory Ordinance', Regulation 5 emphasises at a consolidated course in research methods and techniques along with the art of writing research papers and learning the use of the library and methods of collecting and analysing data including medical statistics to be given to all the candidates soon after they have been registered. In addition for candidates registering in clinical subjects training is required to be given in Anatomy, Physiology, Biochemistry, Biophysics, Pharmacology and Pathology in their applied aspects so far as they relate to the speciality of the candidate concerned It further says

"The Course will be organised by the Dean of the Faculty of Medicine Each candidate will be required to attend a minimum 90% of all lectures, demonstrations/practicals, seminars, group discussions, clinical meetings etc

"He will be required to participate in the teaching and training programmes of the under-graduate students

"In clinical subjects he will be given graded and increasing responsibility in the management and treatment of patients "

Then follow the details of courses of study and scheme of examinations

18. Now, we shall deal with the contentions urged on behalf of the petitioners one by one As for the opportunity to explain, the basic question which arises is as to whether the petitioners were eligible to appear at the examination which was to start from 27-11-1980 and for that the reason which now remains for consideration is shortage of attendance It was emphasised by Sri Verma that the requirement of 90% of attendance is only for the period prior to the submission and acceptance of the thesis and thereafter there is no such requirement It has been stated in the petition as well that after the acceptance of thesis no attendance register is maintained and there are no regular classes. It has been claimed that the petitioners fully complied with the requirements of the Regulations and the Prospectus of the Allahabad University We have given the relevant provisions of the Regulations and the Prospectus above and in our opinion the present petitioners do not fulfil the requirements in this behalf It is correct that in regard to the petitioners of the first petition up to the stage of submission of their thesis there was no defect found in their training. Their Professors and Co-examiners gave the necessary certificates which are Annexures 2, 3 and 4 to the writ petition. These theses were duly accepted. Dr Rakesh Kumar Gupta joined the service after the submission of thesis, while the other two did so even prior to that It may be that after joining service they might have taken leave and completed the requisite quota of attendance in the institution Any how for the period prior to the submission and acceptance of thesis the question of shortage of attendance does not arise. It arises for the period thereafter Admittedly, these three petitioners were in service elsewhere and they

have not averred also that physically they made any attempt to attend the training required under the Regulations or the Prospectus Further we have indicated that the Regulation contemplates that throughout the training the student has to be a full time resident There are only two types of Post-Graduate Students provided for (i) those holding posts in the same Department in which they have sought admission and (ii) those receiving stipends Both the categories of these students are required to be full time residents They have to remain in the Institution for the entire period of their training This was lacking in the cases of these three petitioners and hence for shortage of their attendance they rendered themselves ineligible to appear at the examination

18-A. As for Dr Dhruva Banerji, the details of his attendance during 1979-80 have been given Dr Banerji has not controverted these details They clearly go to show that for weeks together Dr Banerji absented himself from the Institution and has made no attempt to explain as to how the shortage in his attendance occurred

19. It is correct that every person or authority empowered to decide a matter which may affect the rights of another is under a duty to hear that person There are, however, certain exceptions to this rule If there is an express provision in the Legislation or the relevant Regulations in regard to a particular requirement and that has not been fulfilled, it is doubtful that the rule of opportunity would come in the picutre Even in the present writ petitions no attempt has been made by these petitioners to explain the shortage in their attendance As for the three petitioners of the first petition there could have been no explanation because admittedly physically they could not have been presented in the institution in which they had sought admission for Post-Graduate courses In our opinion, therefore, there is no breach of principles of any natural justice The decision of the Delhi High Court in Azra Seema v I P Obroi (AIR 1979 Delhi 101) is on its own facts and is of not much help to the petitioners Similarly the decision in Board of High School and Intermediate Education U P v Chittra (AIR 1970 S C 1039) is distinguishable on facts In that case the Board of High School and Intermediate Examination cancelled the examination of a candidate who had been allowed to appear at the examination and had actually answered all the Question papers on the ground that he had been admitted to the examination in spite of shortage in attendance at lectures. Since no show cause notice had been given to the candidate, it was held that the action of the Board was vitiated by violation of rules of natural justice In the present case the petitioners were given prior notice of the grounds on which they were found ineligible to appear at the examination They could have shown cause before the Principal of the College but they did not do so They have been allowed to appear at the examination under orders of this Court That situation is entirely different In our opinion, therefore, this contention has no substance

20. As for the second contention, as we have shown above, there are three stages in the examination of Post-Graduate courses. The first stage is of submission of thesis The acceptance of the thesis is a pre-condition for admission to sit in the rest of examination, as stated in the Regulations aforesaid at page 11 The rest of the examination consists of four theory papers and the clinical examination It is not correct to say that the process of the examination starts with the submission of the thesis and if the thesis is accepted, then the candidates cannot but be allowed to take the theory and clinical tests even though otherwise they may not have satisfied the other requirements of the training What the Regulation and the relevant provisions of the prospectus in this behalf require is that after the acceptance of the thesis the candidate shall take in-resident training and appear at four theory papers and at the clinical examination In other words, in order to entitle himself to a degree in the post-graduate course, the candidate is first required to submit a thesis and if it is accepted then he has to pass in the theory and clinical examination

21. Reliance was placed on behalf of the petitioners on the decision of the Supreme Court in Sri Krishan v Kurukshetra University (AIR 1976 S C 376) in which it has been laid down that once the candidate is allowed to take the examination rightly or wrongly, then the statute which empowers the University to withdraw the candidature of the student has worked itself out and the candidate cannot be refused admission subsequently for any infirmity which should have been looked into before giving the candidate permission to appear In our opinion this decision is of not much help to the petitioners because they were not allowed here to take the examinations which were to commence on 27-11-1980 The acceptance of the thesis ends one part of the examination

For the other part of the Examination, namely, the written papers etc the mandatory requirement is to attend the classes in the Institution for one more year Without this training candidate is not eligible to appear at the written examination That training was not gone through by these three petitioners at least and as for Dr Dhruva Banerji his attendance was clearly short of the requirements For all these reasons, therefore, we do not accept this contention as well

22. Coming to the last question, now it is only of academic interest. The contention is that the Principal of the College has no power to restrain the candidate from appearing at an examination Here the final list which was prepared on Nov 24/25, 1980 was communicated by him to the Registrar The decision, therefore, was to be taken by the University authorities concerned We do not know what orders were passed on it This submission also, therefore, is not of such consequence

23. In the result, therefore, both these petitions fail and are dismissed In the circumstances of the case, however, we make no orders as to costs

Petitions dismissed

1981 ALL. L. J. 1250

V K MEHROTRA, J

Mahesh Chandra, Appellant v Kishan Prakash Gupta, Respondent

Second Appeals Nos 1735 and 1736 of 1981, D/- 4-8-1981 *

Contract Act (9 of 1872), Section 23 — Public policy — Incoming tenant agreeing to pay pagari i.e. premium to outgoing tenant of premises in consideration of latter handing over possession — Agreement is opposed to public policy.

The benefit contemplated by the U P Rent Act 3 of 1947 or the U P Rent Act 13 of 1972 which followed the 1947 Act would very nearly be rendered nugatory in case it is left open to an outgoing tenant to make an exaction from the incoming one for enabling a contract of tenancy between the landlord and him, albeit under the direction of the District Magistrate, to fructify by being subjected to a further requirement of payment to be made by the incoming tenant for getting possession of the premises demised to him to the outgoing tenant The mischief which was sought to be abridged by statutory control of letting and rent could manifest itself in the shape of exorbitant exaction by an outgoing tenant for enabling the incoming tenant to peacefully obtain possession of the premises allotted to him and obviating the necessity of recourse to public authority, through the provisions of the Act for obtaining possession of the allotted premises Harassment and undue delay to an incoming tenant would be implicit in the recognition of the right of an outgoing tenant to charge premium for giving up possession of a premises The liberty to enter into a contract for payment of any amount by way of pagari, for giving up possession of any premises to the outgoing tenant, in the present context of scarcity of accommodation was without doubt the harmful tendency of involving an incoming tenant in unavoidable harassment The effect of such liberty would clearly be baneful upon the community as a whole. Law does not countenance enforceability of an agreement which would have a detrimental effect upon the community in the present days of scare accommodation particularly in urban areas The agreement would clearly be void under Section 23 of the Contract Act The concurrent findings of the two courts below being that the consideration for the agreement resulting in the promisory notes, so far as the appellants are concerned was payments of the amount by way of pagaris i e premium to the plaintiff for the latter handing over possession of the shop to them, it is clear that it was opposed to public policy As such, it was void. It could not be enforced. AIR 1974 S C 1924 Relied on, (1921) 3 KB 404 Distinguished (Paras 15, 16, 18.

Cases Referred : Chronological Paras

AIR 1974 S C 1924 9, 14
AIR 1959 S C 781 : (1959) Supp 2 SCR 406 7, 8, 9
(1921) 3 KB 404 : 90 LJ KB 1248 : 125 LT 749 Remmington v Larchin 17
(1916) 1 AC 428 : 114 LT 292 : 85 LJ PC 60 Hollinshead v Hazleton 9
(1853) 4 HLC 1 : 10 ER 359 : 23 LJ Ch 348, Egerton v. Brownlow 9

S. K. Varma, for Appellant, N. Lal and Smt P. Srivastava, for Respondent.

*Against order of Inder Paul Singh, Dist. J. Bujaun, D/- 27-5-1974.

IV KY 'E466'81 JHS

JUDGMENT :– These two Second Appeals are by the defendants in two suits brought against them by two different plaintiffs The defendants are own brothers The suits were for recovery from them of some amounts claimed as the balance of amount due to the plaintiffs towards accounts of partnership business between them and defendant Mahesh Chandra after the dissolution of the firm on Feb 7, 1968

2. The plaintiffs' case was that defendent Mahesh Chandra and the two them were partners in the business of general merchandise Ramesh Chandra, the other defendant, was assisting his brother Mahesh Chandra in carrying on the business Upon dissolution of the partnership when accounting was done a sum of Rs 5000/- was due from the defendants Since they were short of funds, the defendants executed promissory notes for Rs 2500/- each is favour of the plaintiffs and agreed to pay interest at the rate of Re 0 50 paise % per month In the alternative it also was (argued) that in case it was found that the promissory notes related to the amount of pagari demanded by the defendants (?) for having permitted the plaintiffs (?) to carry on business in the shop hitherto used by the partnership firm as alleged by the defendants, the amount was even then recoverable from the defendants

3. The defendants took the stand that the partnership between the parties had come to an end on October 12, 1965 and final settlement of account had already been done between them The sum now sought to be recovered represented the amount of pagari which the defendants were required to pay to the plaintiffs for enabling them to continue doing business in the same shop in which the partnership was carrying on business and which earlier stood leased in the name of plaintiff Krishna Prakash, a cousin of the two defendants

4. One of the issues which was framed by the trial court in each of the cases was whether the pronote and receipt in suit were executed in lieu of pagari as alleged by the defendants. This issue was answered by the trial Judge in the affirmative After appraising the evidence on record, he found that the promissory notes in the two suits were executed in lieu of pagari amount and not in lieu of partnership dues The finding of the trial Judge was affirmed by the lower appellate court

5. The trial Judge and thereafter the lower appellate court have both taken the view that the plaintiffs were entitled to recover the amount of these promissory notes from the defendants albeit the finding (was) that the amount was demanded by way of pagari They have taken the view that the demand of pagari was neither immoral nor opposed to public policy and as such the promissory notes had been executed for a lawful consideration This view of the courts below is being assailed by the defendants in these appeals

6. It is permissible under the Contract Act to enter into an agreement for a lawful consideration and with a lawful object An agreement of the nature made by free consent of the parties who are competent to contract amounts to contract under Section 10 of the Contract Act The contract of which the object or consideration is unlawful in void under Section 23 of the Contract Act which inter alia provides that consideration or the object of an agreement is lawful unless the court regarded it to be immoral or opposed to the public policy

7. In Ghenulal Parakh v Mahadeodas Maiya (AIR 1959 SC 781) it was observed (in para 30 of the report) that "the word 'immoral' is a very comprehensive word Ordinarily, it takes in every aspect of the personal conduct deviating from the standard norms of life Its varying content depends upon time, place and the stage of civilization of a particular society . The provisions of Section 23 of the Contract Act indicate the legislative intention to give it a restricted meaning, precedents confine the said concept only to sexual immorality and no case has been brought to our notice where it has been applied to head other than sexual immorality" These observations rule out the submission made on behalf of the defendants that the consideration for the two promossory notes being the demand of pagari amount, was immoral within the meaning of Section 23 of the Contract Act.

8. The question which needs serious attention is whether the consideration for execution of the two promissory notes was unlawful as being opposed to public policy. Considerable arguments were addressed by the learned counsel for the parties on this aspect of the case and reliance was placed by them upon several decisions many of them not being very relevant to the question The scope of inquiry, however, has been considerably narrowed down for the broad principles even in respect of this question were noticed and laid down by the Supreme

Court in Gherulal Parakh's case (supra). In that case, the Supreme Court was called upon to decide whether a partnership agreement with the object of carrying on wagering transactions was lawful having regard to the provisions of Section 23 of the Contract Act or not. One of the submission was that the object was opposed to public policy and thus unlawful within the meaning of that provision. The Supreme Court examined the concept of public policy as also its application by the courts in England and in India to different situations. In para 23 it observed

"The doctrine of public policy may be summarised thus: public policy or the policy of the law is an illusive concept; it has been described as "untrustworthy guide," "variable quality," "uncertain one," "unruly horse," etc. the primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the court may relieve them of their duty on a rule founded on what is called the public policy for want of better words. Lord Atkin describes that something done contrary to public policy is a harmful thing, but the doctrine is extended not only to harmful cases but also to harmful tendencies, this doctrine of public policy is only a branch of common law, and just like any other branch of common law, it is governed by precedents. principles have been crystallised under different heads and though it is permissible for courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public, though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days."

9. A few years later in Murlidhar Agarwal v. State of U. P. (AIR 1974 SC 1924) Mathew J. Speaking for the Supreme Court observed (in Paras 28 to 32) as follows :—

"28. The expression (public policy) has an entirely different meaning from policy of the law' and one much more extensive. Nevertheless, the term 'public policy' is used by the House of Lords itself apparently as synonymous with the policy of the law of the policy of a statute (see Hollinshead v. Hazleton 1916-1 AC 428). Yet it is clearly so used without intent to repudiate or disregard the distinction so clearly drawn in Egerton v. Brownlow (1853) 4 HLC 1 at p. 105. It seems clear that the conception of public policy is not only now quite distinct from that of the policy of law but has in fact always been so except in some exceptional instances of confussion which have had no substantial effect on the general course of authority. See W. S. M. Knight, 'Public Policy in English Laws' 36, Law Quarterly Rev. 207 at p. 217-218.

29. The Courts have often repeated Mr. Justice Burrough's metaphor about public policy being an unruly horse. Some Judges appear to have thought it more like a tiger and have refused to mount it at all, perhaps because they feared the fate of the young lady of Riga. Others have regarded it like Balsam's ass which would carry its rider nowhere. But none, at any rate at the present day, has looked upon it as a Pegasus that might soar beyond the momentary needs of the community. There is nothing remarkable in this because the topic itself is so elusive. See percy H. Winfield "Public Policy in English Common Law" 42 Harward Law Rev. 76.

30. "Public policy" has been defined by winfield as "a principle of judicial legislation or interpretation founded on the current needs of the community." (See percy R. Winfield "Public Policy" in English Common Law." 42 Harvard Law Rev. 76). Now, this would show that the interests of the whole public must be taken into account, but it leads in practice to the paradox that in many cases what seems to be in contemplation is the interest of one section only of the public and a small section at that. The explanation of the paradox is that the courts must certainly weigh the interest of the whole community as well as the interest of a considerable section of it, such as tenants for instance, as a class as in this case. If the decision is in their favour, it means no more than that there is nothing in their conduct which is prejudicial to the nation as a whole. Nor is the benefit of the whole community always a more tacit consideration. The courts may have to strike a balance in express terms between community interest and sectional interest. So, here we are concerned with the general freedom of contract which everyone possesses as against the principle that this freedom shall not be used to subject a class, to the harassment of suits without valid or reasonable grounds. Though there is considerable support in judicial dicta for the view that courts cannot create new heads of public policy. See Gherulal Parakh v.

Mahadeodas Maiya, 1959 Supp (2) SCR 406 at p. 440 (AIR 1959 SC 781), there is also no lack of judicial authority for the view that the categories of heads of public policy are not closed and that there remains a broad field within which courts can apply a variable notion of policy as a principle of judicial legislation or interpretation founded on the current needs of the community. See Dennis Lloyd, "Public Policy" (1953), pp. 112-113.

31. Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation, public policy would be almost useless if it were to remain in fixed moulds for all time.

32. If it is variable, if it depends on the welfare of the community at any given time, how are the courts to ascertain it? The judges are more to be trusted as interpreters of the law than as expounders of public policy. However, there is no alternative under our system but to vest this power with judges. The difficulty of discovering what public policy is at any given moment certainly does not absolve the judges from the duty of doing so. In conducting an enquiry, as already stated judges are not hide bound by precedent. The judges must look beyond the narrow field of past precedents, though this still leaves open the question in which direction he must cast his gaze. The Judges are to base their decision on the opinion of men of the world, as distinguished from opinions based on legal learning . . . . The judges must consider the social consequences of the rule propounded especially in the light of the factual evidence available as to its probable results."

10. The Supreme Court was considering the question whether it was open to a tenant to forego the protection of Section 3(1) of the U. P. Temporary Control of Rent and Eviction Act (U. P. Act III of 1947). It held that the benefit could not be waived by a tenant because, in its opinion, although Sec. 3 was primarily for the protection of the tenants only, the provisions contained in Section 3 were based upon public policy of protecting a weaker section of the community, namely, the tenants with a view to ultimately protect the interest of the community in general by creating equality of bargaining power.

11. In Anson's Law of Contract (24th Edition), it has been stated at pp. 334-335 that there are a number of situations where a contract, cannot be enforced even though these are not the subject of any positive enactment, and that remedy is denied at common law by virtue of operation of rules of public policy. Further, at the present time there is an increasing recognition of the positive function of the courts in matters of public policy.

12. Section 105 of the Transfer of property Act recognises the distinction between premium and rent. It also defines 'lease' as transfer of right to enjoy immovable property in consideration of a price paid or promised or of a money etc. to be rendered periodically to a transferor by a transferee. Premium is the price while the money periodically paid is the rent. U. P. Rent Act III of 1947 provided in Section 4 that it will not be lawful for the landlord to take or receive for admitting a tenant to any accommodation any premium or any additional payment of any sort whatsoever over and above the rent payable therefor under the provisions of that Act. The U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U. P. Act XIII of 1972), which has replaced that Act, has, in addition prohibited by Section 4, receipt by a landlord of any premium or additional payment over and above the rent for admitting a tenant to any building and has also prohibited a tenant from taking or receiving money for admitting a sub-tenant or any other person. The scheme of both the Acts is similar namely, that any person who is in a position to admit another as a lessee or sub-lessee of an accommodation or building to which admittance is controlled by the provisions of these Statutes, shall not be entitled to charge any premium. This is a departure from what is provided by the enabling provisions in that regard in the T. P. Act.

13. There is nothing expressly contained in the T. P. Act or in these two State Acts in regard to the right of a lessee to exact any payment for handing over possession of premises of which he is a lessee or sub-lessee to another person, who may have been inducted as a lessee or sub-lessee by his own lessor. In other words, it is not contemplated that on transfer of possession from tenant to tenant the out-going tenant may be entitled to charge a premium from the incoming one. Transfer of possession of an accommodation or building from a tenant to tenant is, in fact not envisaged by either of the two U. P. Acts. Both these Acts contemplate direction from the District Magistrate to the landlord to let out the premises to a person specified by

him That is the provision contained in Section 7 of the 1947 Act and that is what is provided for in Section 16 of the 1972 Act An allottee became liable for rent from the date of the allotment under Rule 5 of the U P (Temporary) Control of Rent and Eviction Rules, 1949 unless he intimated in writing to the District Magistrate his refusal to accept the accommodation allotted to him The tenant in occupation of any accommodation was under a statutory liability under Section 7(1)(b) of the 1947 Act to give notice in writing to the District Magistrate within seven days of his vacating it It has been made explicit in Sec. 16(3)(c) of the 1972 Act that the allotment order shall specify a date by which the landlord was to deliver possession to the allottee

14. The object of U P Act III of 1947, like that of U. P. Act XIII of 1972. was to control the letting and rent of residential and non-residential accommodation and of the eviction of tenants from them in the interest of general public The enactment clearly evinced a policy of protecting the interest, in the words of the Supreme Court in Murlidhar's case (AIR 1974 SC 1924), (supra), of "a weaker section of the community with a view to ultimately protecting the interest of the community in general" It was a beneficient piece of legislation like the one which followed it namely, U P Act XIII of 1972

15. It is obvious that the benefit contemplated by these enactments would very nearly be rendered nugatory in case it is left open to an outgoing tenant to make an exaction from the incoming one for enabling a contract of tenancy between the landlord and him, albeit under the direction of the District Magistrate, to fructify by being subjected to a further requirement of payment to be made by the incoming tenant for getting possession of the premises demised to him to the outgoing tenant The mischief which was sought to be abridged by statutory control of letting and rent, could manifest itself in the shape of exorbitant exaction by an outgoing tenant for enabling the incoming tenant to peacefully obtain possession of the premises allotted to him and obviating the necessity of recourse to public authority, through the provisions of the Act, for obtaining possession of the allotted premises. Harassment and undue delay to an incoming tenant would be implicit in the recognition of the right of an outgoing tenant to charge premium for giving up possession of a premises

16. The liberty to enter into a contract for payment of any amount by way of pagari, for giving up possession of any premises to the outgoing tenant, in the present context of scarcity of accommodation, has without doubt the harmful tendency of involving an incoming tenant in unavoidable harassment The effect of such liberty would clearly be baneful upon the community as a whole. Law does not countenance enforceability of an agreement which would have a detrimental effect upon the community in the present days of scare accommodation particularly in urban areas The agreement would clearly be void under Section 23 of the Contract Act

17. In Remmington v Larchin, (1921 - 3 KB 404) the court of appeal was called upon to decide as to whether the charging of premium by a tenant from the succeeding one was contrary to Section 8(1) of the Increase of Rent and Mortgage interest (Rstrictions) Act, 1920 under which there was a prohibition upon the lessor from making any charge. The Court of Appeal held that the provision only created restriction upon the landlord and did not prohibit the out-going lessee to charge premium from the incoming one That was a decision wherein no question of the agreement being void for its consideration being opposed to public policy was involved or considered

18. The concurrent findings of the two courts below being that the consideration for the agreement resulting in the promissory notes, so far as the appellants are concerned, was payments of the amount by way of pagari i.e premium to the plaintiff for the latter handing over possession of the shop to them, it is clear that it was opposed to public policy. As such, it was void. It could not be enforced. The courts below have misdirected themselves in law in enforcing payment of the amount of these two promissory notes. Their decree cannot be upheld.

19. The appeals are allowed The decree in both the cases is set aside and the plaintiff's suits are dismissed. The appellants shall, however, bear their own costs.

Appeals allowed

1981 ALL. L. J. 1255

DEOKI NANDAN, J

Ram Pyare, Appellant v Mahadeo and others, Respondents

Second Appeal No 2604 of 1965, D/- 8-9-1981 *

(A) Civil P. C. (5 of 1908), S. 2(2); O. 41 R. 11 — Decree — Definition of — Does not include order rejecting appeal on ground of limitation — Such order is not appealable. (1921) 60 I. C. 493 and AIR 1941 Pat. 108 and AIR 1965 Orissa 102, Dissented from. (1885) ILR 7 All. 42 held not good law.

An order rejecting an appeal as time barred is not a decree within the meaning of S 2(2), Civil P C and is not, therefore, appealable (1921) 60 I C 493 and AIR 1941 Pat 108 and AIR 1965 Orissa 102, Dissented from (1885) I L R 7 All 42 explained and held not good law in view of Civil P C (1908), AIR 1964 All 190 and AIR 1976 Cal 415 and ILR 1962 Cut 818, Rel on AIR 1976 All 159, Disting (Paras 17, 18)

An order rejecting the memorandum of appeal as time barred, does, no doubt, impart finality to the litigation between the parties and could in that sense be described as a final order, but it does not follow as a matter of course that it must also be a decree, and appealable as such Unlike the earlier Civil P C of 1881 it is not enough, in the Civil P C of 1908 that it should have decided the suit or the appeal It must also be an adjudication which conclusively determines the rights of the parties with regard to all or any of the matter in controversy in the suit An appeal, when it is heard on the merits, does involve a rehearing of the suit on the points raised before the appellate court and the decision by the appellate court of the points raised before it would surely amount to a decree, but a determination of an appeal by an order rejecting it as time barred or as not properly drawn up or for want of prosecution could not be described an adjudication by the appellate court which conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit, inasmuch as none of the matters in controversy in the suit could in that situation be said to have been raised before the appellate court. (Paras 9, 10)

Rejection of an appeal as time barred, is not a dismissal of the appeal after hearing under R 11 of O 41 of the Civil P C (Para 16)

(B) Civil P. C. (5 of 1908), S. 115 (as applicable in U. P.) — Revision — Order rejecting appeal as barred by limitation — Suit valued at less than Rs. 20,000/- — Revision not maintainable although order is passed by District Judge. 1979 All L J 685 (F B) and 1980 All L J 751 (S C) Followed. (Para 18)

(C) Constitution of India, Art. 227 — Power under, though wide is to be exercised sparingly — Order rejecting appeal as barred by limitation — Delay not condoned — Second appeal or revision to High Court not maintainable — Lower Court not exercising discretion judicially while not condoning delay and therefore rejecting appeal — Held, proper case to exercise jurisdiction under Art. 227 for setting aside the order — (Limitation Act (1963), S. 5; Civil P. C. (1908), Ss. 100, 115). AIR 1957 All 414, Rel. on. (Paras 18, 19)

(D) Limitation Act (36 of 1963), S. 5 — Delay in filing appeal — Condonation of — Plea that delay of only one day caused due to illness of appellant — Physician's certificate not disbelieved by Court — Fit case for condoning delay.

In the instant case the last date for filing appeal was 13-11-1964 The appellant presented the appeal on 16-11-1964 along with application for condonation of delay Medical certificate to the effect that during 10-11-1964 to 14-11-1964 the appellant was suffering from cholera was produced and was not disbelieved by the Court 15-11-1964 was Sunday

Held in the circumstances that it was a fit case for condoning the delay (Para 19)

Cases Referred : Chronological Paras

1980 All L J 751 AIR 1980 S C 1575 (1980) 4 S C C 81 18
1979 All L J 685 AIR 1979 All 218 1979 (5) All L R 341 (F B) 18
AIR 1976 All 159 14
AIR 1976 Cal 415 (1976) 2 Cal L J 241 (F B) 8, 12
AIR 1965 Orissa 102 16
AIR 1964 All 190 13
ILR (1962) Cut 818 (Orissa) 16
AIR 1957 All 414 : 1957 All L J 389 1957 All W R (H C) 296 (F B) 18

*Against decree of R K Sircar, Distt J. Gorakhpur, D/- 13-3-1965

AIR 1941 Pat 108 15
AIR 1920 Pat 818 60 Ind Cas 493 15
(1885) ILR 7 All 42 16

S R Misra, for appellant, C P Dixit, for Respondents

JUDGMENT :— By this Second Appeal one Ram Pyare has impugned the correctness of an order dated 13th March, 1965 of the court of District Judge, Gorakhpur refusing to condone the delay in filing an appeal from the decree of the court of IInd Additional Munsif, Gorakhpur, dismissing suit No 442 of 1961, on an application under S 5, Limitation Act. The appeal was also simultaneously rejected as time barred by the Learned District Judge by the very same order

2. The plaintiffs who number 10, were the appellants in the lower appellate Court The application under S 5, of Lim Act appears to be signed only by the counsel for the appellants The application is expressed to have been made by "Ram Kumar, Appellant-applicant " It says

"that the applicant was entrusted with the work of filing the appeal but suddenly nformation was received from village Tighra, Pappa Pachapara, Pargana Haveli, distt Gorakhpur that Sri Raghubir a relation was seriously ill so the applicant went there to see him on 9-11-64 but on the next day the applicant fell victim to cholera and got cured on 14-11-64 So there was some delay in filing he appeal The delay in filing the appeal is not intentional rather accidental and the applicant should be given benefit of S 5, Limitation Act "

The application is dated 16th Nov , 1964 and he appeal was presented the same day along with it There is a medical certificate dated 4th Nov , 1964 of Dr Chandrama Singh, M A., A B M S (B H U) which certified that

"Sri Ram Kumar s/o Sri Jhakari Mallah has been suffering from Cholera and he was under my treatment since 10-11-1964 to 4-11-64 Now he is fit "

There is an affidavit of Ram Kumar in support of the application. It only repeats the contents of the application already quoted above.

3. The order of the learned District Judge shows that the appeal before him would have been within time if filed on 13th Nov 1964 According to the learned District Judge, the appeal could have been filed on 14th Nov inasmuch as the medical certificate showed that Ram Kumar was fit on 14th Nov , 1964, and there was no explanation for not filing the appeal on 14th Nov , 1964 or on 15th Nov , 1964

4. Learned counsel for the appellant urged that 15th Nov , 1964 was a Sunday and that being so the entire reasoning of the Learned District Judge for dismissing the application under S 5 of the Lim Act fails to the ground At any rate, he urged that such a hyper-technical view of things in never taken by the courts, and in view of the fact that the appeal was filed on 16th Nov., 1964, which was the next working day after 14th Nov , 1964, the delay in filing the appeal was of one day only and it should have been condoned

5. Before going into the merits of the case, it appears necessary to notice a preliminary objection to the maintainability of the second appeal It has been urged by the Learned Counsel for the respondents that the order rejecting the appeal was not a decree and that being so, the second appeal was incompetent

6. Mr S R Misra, Learned counsel for the appellant, urged in rejoinder that the rejection of the appeal as time barred did finally put the litigation to an end and did conclusively determine the rights of the parties and was, therefore, a decree In the alternative, he urged that even if the court were to have any doubts about that, and came to the conclusion that the appeal was not maintainable, the order of the Learned District Judge was so plainly arbitrary and wrong that it was fit to be set aside by this Court in the exercise of its supervisory jurisdiction under Art. 227 of the Constitution, which could be exercised suo motu in this case as the record of the lower appellate court is before this Court

7. The following is the definition of decree as contained in cl. (2) of S 2 of the Civil P C —

"(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S 144, but shall not include.

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) Any order of dismissal for default

Explanation — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of It is final when such adjudication completely disposes of the suit It may be partly preliminary and partly final"

8. In Mamuda Khateen v Beniyan Bibi, (AIR 1976 Cal 415), a Full Bench of the Calcutta High Court held that "when an appeal is barred by Limitation and an application is made under S. 5 of the Lim. Act for condonation of the delay along with Memorandum of appeal, until the application under S 5 is allowed the appeal cannot be filed and admitted at all" and that until the application under S 5 of the Limitation Act is allowed "the appeal is non est", and in that event the question of rejecting the memorandum of appeal does not arise at all On the other hand, when the application under S 5 of the Limitation Act is rejected, "the order rejecting the application cannot be a decree" and "the order rejecting the memorandum of appeal is merely an incidental order."

9. Indeed, if I may with respect add, there is no adjudication of the rights of the parties by the order which rejects the memorandum of appeal The adjudication on the application for condonation of the delay by the order rejecting the application, is not an adjudication of any substantive rights of the parties in the case, which may have been claimed by one and denied by the other It is an adjudication merely of the procedural rights of the parties, inasmuch as it denies the right of appeal to the party whose application is dismissed on the ground of latches It does make the judgment sought to be appealed from final But that result follows even when a judgment is not appealed from The omission to appeal from a judgment within the limitation prescribed by law is not very different in character from the act of not appealing from a judgment, for even when it is said that the judgment has not been appealed from, it means that the judgment has not been appealed from upto the date of the making of that statement, although the limitation for filing an appeal has already expired

10. The adjudication conclusively determining the rights of the parties, spoken of in the definition of a decree, is "with regard to all or any of the matters in controversy in the suit." The right to file an appeal is not one of those matters which could be said to be "in controversy in the suit" Such matters are thus those which relate to the substantive rights of the parties on the merits of the dispute between them and do not relate to matters of procedure in accordance with which that dispute is adjudicated upon It has been stated in the AIR Commentaries on the Code of Civil Procedure IX Edition Volume I at pages 24-26 that the word "rights" in the definition "means substantive rights in regard to the subject-matter of the suit," and does not include "rights in matters of procedure, "or a mere right to sue" and thus "interlocutory orders on matters of procedure which do not decide the substantive rights of the parties inter se in respect of the subject-matter of the suit are not decrees" Decisions on question of limitation, jurisdiction, res judicata and maintainability of a suit which determine only the plaintiff's rights to sue are also not decrees After giving an illustration of a case where a court proceeds to hear a suit after negativing the defendant's contention as to the bar of limitation or res judicata, as an example, where the decision negativing the defendant's contention is not a decree, the commentary proceeds on to state that "where, however, the effect of an order is to dismiss the appeal itself, it amounts to a denial of the substantive rights claimed by the plaintiffs against the defendant and may amount to a decree if other elements are present"

11. One could readily give example of a case where such other elements could be said to be present. For instance, if after holding that the basis on which the plaintiff claims title to the property in suit, is res judicata, by reason of an earlier decision, the court proceeds to dismiss the suit with the finding that the plaintiff could not be said to have the title claimed by him, consistently with the earlier decision, the judgment dismissing the suit would surely be a decree

12. There is no end to cases on this vexed question and no useful purpose would be served by citing decisions given in a different context. The Full Bench decision of the Calcutta High Court in Mamuda Khateen v Beniyan Bibi (AIR 1976 Cal 415) (supra) is a case directly in point and in the absence of any binding authority to the contrary, I am inclined to follow it

13. Before I proceed to discuss the cases decided by other High Courts, I must refer to two decisions of our High Court. The first one is Hira Lal v. Jhunni Lal, (AIR 1964 All 190). That was a case of revision from an order rejecting an application under S 5 of

the Lim Act praying for condonation of delay in filing an appeal in the lower court It was contended that the revision was not maintainable, inasmuch as subsequent to the rejection of the application under S 5 of the Limitation Act, the appeal had been dismissed and a decree pursuant to the dismissal of the appeal had come to be drawn up Manchanda, J met the contention in the following words, at page 192, para 5 —

"If the drawing up of the decree was merely the result of the rejection of the application by the Additional District Judge, under S. 5 of the Limitation Act, then manifestly that decree depends for its validity upon the very order which is now being impugned before me The decree passed was not as a result of the decision on merits and, therefore, it is difficult if not impossible to contend that the passing of the decree renders the revision application in the present case infructuous The acceptance of the present revision application and its remand would ex necessitate result in the supersession of the decree which depended wholly for its validity upon the order rejecting the application under S 5 of the Act The existence of an alternative remedy can never be an absolute bar to the exercise of the powers of this Court under S 115 of the Code for curing manifest injustice."

While it may not be easy for a technical lawyer to say that the existence of an alternative remedy is not a bar to the exercise of the revisional powers under S 115 of the Civil P C , for, that section specifically provides that a revision lies only where no appeal lies, yet the fact remains that the learned Judge did not attach any finality to the so-called decree passed pursuant to the order rejecting the application under S. 5 of the Lim Act, and declared that its existence was wholly dependent on the continued existence of the order under S. 5 of the Lim Act, The fact remains that the learned Judge entertained the revision. If an appeal lay as an appeal from decree from the orders of the District Court rejecting the appeal as time barred, on the rejection of the application under S 5 of the Lim Act passed simultaneously, the learned Judge could not have entertained a revision from the order rejecting the application under S 5 of the Lim. Act.

14. The next case of our court to which my attention was drawn, is Sohan v Abdul Hameed (AIR 1976 All 159) In this case a second Appeal was entertained without objection from the orders of the District Court rejecting an appeal as time barred on the rejection of an application under S 5 of the Lim Act, and finding that the order of the District Judge on that point was correct, T S. Misra, J dismissed the second Appeal without considering any thing more therein The question whether the second appeal was maintainable was not raised before the learned Judge in that case. A case is an authority for what it decides and not for what it does not decide

15. The cases, which are all of other High Courts, to which my attention was drawn by the Learned counsel for the appellant in support of maintainability of second appeal as an appeal from a decree, are, in chronological order, (1) Farzand Ali v Abdul Hameed, (1921) 60 Ind Cas 493 (AIR 1920 Pat 818) It has been observed in that case that if a memorandum of appeal is drawn up in proper form, it cannot be rejected under R 3 of O 41, Civil P C , but if the appeal is barred by Limitation, it has to be dismissed under R. 11 of that Order and that the rejection of an appeal on the ground of limitation, therefore, amounts to a dismissal thereof, and such order of rejection is appealable With respect, an appeal filed beyond limitation cannot be received at all, unless it is accompanied by an application under S 5 of the Lim Act, inasmuch as in case where an appeal is not accompanied by such an application and, on the face of it, it appears to be barred by limitation, and it is not contended by the appellant that it is not so barred, the appeal has to be dismissed under S 3 of the Lim Act without waiting for the respondent to come and show to the court that the appeal is barred by limitation An appeal, which is not accom anied by an application under S 5 of the Lim Act, in case it is filed after the expiry of limitation, cannot be said to be a proper appeal and cannot be admitted or registered by the appellate court under R. 9 of O. 41, Civil P C If there was any doubt as to that, R. 3A of O 41, inserted thereinto by the 1976 amendment of the Code of Civil Procedure, makes it clear that an appeal presented after the expiry of the period of limitation must be accompanied by an application supported by an affidavit, under S 5 of the Lim. Act and the appeal cannot be heard under R 11 of O 41 unless the application under S 5 of the Lim. Act is allowed after issue of notice of the application to the respondent. It, therefore, appears to me that the rejection of an appeal as time barred, is not a dismissal of the appeal after hearing under R 11 of O. 41,

Civil P C I am, therefore, unable to subscribe to the view expressed by the Patna High Court in the above case

(2) Gajadhar Bhagat v Moti Chand (AIR 1941 Pat 108) is also a decision of a learned Single Judge of the Patna High Court He observed

"It is well settled that the rejection of a memorandum of appeal being out of time does amount to a decree and is appealable"

16. I find it difficult to subscribe to the view An order rejecting the memorandum of appeal as time barred, does no doubt, impart finality to the litigation between the parties and could in that sense be described as a final order, but it does not follow as a matter of course that it must also be a decree, and appealable as such Unlike the earlier Code of Civil Procedure, it is not enough, in the 1908 Code that it should have decided the suit or the appeal It must also be an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit An appeal, when it is heard on the merits, does involve a rehearing of the suit on the points raised before the appellate court and the decision by the appellate court of the points raised before it would surely amount to a decree, but a determination of an appeal by an order rejecting it as time barred or as not properly drawn up or for want of prosecution could not be described an adjudication by the appellate court which conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit, inasmuch as none of the matters in controversy in the suit could in that situation be said to have been raised before the appellate court The definition of decree shows that the language used therein did not include the rejection of a plaint or the determination of any question within S 47 or S 144, inasmuch as such orders could not be said to be orders passed on any of the matters in controversy in the suit, the order rejecting a plaint being an order passed before the start of the controversy in the suit between the parties and the orders under Ss 47 and 144 being orders passed after the final adjudication of the controversy by the decree passed in the suit. That seems to be the reason why an order rejecting a plaint and orders under Ss 47 and 144 were included within the definition of decree by a deeming clause

Banwari Lal v Neelakantham (AIR 1965 Orissa 102) In this Division Bench decision of the Orissa High Court, it was held that an order rejecting an appeal as time barred is a decree It appears that a learned Single Judge of the Orissa High Court had, in the case of Achyuta Dhangadamajhi v Sibram Dhangadamajhi, ILR (1962) Cut 818, taken the view that such an order was not a decree According to the Division Bench, with the exception of that case, there was no decision of any other High Court to the effect that the dismissal of an appeal on the ground that it is barred by Limitation with the consequential result of affirming the judgment and decree of the lower court is not a decree, as defined in the Civil P C The Bench observed that, on the other hand, all the High Courts have uniformally taken the view that such an order would amount to a decree. The first decision referred to by the Bench was that of this Court in Gulab Rai v Mangh Lal (1885) ILR 7 All 42 The decision of that case turned on the definition of decree as contained in the Civil Procedure Code, 1881 A Bench of this Court (consisting of) Mahmood and Duthoit, JJ observed on page 43-44 (last)

"In the Civil Procedure Code there is no separate provision which allows the appellate Court to "reject" a memorandum of appeal on the ground of its being barred by limitation S 543 is limited to cases in which the memorandum of appeal is not drawn up in the manner prescribed by the code, and it is only by applying S. 54 (c), mutatis mutandis, (as provided by the last part of S 582), to appeals that the Code can be understood to make provision for rejection of appeals as barred by limitation However, S 4 of the Limitation Act clearly lays down that every "appeal presented after the period of limitation prescribed therefore shall be dismissed" It is therefore clear that the order of the District Judge in this case must be taken to be one which falls under the definition of "decree" within the meaning of S 2 of the Code, as the order, so far as the Judge was concerned, disposed of the appeal. We do not think any other view can give effect to the provisions of the Code, for we cannot hold that the Legislature intended such orders to be final."

The decision turned on the finality imparted by the order or the fact that it finally disposed of the appeal The test for determining whether a certain order amounted to a decree or not under the 1881 Code of Civil Procedure was whether it finally disposed of the suit or the appeal and that test being satisfied the order rejecting an appeal as time barred was held to be a decree That, however, is not the position under the 1908 Code As observed, above, in order to constitute a decree within the meaning of the definition under the 1908 Code the order in

question must be the formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and may be either preliminary or final The Orissa High Court did not notice the distinction between the definitions of decree in the 1881 Code and the 1908 Code So far as I am concerned, the decision of a Division Bench of this Court in Gulab Rai's case (supra) is binding on me, but as pointed out above, that decision can no longer govern the matter in view of the change in the definition of decree It is not necessary for me to refer to the other decisions noticed by the Bench of the Orissa High Court in Banwarilal's case (AIR 1965 Orissa 102) (supra) For the reasons already given in the course of this judgment, I find myself unable to subscribe to the view taken by the Bench of the Orissa High Court in Banwari Lal's case (supra)

17. I am accordingly of the view that the order under appeal is not a decree as defined in Civil P C 1908

18. That being so the appeal is incompetent And in view of the amendment of S 115 of the Code of Civil Procedure in the state of Uttar Pradesh in 1978, no revision lies to this Court from the said order, inasmuch as it was passed in a suit valued at less than Rs 20,000/- although it was passed by the Court of the District Judge in a proceedings in the nature of an appeal from the decree in that suit. See Jupiter Chit Fund (P) Ltd v Dwarka Diesh (1979 All L J 685) (AIR 1979 All 218) (F B) and Sri Vishnu Awatar v Shiv Autar (AIR 1980 SC 1575) (1980 All L J 751) It, therefore, appears necessary to consider whether this Court should interfere with the order of the District Judge in exercise of its supervisory jurisdiction under Art. 227 of the Constitution In Aidal Singh v Karan Singh (AIR 1957 All 414), a Full Bench of this Court held that the power under Art. 227 is both judicial and administrative, it can be exercised suo motu by the Court as the custodian of all the justice within the limits of its territorial jurisdiction and for the vindication of its position as such For the exercise of the power under Art. 226, the Court has framed rules There are no such rules for the exercise of power under Art. 227 There are no restrictions indicated in Art. 227 itself, and the restrictions, if any, are self-imposed. It is the wide amplitude of the powers of this Court under Art 227 which restricts the occasions for its exercise. The question is whether the present case is a fit one for the exercise of this Court's powers under Art 227, and that too suo motu on the record which is before the Court

19. The grounds, on which the learned District Judge rejected the application for condonation of the delay in filing the appeal, have already been referred to above It has also been noticed above that 15th Nov , 1964 was a Sunday The medical certificate filed with the apeal showed that Ram Kumar, who was one of the appellants and seems to have been entrusted with the duty of filing the appeal on behalf of the other appellants as well, had an attack of Cholera and was under the treatment of the doctor who issued it from 10-11-1964 to 14-11-1964 although the medical certificate also says on 14-11-1964 that "now he is fit" The Learned District Judge did not disbelieve the medical certificate and although one cannot place implicit reliance on a medical certificate of the kind produced by Ram Kumar in the appellate court, it is not possible to reject that certificate out of hand in this case Firstly the Learned District Judge did not reject it, Secondly all that the certificate did do was to explain the reasons for not filing the appeal on the 13th and the 14th Nov , 1964 It cannot be disputed that Ram Kumar saw the doctor at Gorakhpur on 14th Nov , 1964 for obtaining the medical certificate If he had been in a position to file the appeal on the 14th Nov , 1964, it is reasonable to suppose that he would have done so as a prudent person. Taking all these facts and circumstances into consideration I am of the opinion that the case was one in which any court would have condoned the delay in filing the appeal under S 5 of the Lim Act It has already been seen above that the order of the District Judge is undoubtedly vitiated in so far as he took the view that there was no explanation for not filing the appeal on 15th Nov , 1964. The appeal could not have been filed that day because it was a Sunday It must, therefore, be held that the learned District Judge did not exercise the discretion which he was required to exercise judicially under S 5 Lim Act. Justice requirs that the order of the learned District Judge, rejecting the application under S. 5, Lim Act and rejecting the appeal before him as time barred, must be set aside and I do so in exercise of this Court's powers under Art 227 of the Constitution

20. In the result, the appeal is dismissed as not maintainable but in exercise of this Court's powers under Art. 227 of the Constitution, the order dated 13th March,

1965 of the Court of the District Judge, Gorakhpur, in Misc Case No 434 of 1964, dismissing the application under S 5, Lim Act and rejecting the appeal from the decree in Suit No 442 of 1961 of the Court of the Second Additional Munsif, Gorakhpur, as time barred, are set aside Instead the said application under S 5, Lim Act is allowed The delay in filing that appeal in the Court of the District Judge, Gorakhpur, is condoned, and it shall be registered and heard by that Court or by any other Court of competent jurisdiction, to which it may be assigned by the District Judge, Gorakhpur, in accordance with law The lower Court's record shall be sent down immediately to the Court of the District Judge, Gorakhpur 19-10-1981 is fixed as the date for appearance of the parties in the Court of the District Judge, Gorakhpur, under O 41 R 26A C P C for receiving the directions of that court as to the further proceedings in the appeal from the decree in suit No 442 of 1961 of the court of the second Additional Munsif, Gorakhpur In the circumstances, the parties shall bear their own costs of this Court

Order accordingly

1981 ALL. L. J. 1261

P N GOEL, J

Km Madhu Jain, Applicant v Kunwar Suraj Avtar and another, Respondents

Contempt Appln No 36 of 1979, D/- 11-9-1981

Contempt of Courts Act (70 of 1971), Ss. 12, 2 (b) — Civil contempt — Punishment for — Offender cannot be punished for non-feasance unless it is culpable.

Where a lecturer in whose favour an order for reinstatement was passed by the High Court moved contempt petition against the Manager of the College and the Principal on the allegation that the said Secretary and the Principal told her that they had no intention to reinstate her and that the judgment of the High Court had no binding force on them and this allegation could not be believed as true, the mere fact that the offenders allowed the lecturer to resume her duties two years after the passing of the order in writ petition would not render them liable for civil contempt when the offenders gave effect to the order after the same was not stayed in the appeal to the Supreme Court If the parties proceeded against did not call upon the lecturer to join, they could be said to have committed an act of non-feasance (omission of something which ought to have been done) and therefore, the parties could not be punished for non-feasance unless it was culpable Taking into consideration the definition of the expression "Civil Contempt" it would be obvious that the offenders could only be punished for an act of mis-feasance (doing a lawful act in a wrongful manner) or mal-feasance (doing of what one ought not to do i e an illegal deed) (Paras 11, 12, 15)

Cases Referred : Chronological Paras

1977 Cri L J 1174 (Pat) 8
AIR 1957 S C 875 1957 SCJ 159 13

P P Srivastava, R N Bhalla and S C Verma, for Applicant, Navin Sinha, G Bhatt and N C Upadhyaya, for Respondents

ORDER :— Km Madhu Jain, Lecturer in the Department of Hindi in Sahu Gopnath Girls Degree College (now called Sahu Ram Swarup Mahila Vidyalaya) Bareilly, has moved this application for punishing Kunwar Suraj Avtar, Secretary/Manager and Smt. Bimla Shukla, Principal of the College under S 12 of the Contempt of Courts Act, 1971

2. The basis of the application is the order dated 19-1-1979 passed by this Court in writ petition No 5276 of 1978 The facts which are not disputed are these The petitioner was selected for the post of lecturer and she joined on 8-9-1976 The Vice Chancellor approved her appointment saying that her appointment was temporary upto 30-4-1977 By letter dated 9-5-1978, the Principal asked the petitioner to hand over charge of her post to Km Giga Ram Misra The petitioner made representations to the Vice Chancellor as well as the Chancellor, but to no relief Therefore, she filed writ petition against the Chancellor Rohilkhand University and others The operative part of the judgment in the writ petition read as follows —

"For the reasons given above, we are satisfied that the order of the Vice Chancellor approving the appointment of the petitioner upto 30th June, 1977 on a temporary basis suffers from a manifest error of law The petitioner was selected for a permanent post of Lecturer, and, therefore, her appointment will be deemed to be on probation for one year and the same probationary period will be deemed to have been extended upto 30th June, 1978, and the order of the Principal

asking the petitioner to hand over charge on 13th May. 1978 are all illegal and must be quahsed

In the result the writ petition must succeed which is allowed "

3. The grievence of the petitioner is that the opposite parties did not obey the above order It will thus appear that it is a case of civil contempt Expression "Civil contempt" has been defined in S 2 (b) of the Act as "wilful disobedience to any judgment, decree, direction, order, writ " In view of the definition of the expression "Civil contempt", the petitioner has not only to show disobedience of the order passed in the writ petition but has also to show that the disobedience was wilful Word 'disobedience' means neglect/disregard or refusal to obey Word 'wilful' means deliberate or intentional

4. The petitioner has alleged in the petition that on 29-1-1979 she wrote a letter to the Secretary through the Principal bringing to his notice about the judgment in her favour and seeking permission to join her duties (Annexure 1) On the same day she wrote a letter to the Secretary to the said effect (Annexure 2) On 30-1-1979 the Principal informed her that her letter had been forwarded to the Secretary (Annexure 3) By letter dated 5-2-1979, the Secretary informed her that a copy of the judgment of the High Court was not available and that she should furnish a true copy of the same (Annexure 4) Along with the letter dated 15-2-1979, she sent a photostat copy of the certified copy of the judgment by Registered post to the Secretary (Annexure 5) The petitioner then contacted both the opposite parties on 16-2-1979 and told them that she had sent a copy of the judgment by registered post (para 17) The opposite parties told her that the copy of the judgment had not yet been received. The petitioner then alleged that she met the opposite parties on 17-2-1979 and they told her that they had received copy of the judgment and that they had no intention of reinstating her and that she might seek her remedy again in the High Court They added that the judgment of the High Court had no binding force on them and it could not be complied with (para 19) This is the real basis of the present petition The petitioner filed this application for taking action against the opposite parties on 22-2-1979 i e 5 days after meeting the opposite parties on 17-2-1979

5. Both the opposite parties filed separate counter affidavits In these affidavits both the opposite parties denied the allegation of the petitioner contained in para 19 of the petition They deposed that the petitioner did not meet them on 17-2-1979 and that they did not tell her that the judgment of the High Court had no binding force and that it would not be complied with They also did not tell her that they had no intention of reinstating her and that she should seek her remedy again in the High Court The opposite party No 1 further asserted that leave petition to file appeal was filed in the Supreme Court, that by order dated 26-3-1979, the Supreme Court had stayed proceedings in the contempt petition, that ultimately the Supreme Court granted leave to appeal on 26-8-1980 and that on the said date the Supreme Court vacated the order staying proceedings in the contempt petition The opposite party No 1 also mentioned that by means of letter dated 19-9-1980, the petitioner sought permission to resume her duties, that its reply was sent on 15-10-1980 saying that she had incorrectly mentioned that she had come to join the College, that he had to consult the committee and take legal advice on the representation of the petitioner, that thereafter on 11-12-1980, he wrote to the petitioner to contact the Principal for resuming her duties, that another letter dated Jan 15/20, 1981 was sent to the petitioner asking her to join her duties forthwith and that the petitioner then joined on 27-1-1981 Smt Bimla Shukla Principal, further deposed that the petitioner had wrongly alleged that she met her on 16-2-1979 (para 17 of the petition), that she had gone to Delhi to attend a conference from 13th to 16th Feb, 1979 and that on 16-2-1979 she was not in the College and was at Delhi in connection with a seminar

6. Tej Bhan Smgh, brother of the petitioner filed separate rejomder affidavits denying the allegations made in the counter-affidavits and reiterated the allegations made in the petitioner's affidavit filed in support of the petition He further deposed that the alleged letter dated 11-12-1980 sent by the opposite party No 1 was never received by the petitioner and that the petitioner intimated so through a registered letter dated 26-1-1981 He further deposed that by letter dated 21-1-1981, the Assistant Director of Higher Education directed the Principal to allow the petitioner to join her duties It was on account of this letter that she was permitted to join on 27-1-1981.

7. Learned counsel for the parties were heard at length

8. The petitioner's counsel referred to the case of Kedar Nath Sinha v Sahdeo Jha, 1977 Cri L J 1174 (Pat) In this case there were positive overt acts in writing of the Secretary of the Bihar Madhyamik Shiksha Board, respondent No 4, the Managing Committee of the School and Head Master which clearly indicated that they disobeyed the order of the High Court passed in the writ petition Therefore, all the 4 respondents were found guilty of the contempt of court Suffice it to say that some overt act on the part of the contemners has to be established by the petitioner In the present case the only overt act which has been attributed to the opposite parties is contained in para 19 In this paragraph the petitioner alleged that she met the opposite parties on 17-2-1979, that at that time the opposite parties told her that they had no intention of reinstating her, that she should seek her remedy again in the High Court, that the judgment of the High Court in the writ petition had no binding force on them and that it would not be complied with In support of these allegations there is the affidavit of the petitioner and no other piece of evidence to corroborate it Both the opposite parties have clearly denied the said allegations in their later affidavits

9. The learned counsel for the opposite parties has assigned some reasons to show that the allegations of the petitioner were not correct They are

(1) Immediately after 17-2-1979, the petitioner did not write to the opposite parties that they had committed contempt of the High Court by saying that the judgment of the High Court had no binding force on them and that it would not be complied with

(2) The petitioner made no complaint to any authority of the Education department stating that on 17-2-1979 the opposite parties blankly told her that they had no intention to reinstate her, that the judgment of the High Court had no binding force on them and that it would not be complied with

(3) Smt Bimla Shukla, Principal, deposed in para 12 of her counter affidavit that the petitioner had not met her on 16-2-1979 as alleged in para 17 of the petition because on that date she was at Delhi attending a seminar Tej Bhan Singh has not admitted the contents of para 12 of her counter-affidavit. This non-admission/denial is simply vague. He has not specifically stated that on 16-2-1979. Smt Bimla Shukla was not at Delhi and that she was at Bareilly It will be noticed that Tej Bhan Singh has not deposed that he had gone to the opposite parties on 16-2-1979, along with his sister, the petitioner There is no assertion of the petitioner that on 16-2-1979, she met the opposite parties along with her brother Tej Bhan Singh It means that Tej Bhan Singh has denied the allegation contained in para 12 of the counter affidavit just by the way In case the petitioner can make a wrong allegation in respect of 16-2-1979, she can also make a wrong allegation in respect of 17-2-1979

(4) The order passed by this Court in the writ petition did not contain any specific direction and that no particular date for compliance was fixed The opposite parties had a right to move the Supreme Court to grant special leave to appeal. The opposite parties, with a view to file an appeal in the Supreme Court, would obtain a certified copy of the order of this Court. In taking the copy some time will be spent Then sometime will be taken in consulting an Advocate and in getting an application for special leave to appeal prepared In these circumstances it is not easily believable that just after about a month of the decision of the writ petition, opposite parties could have boldly told the petitioner that they had no intention of reinstating her, that she could seek her remedy again in the High Court, that the judgment of the High Court had no binding force on them and that it would not be complied with.

10. Giving careful consideration to the contentions of the learned counsel for the opposite parties, I am of the view that there is great force in the contentions Therefore I would not be justified in accepting/believing the allegations contained in para 19 of the petition The necessary result which follows is that the petitioner has failed to show any overt act on the part of the opposite parties from which it can be held that the opposite parties disobeyed the order passed in the writ petition, what to say of wilful disobedience of the said order

11. The learned counsel for the petitioner contended that the subsequent conduct of the opposite parties should also be taken into consideration He means to say that the opposite parties did not permit the petitioner to join her duties immediately after the decision of the writ petition and that they allowed her to join her duties on 27-1-1981 i.e two years after the decision of the writ petition and that the opposite parties did not

give her pay The petitioner's counsel urged that this undue delay on the part of the opposite parties should be considered to indicate that the opposite parties had no intention to obey the order passed in the writ petition earlier The learned counsel for the opposite parties contended that this case was not set up by the petitioner in her petition

12. Subsequent conduct is relevant and can be considered under S 8 of the Evidence Act This section lays down that the conduct of any party in reference to any fact in issue and conduct of any person, an offence against whom is the subject of any proceeding is relevant whether it was previous or subsequent

13. The petitioner's counsel has referred to the case of Surendra Kumar v Gian Chand, AIR 1957 S C 875 In this case the plaintiffs brought a suit on the basis of a mortgage They claimed to be the legatees under registered will of their maternal grandfather The defence pleaded that they had no knowledge of the will and that therefore the plaintiffs were not the legal representatives of the mortgagee and as such no locus standi to sue The probate of the will was granted by the District Judge in favour of the appellants and their mother The plaintiffs-appellants wanted to bring the probate on record The Supreme Court admitted the probate observing that in deciding the appeal it had to take the circumstances as they were at the time when the appeal was being decided and that the judgment in rem having been passed in favour of the appellants was necessary and could be admitted This case is not of help to the petitioner Its reason is that there was a positive judgment pronounced during the pendency of the case No judgment or order was passed in favour of the petitioner or against the opposite parties during the pendency of this contempt application. But as said above the subsequent conduct is relevant and can be considered under S 8 Evidence Act

14. It is undoubtedly clear that the opposite parties allowed the petitioner to join her duties 2 years after the decision in the writ petition The Supreme Court had not stayed the operation of the order passed in the writ petition But on this account it cannot be inferred that the allegations made in para 19 were correct. Assuming for a moment that the petitioner met the opposite parties on 17-2-1979, it is but expected that the opposite parties would have told her that they had an intention to file an appeal in Supreme Court and that she should wait till then In case the opposite parties told so to the petitioner, it would not amount to wilful disobedience of the order passed in the writ petition

15. The matter has to be judged from another aspect If the opposite parties did not call upon the petitioner to join, it was an act of omission on the part of opposite parties In other words, the opposite parties can be said to have committed an act of non-feasance (omission of something which ought to have been done) Taking into consideration the definition of the expression civil contempt, it is obvious that the alleged offender cannot be punished for non-feasance unless it is culpable The offender can only be punished for an act of mis-feasance (doing a lawful act in a wrongful manner) or mal-feasance (doing of what one ought not to do i e an illegal deed) In this aspect of the matter on account of the alleged delay on the part of the opposite parties, the opposite parties cannot be said to have committed civil contempt punishable under S 12 of the Act

16. In case salary was not given, she could sue for its recovery. Taking into consideration all what has been discussed above, it is not at all a fit case in which the opposite parties can be held guilty of the contempt of Court Hence the opposite parties cannot be punished as desired by the petitioner.

17. The learned counsel for the opposite parties contended that the petitioner had acted in hot haste and the petition was wholly premature. This contention seems to be well founded because according to the petition itself, the petitioner moved this application just after 5 days of the alleged conduct of the opposite parties She did not allow the opposite parties sufficient time to seek their remedy in the Supreme Court

18. For what has been found above the petition is dismissed

Petition dismissed

1981 ALL. L. J. 1265

V. K. MEHROTRA, J.

U. P. State Electricity Board and another, Appellants v. Jhanda Lal and others, Respondents

Second Appeal No. 815 of 1974, D/- 18-8-1981.*

Specific Relief Act (47 of 1963), Ss. 36, 38 — Injunction — Grant of — Lower court granting injunction even on finding that the conduct of plaintiff was not clean — High Court in second appeal can interfere and set aside the decree — (Civil P. C. (1908), Ss. 100-101.)

Where the lower Court while granting injunction had not kept before itself the guiding principle, that the conduct of the plaintiff seeking equitable relief should be clean and above reproach, and thus granted injunction to the plaintiff even on arriving at finding that the plaintiff had not stated the whole truth and had suppressed material facts, the High Court in second appeal could interfere and set aside the decree of injunction. AIR 1976 All 159, Rel. on. (Paras 12, 13 and 15)

Normally the High Court will not interfere with an order passed by the court below in its discretion except where it has not been guided by the correct legal principle or the discretion has been exercised in an arbitrary or perverse manner. It is, however, a matter of enquiry in each case as to whether the court below has passed an order in exercise of its discretion or not and whether that order, has inter alia, been passed with due regard to the correct legal principle for exercise of discretion by it. (Para 15)

Cases Referred :	Chronological	Paras
AIR 1976 S. C. 830	1976 Lab. I. C. 575	1976
U. J. (S. C.) 220		14
AIR 1976 All 159		14

Sudhir Chandra Agrawal, for Appellants, B. D. Mandhayan, for Respondents

JUDGMENT :— This second appeal is by the defendants m a suit for injunction filed by plaintiff-respondent No. 1. The injunction sought was that the defendants be restrained from realising from the plaintiff a sum of Rs. 2106-29 by arrest of the plaintiff or otherwise. The trial court had dismissed the suit. The lower appellate court decreed it.

2. The plaintiff's case was that he had been served with a false notice demanding a sum of Rs. 2106-29 towards charges for electricity (consumed) by him in the bill which related to premises No. 101-B Chak Daudnagar, Naini, Allahabad with which he had nothing to do. He never took any electric connection nor was he supplied any electricity.

3. The suit was contested and the principal plea which was taken by the present appellants was that on the request of the plaintiff, an electric connection was given to him in the premises in question. Later, the plaintiff made a request for disconnection. The amount that was being claimed from him related to the consumption of electricity before the date of disconnection. Since the plaintiff had not paid it in spite of demand, it had become necessary to seek its recovery through coercive process. The plaintiff was not entitled to the relief asked for by him.

4. The trial court believed the case of the defendants that the plaintiff had made a request for connection in premises No. 101-B Chal Daudnagar and that he had actually been given that connection and after that electricity had been consumed by the plaintiff. The plaintiff, was consequently, liable to pay the amount due from him and was, as such, not entitled to any injunction restraining the defendants from effecting the recovery thereof. The trial court arrived at the conclusions aforesaid on its view of the evidence led by the parties. It recorded a finding that several material facts had been concealed by the plaintiff in the plaint and that the plaintiff was not a truthful person.

5. The plaintiff assailed the decree of the trial court in an appeal. That appeal was heard by the Second Additional District Judge, Allahabad. The learned Judge re-appraised the evidence on record and felt that even though the plaintiff had not been truthful in certain respects, the defendants had failed to establish that any electric connection was actually provided in the premises in dispute on the request of the plaintiff or that the plaintiff had consumed any electricity. The lower appellate court was of opinion that the defendants could have produced evidence to establish the extent of energy consumed by the plaintiff and thus, the fact that he was liable for the

*Against judgment and decree of J. P. Saxena, 2nd Addl. Dist. J., Allahabad, D/- 22-11-1973.

amount sought to be recovered from him could have been established affirmatively Since the defendants had failed to do so, they were not entitled to make any recovery from the plaintiff As such, the plaintiff was entitled to the relief of injunction The lower appellate court therefore, set aside the trial court' decree and restrained the defendants from realising the amount from the plaintiff It is this decree which has been assailed by the defendants in the present second appeal

6. The first submission which has been made by the learned counsel for the appellants is that the lower appellate court was not justified in its view that the plaintiff was not given any electric connection in the premises in question and that no electricity was consumed by him It has been urged that from the circumstances on record, as noticed by the lower appellate court as well in its judgment under appeal, the only reasonable conclusion was that the defendants had given an electric connection to the plaintiff and that the plaintiff had consumed electricity in the premises

7. The lower appellate court has taken into account the statement made by the two witnesses produced by the defendants in support of their plea that electric connection was given to the plaintiff in the premises in question It has taken note of the fact that the testimony of these two witnesses only went to the extent of establishing that some steps towards giving of electrical connection in the premises in question were taken by the defendants on the request of the plaintiff It then proceeded to notice the statement made by the two witnesses of the defendants wherein they gave out that they did not know whether actually an electric connection was given in the premises in pursuance of the steps taken by the defendants at the request of the plaintiff in that regard The finding that no electric connection was given is, prima facie, based upon this ignorance on the part of the two witnesses of the defendants

8. The next and the principal submission of the learned counsel for the appellants is that on the facts found by the courts below, the present was not an appropriate case in which the discretionary relief of injunction should have been granted to the plaintiff. It has been urged that the conduct of the plaintiff himself was (not?) such which entitled him to the grant of the discretionary relief of an injunction It was argued that if the plaintiff could establish in appropriate proceedings that he was not liable for payment of the amount which was sought to be recovered from him, he would be entitled to seek the refund of the amount if realised by the defendants

9. The grant of relief of injunction is undoubtedly one of discretion. It is an equitable relief and the Specific Relief Act, 1963 itself contemplates that the grant of the relief of injunction is in the discretion of the court In fact, this proposition is so well settled that the learned counsel for the plaintiff-respondent fairly did not contest it

10. The case with which the plaintiff came to court was a simple one He alleged that he had no concern with premises No. 101-B Chak Daudnagar and that he never took any electric connection Further, no electricity was supplied to him and fictitious bills had been raised by the defendants who were trying to realise the amount thereof arbitrarily from the plaintiff, inter alia, by his arrest The defendants had no right to realise the amount from him The defendants, however, pleaded that the case of the plaintiff as set out in the plaint was not true and that he had not only made an application for electric connection in the premises but had also made certain deposits with the defendants towards the taking of that connection in the premises in suit The plaintiff, according to the case of the defendants, actually consumed electricity and was, thus, liable for the amount demanded from him Since he had failed to pay the amount, recourse to its recovery through coercive process had to be taken as the defendants were entitled in law to do so.

11. The trial court, as noticed earlier, observed, on consideration of the evidence led before it, that the allegation that he had no concern with House No. 101-B Chak Daudnagar, was incorrect. Further that the plaintiff had not told the truth when he alleged that he never took any electric connection from the defendants In fact, he had not only applied for such a connection but had also deposited some amounts towards it. These findings were expressly affirmed by the lower appellate court which re-appraised the evidence on record In fact, the lower appellate court observed as follows

"I find that the appellant had not said the whole truth and at places he had differed from his original version.. . . . ..

To begin with the case of the appellant was that he had nothing to do with house

No 101-B Chak Daudnagar, Naini, but when the evidence was led it transpired that he had something to do with it

The evidence adduced by the appellant goes to indicate that he did intend to take an electric connection and for that matter a sum of Rs 700/- had been advanced to one Mr Saxena It has, however, not been proved from the evidence of the appellant (respondent to be correct) that the electric connection was supplied to the appellant or that he had consumed the electricity The respondents produced two witnesses in their defence Both of them proved certain circumstances which go to indicate that some steps necessary for supplying an electric connection are taken They have proved that an estimate was prepared and some wiring had been done, but both these witnesses say that they did not know if ultimately the electric connection was given or not "

12. The lower appellate court was of opinion that the fact that the plaintiff had not said the whole truth and at places he had differed from his original version had little effect on the decision of the case itself and that what was to be seen was whether the amount which was being realised from the appellant was due from him or not The observation of the lower appellate court indicates that it was oblivious to the fact that the conduct of a party in a case wherein the relief sought is on grounds of equity has material bearing upon the ultimate decision about the grant or otherwise of that relief It is true that one who seeks equity must come with clean hands On the findings about the conduct of the plaintiff recorded by the two courts below concurrently it is obvious that the plaintiff had not come to court with clean hands He had suppressed material facts and had not stated the whole truth

13. The lower appellate court appears to have felt that the circumstances that the defendants had failed to establish that the plaintiff was liable to pay the amount, which was being demanded from him, was enough to grant relief to the plaintiff This approach, however, is clearly contrary to the settled view that the grant of the equitable and discretionary relief of an injunction cannot be claimed by a party as a matter of course Before a party can claim to be entitled to an equitable relief, it has also to prove to the satisfaction of the court that his own conduct was above reproach.

14. It has been urged by the learned counsel for the plaintiff-respondent that the lower appellate court having decided to grant the relief of injunction to the plaintiff in its discretion that grant was not amenable to challenge in second appeal and that, in any case, the exercise of discretion in favour of the plaintiff was not liable to be interfered with by this court in appeal. In support of this proposition, reliance has been placed upon the decision of the Supreme Court in Reserve Bank of India v Ram Krishna Govind Morey (AIR 1976 S C 830) wherein it was observed (in para 2 of the Report) as follows

"The plaintiff's case did not depend on what the defendant might say in the written statement and if what he proposed to introduce in the plaint by way of amendment was relevant to his case, there is no apparent reason why this was left out when the plaint was filed Prima facie, therefore, the order of the trial court rejecting the plaintiff's application for amendment of the plaint was not arbitrary Whether the trial court should not have exercised its discretion differently, is not a question of law justifying interference by the High Court in second appeal The learned Judge of the High Court also failed to consider the fact that a revisional application from the order refusing amendment had earlier been dismissed by the High Court For these reasons, we hold that the High Court had no jurisdiction in second appeal to interfere with the order passed by the trial court in its discretion which was affirmed by the lower appellate court .. "

Learned counsel for the respondent also relied upon the decision of T S Misra, J. in Sohan v Abdul Hameed Khan (AIR 1976 All 159) in which the learned Judge observed (in para 4 of the Report) that "the principle is that where the discretion has been exercised by the courts below in a sound and reasonable way, the High Court, would not interfere in second appeal " The learned Judge was dealing with a case where the lower appellate court had refused to condone the delay in filing of the appeal on its view that there was no sufficient cause for the appellant for not preferring the appeal within the time prescribed It is noticeable that the observation aforesaid was followed by the observation that " . If the court below does not exercise its discretion at all or exercises its discretion capriciously and arbitrarily or without proper legal material to support its decision, this court would interfere with that order in second appeal . . . "

15. The principle undoubtedly is that normally an appellate court would not interfere with an order passed by the court

below in its discretion except where it has not been guided by the correct legal principle or the discretion has been exercised in an arbitrary or perverse manner Not much authority is needed for this proposition which is a settled view of law It is however, a matter of enquiry in each case as to whether the court below has passed an order in exercise or its discretion or not and whether that order, has inter alia, been passed with due regard to the correc legal principle for exercise of discretion by it In the present case, as noticed earlier, the lower appellate court appears to have felt that the conduct of the plaintiff in not stating the whole truth and at places differing from his original version was of no consequence This is what it observed when it started examining the case on merits The observation made by the learned Judge clearly betrays an erroneous approach in law to the question of the grant or otherwise of the discretionary relief of injunction which is equitable in character The lower appellate court clearly felt compelled to grant the relief when it observed that what was to be seen was whether the amount which was being realised from the plaintiff was due from him or not and upon the finding recorded by it that it was not so due In taking the view that it has, the lower appellate court has not kept before itself the guiding principle in the matter of grant of relief of injunction, namely, that the conduct of the applicant seeking relief should be clean and above reproach That the conduct of the plaintiff-respondent was not such is clear from the findings recorded by the courts below themselves In the circumstances, the lower appellate court was not justified in granting the relief of injunction in the case

16. The basic question which had to be determined in the instant case was whether the plaintiff was entitled to an injunction against the realisation from him of the amount said to be due from him by recourse to coercive process The mere fact that the plaintiff is being held not entitled to the grant of the equitable relief of injunction does not mean that the defendants are entitled to realise the amount claimed by them from the plaintiff In case realisation by recourse to coercive process is actually made of the amount from the plaintiff-respondent, it would always be open to him to seek its refund in appropriate proceedings in case he is able to establish that he is not liable for the payment of the amount. In fact Sri Sudhir Chandra appearing for the defendents appellants has very clearly stated that the appellant-Board will proceed to make the realisation only in case it is found, on due enquiry afresh, that the plaintiff owes the amount to the Board. I have no doubt that the appellant Board will be fair to the plaintiff in this regard and that it would scrutinise the plaintiff's case again in the light of the representation that the plaintiff may make to it

17. In the result, the appeal succeeds and is allowed The decree of the lower appellate court is set aside and the plaintiff's suit is dismissed In view, however, of the circumstances of the instant case, I direct that the parties shall bear their own costs throughout

Appeal allowed

1981 ALL. L. J. 1268

K N SINGH AND B N SAPRU, JJ

Abid Khan and another, Appellants v M/s Escorts Farm, Ramgarh, Respondent

F A F O No 283 of 1974, D/- 25-9-1981 *

Arbitration Act (10 of 1940), Ss. 34, 8 — Application for staying suit — Affidavit in support of application — Not necessary — Failure to make averment that defendant ready and willing to get matter adjudicated through arbitration — Suit cannot be stayed.

It cannot be said that an affidavit must be filed in support of the application made under S 34 or that the averments must be a detailed one or that in the absence of an affidavit the application should be rejected (Para 6)

Where the defendant in his application to stay suit under S 34 did not make any averment that he was ready and willing to do all things necessary to the proper conduct of the arbitration at the time the suit was filed as well as at the time when the application was made, the suit could not be stayed because of failure to satisfy the necessary condition required by S 34 However mere inaction on the part of the defendant to take recourse to S 8 for appointment of arbitrator or to supply vacancy occurred due to refusal of the sole arbitrator to act as arbitrator does not justify a finding that the defendant was not ready or willing to get the matter adjudicated through arbitration Case law discussed (Paras 9, 10)

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*Against judgment and order of Iqtamul Bari Addl. Civil J., Nainital, D/- 30-8-1974

KY/KY/F104/81/VNP

A party, who seeks to get the proceedings in the suit stayed, must be willing to get the matter adjudicated through arbitration. The readiness and willingness to do all things necessary for the arbitration cannot be presumed from the mere fact that the defendant moves an application for stay of proceedings, instead the defendant must make a clear statement that he was ready and is still willing for the adjudication of the dispute through arbitration. The readiness and willingness must exist not only when the application for stay was made but also at the commencement of the legal proceedings. (Paras 4, 5)

Cases Referred : Chronological Paras

AIR 1979 Pat 14 1978 Pat L J R 486 6
AIR 1975 S C 469 (1975) 4 S C C 815 5
AIR 1974 Andh Pra 278 7
AIR 1967 Mad 201 (1965) 78 Mad L W 681 6, 7
AIR 1961 Madh Pra 322 1961 M P L J 392 7
AIR 1960 Bom 292 60 Bom L R 509 6, 7
AIR 1955 S C 53 1955 S C J 200 5

K. M. Sinha, for Appellants, J. M. Pant and K. S. Chaudhri, for Respondent.

K. N. SINGH, J.— This appeal is directed against the order of the Additional Civil Judge, Kumaun at Naintal, dated 30-8-1974, rejecting the defendant-appellant's application made under S. 34, Arbitration Act, 1940, for the stay of the suit filed by the plaintiff-respondent.

2. Messrs Escorts Farm (Ramgarh) Limited, Kashipur, plaintiff-respondent carries on business in poultry farm of purchasing and selling eggs and birds. M/s. Abid Khan and Sons, defendants, also carry on business of sale and purchase of eggs and birds in Naintal. Sri Abid Khan is its proprietor. The defendants used to purchase eggs and birds from the plaintiff-respondent. Certain disputes regarding payment of price arose between the plaintiff and the defendants. Both the parties agreed to refer the dispute to adjudication by an arbitrator and in pursuance of that agreement they appointed Sri I. N. Tandon, Advocate of Naintal, as sole arbitrator. Sri Tandon entered upon the reference but after some time he refused to act as arbitrator. Thereafter the plaintiff or the defendants took no further steps in the matter and none of the two parties made any application under S. 8, Arbitration Act, before the Court for supplying the vacancy by appointment of another arbitrator. On 5-7-1973, the plaintiff filed a suit in the court of the District Judge, Nainital for the recovery of Rs. 28,134-81 against the defendant-appellants with the allegation that the defendant had purchased eggs and birds on credit from the plaintiff on various dates, but they had not paid the entire price. On the service of the summons, the defendants appeared and made an application before the District Judge on 22-10-1973 under S. 34, Arbitration Act, for stay of the proceedings in the suit on the ground that the parties had agreed in writing to refer the dispute to an arbitrator and Sri Tandon had been appointed as the sole arbitrator. On the refusal of Sri Tandon to act as arbitrator the plaintiff did not take any steps for appointment of arbitrator and as such it was not entitled to file the suit as the agreement dated 26-8-1972 to refer matter to arbitration was still binding on the parties. The plaintiff-respondent filed objection to the application asserting that on the refusal of Sri Tandon the arbitration agreement exhausted itself and the vacancy could not be supplied. The Additional Civil Judge by his order dated 30-8-1974 rejected the defendants' application. Aggrieved, the defendants have referred this appeal.

3. The learned Judge held that the plaintiff-respondent's contention that the vacancy was not to be supplied was without any substance. The arbitration agreement did not indicate any intention of the parties not to supply the vacancy and as such even if Sri Tandon had refused to act as arbitrator, the parties could approach the court for appointment of arbitrator in accordance with the provisions of S. 8 of the Act. The learned Judge further held that the arbitration agreement did not automatically stand terminated on the refusal of Sri Tandon to act as arbitrator. The arbitration agreement was legal and valid and the parties could get an arbitrator appointed in accordance with the agreement. The learned Judge however rejected the defendants' application on the ground that the defendants did not make any attempt for the appointment of arbitrator till the filing of the suit, and the defendants' conduct indicated that they did not intend to proceed with the arbitration. On these findings the defendants' application under S. 34, Arbitration Act, was dismissed.

4. Section 34, Arbitration Act, reads as under —

"34. Where any party to an arbitration agreement or any person claiming under him

commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings and if satisfied that there is not sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration such authority may make an order staying the proceedings."

Under the said provision one of the conditions precedent for staying the proceedings in the suit is that the person who applies for stay of the proceedings in the suit must show that he was at the time when the proceedings in the suit were commenced and is still ready and willing to do all things necessary to the proper conduct of the arbitration Whenever a defendant makes an application for stay of proceedings in the suit under S 34 of the Act it is obligatory for him to show that at the time the suit was filed and also at the time when he was making the application he was all along ready and willing to do all things necessary to the proper conduct of the arbitration This is a mandatory requirement which must be fulfilled before the proceedings in a suit are stayed Under the law of the land it is open to an aggrieved person to approach the civil court for redress of his grievances The civil court has jurisdiction to hear and decide the claim of an aggrieved party, but if the parties agree to get the matter settled through arbitration, the jurisdiction of the civil court is ousted The civil court's jurisdiction cannot however be ousted if the party which comes forward before the court for claiming relief for the stay of the suit does not bind itself to get the matter adjudicated through arbitration in accordance with the arbitration agreement entered into between the parties. This mandatory requirement is based on the equitable principle that a party who seeks to get the proceedings in the suit stayed must be willing to get the matter adjudicated through arbitration. The readiness and willingness to do all things necessary for the [illegible] cannot be presumed from the [illegible] that the defendant moves an application for stay of proceedings instead the defendant must make a clear statement that he was ready and is still willing for the adjudication of the dispute through arbitration

5. In Anderson Wright Ltd v Moran and Co (AIR 1955 S C 53) the Supreme Court held that before proceedings in a suit are stayed under S 34 of the Act it is necessary that four conditions should be fulfilled (1) the proceedings in the suit must have been commenced by a party to agreement against the defendant who is also a party to the agreement, (2) the legal proceedings which are sought to be stayed must be in respect of the matter agreed to be referred, (3) the application for stay must be by a party to the legal proceedings and he must have taken no steps in the proceedings after appearance and it is necessary that the applicant should satisfy the court that not only he was ready but also that he was at the commencement of the suit willing to do all things necessary for the proper conduct of the arbitration and (4) the court must be satisfied that there is sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement Unless all the four conditions are satisfied the defendant cannot possibly ask the court to order stay of the proceedings under S. 34 of the Act and the court would be justified in refusing to stay the proceedings in the suit The Supreme Court reiterated these principles in Food Corporation of India v Thakur Shipping Co (AIR 1975 S C 469) The Supreme Court again held that an applicant for stay of legal proceedings as contemplated by S 34, Arbitration Act, must satisfy the court not only that he is but also that he was at the commencement of the proceedings ready and willing to do every thing necessary for the proper conduct of the arbitration The readiness and willingness must exist not only when the application for stay was made but also at the commencement of the legal proceedings

6. The next question which then arises is whether the defendants were ready and willing to do all things necessary to the proper conduct of the arbitration as required by S 34 This is a question of fact which is to be determined on the material on record Learned counsel for the plaintiff-respondent urged that in the absence of any affidavit filed by the appellants containing an averment that they were ready and willing to do everything necessary for the proper conduct of the arbitration at the commencement of the proceedings in the

suit or that they are still willing for the adjudication of the dispute through arbitration the defendant's application under S 34 must be rejected He placed rehance on the Middle East Trading Co v New National Mills Ltd (AIR 1960 Bom 292) In that case a learned Single Judge held that an application under S 34 of the Act must state in the application all the necessary conditions as required by S 34 of the Act We are in respectful agreement with the observations made by Datar, J but we do not agree with the extreme proposition of law that an affidavit must be filed in support of the application made under S 34 of the Act or that the averments must be a detailed one or that in the absence of an affidavit the application should be rejected In N C Padmanabhan v S Srinivasan (AIR 1967 Mad 201) there was no averment regarding the readiness and willingness of the defendants either at the time of the commencement of the proceedings or thereafter that they were ready and willing to do everything necessary for the proper conduct of the arbitration proceedings, therefore, it was held that the proceedings in the suit could not be stayed. The learned Judge, however, made observation that in the absence of clear averments in the affidavit regarding willingness of the defendants their readiness could not be a matter of implication Similar view was taken by Patna High Court in Sass Construction and Power Co Ltd v Fertiliser Corporation of India, (AIR 1979 Pat 14) These authorities hold that there should be a clear statement in the application made under S 34 of the Act giving out the four conditions precedent as laid down in the section, and there should further be an affidavit containing all the necessary averments to show in unambiguous terms that the defendant was ready and willing at the commencement of the proceedings to do all things necessary for the proper conduct of the arbitration These authorities further lay down that in the absence of any affidavit or requisite averments the proceedings cannot be stayed under S 34 of the Act

7. Learned counsel for the appellants drew our attention to a Division Bench decision of the Madhya Pradesh High Court in Sansar Chand Deshraj v State of Madh Pra (AIR 1961 Madh Pra 322) In that case, it was held that since the defendant in his reply had clearly drawn attention of the Court to the subsistence of the arbitration agreement and further as he had pointed out that the arbitration proceeding was the appropriate remedy for the plaintiff to follow, it was implicit in the objection raised by the defendants that they were ready to get the dispute decided by arbitration The Division Bench did not lay any stress on the filing of any affidavit in support of the application In Sri Venkateshwar Construction v Union of India (AIR 1974 Andh Pra 278) a Division Bench held that the observation made in the Middle East Trading Co v New National Mills Ltd (AIR 1960 Bom 292) (supra) and in N C Padmanabhan v S Srinivasan (AIR 1967 Mad 201) (supra) that the defendant should satisfy the court about his readiness and willingness even prior to the commencement of the suit by means of an affidavit goes far beyond the scope of S 34, and the Bench did not agree with the observations made in the aforesaid two cases

8. The question is whether the defendant's application for stay of the suit must fail for want of an affidavit Section 34 does not require filing of any affidavit, instead it requires the court to satisfy itself about the readiness and willingness of the defendant to do all things necessary for the arbitration at the time when the proceedings were initiated as well as at the time when the application for stay is made By what process and in what manner the court should satisfy itself cannot be laid down exhaustively There is no provision under the Act or under any rule requiring an applicant under S 34 to file application in a specified form or to file an affidavit in support thereof The court may satisfy itself merely on the averments contained in the stay application or it may examine the defendant or it may act on the statement of the counsel for the defendant In an appropriate case the court may require the defendant to file affidavit also The basic requirement is that the court should be satisfied that the defendant was ready and willing to get the matter adjudicated through arbitration at the time of the commencement of the suit and is still ready and willing If a defendant makes all the necessary averments in the application, it is open to the court to be satisfied even without an affidavit But if the court is not satisfied on the basis of mere averments made in the application, it is not open to the appellate court to interfere with the discretion exercised by the trial court It is not possible to lay down any exhaustive principle on the basis of which court should satisfy itself It is for the court before which the application is made under S 34 to satisfy itself of the existence of the necessary

conditions precedent as prescribed under S 34 of the Act

9. In the instant case, the defendant-appellants did not file any affidavit in support of their application made under S 34 of the Act Paragraph 7 of the application merely stated

"7 That the agreement dated 26-8-1972 to refer the matter to arbitration is still binding upon the parties and the defendant applicant is entitled to get the matter in dispute in the present suit settled through arbitration and consequently the proceedings in this suit are liable to be stayed "

Apart from the aforesaid averment the application filed by the appellants did not contain any averment that they were ready and willing to do all things necessary to the proper conduct of the arbitration at the time the suit was filed as well as the time when that application was made In the absence of any such averment in the application one of the necessary condition as required by S 34 of the Act was not satisfied The proceedings in the suit therefore could not be stayed

10. We do not agree with the view taken by the trial court that since the defendant-appellants had not made an application before the court under S 8 of the Act for appointment of arbitrator, it must be presumed that the appellant was not ready and willing for the proper conduct of the case at the time of the commencement of the suit A mere inaction on the part of the defendants to take recourse to S 8 does not justify a finding that the defendants were not ready or willing to get the matter adjudicated through arbitration The plaintiff had raised a claim for money against the defendants and the matter had been referred to arbitration by both the parties and if the arbitrator refused to give the award, the aggrieved party should have approached the Court under S 8 for appointment of another arbitrator or to supply vacancy. In the instant case, the plaintiff was the aggrieved party The defendants had no doubt raised a counter claim against the plaintiff but they had not approached the civil court by means of a suit for obtaining relief Therefore the plaintiff should have taken steps for the filling up of the vacancy The trial court erred in holding that defendants should have approached the court for arbitration Even though the trial court's finding on this question is not sustainable in law but the appellants cannot succeed in the appeal as they have failed to show that they were ready and willing at the commencement of the proceedings and that they are still ready and willing to do all things necessary for arbitration

11. For the reasons stated above we are not inclined to interfere with the trial court's order The appeal fails and is accordingly dismissed, but there will be no order as to costs

Appeal dismissed

1981 ALL. L. J. 1272

R. B. LAL, J

Nagin Chand Jain, Applicant v. State of U. P. and others, Respondents

Criminal Misc. Appln. No. 3581 of 1981, D/- 25-9-1981

(A) Copyright Act (14 of 1957), S. 63 — Complaint against infringement of copyright — Assignment of copyright in favour of complainant is condition precedent for filing complaint. ((f) Criminal P. C. (1974), S. 203 — (ii) Copyright infringement — Complaint — Locus standi).

It is only the author or assignee or licensee of a work who can maintain criminal action under S. 63 of the Act for protection of his copyright in the work Therefore, it is wrong to contend that assignment of the copyright in favour of the complainant is not a pre-condition to the filing of complaint

(Para 9)

Copyright in a literary or other work is a creature of statute namely the Copyright Act and it is to be enjoyed by virtue of and subject to the provisions of the Act The author of the work is the first owner of the copyright therein as provided under S. 17 of the Act This copyright can be assigned by the author, the mode of assignment is mentioned in S. 19 of the Act. The assignment is to be in writing signed by the assignor or by his duly authorised agent The Act provides for grant of licence by the owner of copyright. Section 14 of the Act defines the meaning of copyright Thus, it is the owner or assignee or licensee of a copyright who can feel aggrieved on account of the infringement of that right in a particular work Section 63 of the Act is intended to safeguard the right and interest of such author, assignee or licensee It is open to these persons to ignore infringement of their copyright in a work Though S. 63 of

KY/KY/F78/81/MVJ

the Act does not contain any word suggesting that only the author or assignee or licensee of the copyright can take criminal action for infringement of copyright, this section should be read to imply that the pirating person shall be liable to punishment for infringement only if such author or assignee or licensee seeks to claim protection of law If such a person, notwithstanding the infringement, does not choose to take any action for the infringement, there is no harm caused to any one else The infringement of copyright is not to be regarded as an offence against the society at large, for which any one may move the machinery of criminal law (Para 9)

(B) Copyright Act (14 of 1957), S. 63 — Complaint against infringement of copyright — Proof of assignment — Complainant stating that original assignment had been seized by I. T. authorities — Complainant applying for permission to file copy of assignment — Held, that rejection of permission in circumstances was illegal.
(Para 12)

(C) Copyright Act (14 of 1957), S. 63 — Copyright infringement — Principles and tests to apply to see if there was infringement of book on physics.

While applying the principles to a case of violation of copyright, the nature of the subject-matter dealt with in the book and the class of readers and the purpose for which it is meant, should also be taken into consideration It is obvious that no person can claim copyright in the principles, theories, definitions, formulae and signs to be dealt with in a Science book meant for use of students preparing for a particular examination having a definite syllabus Such books written by two different writers are bound to have similarities not only in respect of the treatment of the scientific principles, theories, definitions, formulae and signs but also in regard to diagrams and model questions to be set on various aspects of the subject matter Even the language employed is bound to be similar In such books there is great need to express various ideas and problems in a language which is precise and concise as well as simple of comprehension A book on Physics or Chemistry subject, on account of the special nature of the subject and the class of readers and purpose for which it is meant, would leave very little room for a personalised treatment of the subject as regards form, manner, arrangement or expression A writer dealing with a Biology subject can have greater freedom in these matters but the same cannot be indulged in by a writer on Physics or Chemistry subject, while writing a book for use of students of a particular educational level These considerations should be borne in mind while considering the question of violation of copyright in a Physics book by the writer of another Physics book AIR 1978 S C 1613 Foll (Para 16)

(D) Criminal P. C. (2 of 1974), S. 482 — Copyright Act (1957), S. 63 — Infringement of copyright — Finding of Magistrate that two books are quite different and there is no infringement of copyright of complainant — It is finding of fact — In proceedings under S. 482 High Court does not ordinarily review or reappraise material concerning finding — Magistrate's view that no offence under S. 420, Penal Code, was made out was correct. (Penal Code (1860), S. 420).
(Paras 19, 20)

Cases Referred : Chronological Paras

AIR 1978 S C 1613 (1978) 4 S C C 118 13, 14, 15
(1968) 1 Andh W R 323 6, 8
AIR 1966 Mad 175 1966 Cri L J 553 (1965) 2 Mad L J 377 6, 7
AIR 1954 All 570 1954 All L J 125 13, 15

Narendra Singh Yadava and P N Lal, for Applicant, Addl Govt Advocate and R N Sharma, for Respondents

ORDER :— This is a petition under S 482 Cr. P C

2. The present petitioner filed complaint against opposite parties 2 to 4 with the allegations that he is proprietor of M/s Nagin Prakashan, Meerut and a reputed publisher of HighSchool and Intermediate books Sri Raj Kumar and Sri G D Mittal were joint authors of a Physics Text Book named 'High School Bhautiki' The authors assigned copyright of the said book to M/s Nagin Prakashan in the year 1968 and had not revoked the same By virtue of the assignment M/s Nagin Prakashan had the exclusive right to publish the said book The last Edition of the book was published in the year 1980 The book had become very popular and had run into 13 Editions, all of which were published by M/s. Nagin Prakashan. Opposite parties 3 and 4 wrote a Physics book named 'New Pattern Gagan Guide' and opposite party 2 published the same This book contained in parts exactly the same questions, the same language and figures etc , as his Publication 'High School Bhautiki'. The work 'New

Pattern Gagan Guide' was complete infringement of his copyright in the book 'High School Bhautiki' The complainant also added that the publication of the pirated book had reduced the sales of his own book and put him to heavy losses He added that the accused (opposite parties 2 to 4) had thus committed offences under S 420, I P C, and S 63, Copyright Act, (briefly the Act)

3. The Magistrate recorded the statement of the complainant Nagin Chand Thereafter he directed the police to investigate and report Sub-Inspector Mahesh Kumar Sharma submitted his report He was also examined as a witness After considering the statement of the complainant and the result of investigation, the magistrate came to the conclusion that there was no sufficient ground for proceeding against the accused for two reasons First that the complainant had not proved assignment of the copyright of the original authors in his favour and, therefore, he had no locus standi to file a complaint Second that a consideration of the external and internal features of the two books indicated that they were quite different The magistrate, therefore, dismissed the complaint under S 203, Cr P C It appears that copies of the book 'New Pattern Gagan Guide' were also seized by the police The magistrate also directed release of those books but the books could not be actually returned to opposite parties 2 to 4 because of the stay order dated 6-7-81 passed by this Court

4. The complainant filed criminal revision 173/81 The learned II Additional District and Sessions Judge, summarily dismissed the revision

5. Being dissatisfied, the complainant has filed this petition under S 482, Cr. P C He has prayed that the magistrate be directed to summon the accused and proceed further

6. The first contention of the learned counsel for the petitioner is that assignment of the copyright in favour of the complainant is not a condition precedent to the filing of a complaint, no such restriction is to be found in S 63 of the Act which creates an offence on account of infringement of copyright He has urged that it is sufficient for the maintainability of complaint that it may be shown prima facie that there has been infringement of copyright This submission has been disputed on behalf of opposite parties 2 to 4 and their learned counsel has contended that no one except the first owner of the copyright can file a complaint under S 63 of the Act unless he proves assignment of the copyright or a grant of a licence in respect of it in his favour In this connection, the learned counsel has placed reliance on two decisions namely A Susiah v. S Muniswamy, AIR 1966 Mad 175 and D S G Siddhanti v Venkateswara Publishing House, (1968) 1 Andh W R 323

7. In Susiah's case one of the two joint authors had initiated criminal action for infringement of copyright The question arose whether the criminal case was maintainable without joining the other co-author It was held that one of the authors, who is aggrieved, is entitled to maintain a criminal action for the offence The question whether a third party could maintain a criminal action for infringement of copyright of the rightful owner did not arise for consideration in that case.

8. In Siddhanti's case (1968-1 Andh W R 323), copyright was claimed in several yearly almanacs and certain civil reliefs including rendition of accounts, were claimed. One of the questions which arose for consideration was, whether there was assignment of copyright claimed by Siddhanti in the almanacs. The question whether a third party who did not have assignment of the copyright in his favour, could or could not maintain a criminal action for infringement of the copyright, did not arise for consideration in that case Thus, these authorities are of little help on the question which has been raised before me by the learned counsel for the petitioner

9. On a consideration of the scheme of the Act I am clearly of the view that the contention raised by the learned counsel for the petitioner must be answered in the negative Copyright in a literary or other work is a creature of statute namely the Copyright Act and it is to be enjoyed by virtue of and subject to the provisions of the Act The author of the work is the first owner of the copyright therein as provided under S 17 of the Act. This copyright can be assigned by the author, the mode of assignment is mentioned in S 19 of the Act The assignment is to be in writing signed by the assignor or by his duly authorised agent The Act also provides for grant of licence by the owner of copyright Section 14 of the Act defines the meaning of copyright Thus, it is the owner or assignee or licensee of a copyright who can feel aggrieved on account of the infringement of that right in a particular

work. Section 63 of the Act is intended to safeguard the right and interest of such author, assignee or licensee. It is open to these persons to ignore infringement of their copyright in a work. Though S. 63 of the Act does not contain any word suggesting that only the author or assignee or licensee of the copyright can take criminal action for infringement of copyright, this section should be read to imply that the pirating person shall be liable to punishment for infringement only if such author or assignee or licensee seeks to claim protection of law. If such a person, notwithstanding the infringement, does not choose to take any action for the infringement, there is no harm caused to any one else. The infringement of copyright is not to be regarded as an offence against the society at large, for which anyone may move the machinary of criminal law. In fact, the infringement of copyright in a work suggests that the infringed work is of value to the society. Dissemination of parts of such a work by pirating the same by another author, can hardly have an adverse effect on the society. Piracy of a work can adversely affect the financial interests of the author or assignee or licensee and, therefore, he should alone be held entitled to claim the protection of criminal law. It must, therefore, be held that only the author or assignee or licensee of a work can maintain criminal action under S. 63 of the Act for protection of his copyright in that work.

10. The next contention of the learned counsel for the petitioner is that the copyright in the work 'High School Bhautiki' had been assigned by the authors to M/s Nagin Prakashan, Meerut in the year 1968, and had not been revoked till the time of the filing of the complaint. The Income-tax Authorities had made a raid in April 1981 and had removed all the papers including the assignment and, therefore, the same could not be produced before the magistrate. A copy of the agreement/assignment of April 1977 which was in the Income-tax Office was produced before the magistrate and he was informed that the original would be summoned at the time of the trial but the magistrate did not accept the same and wrongly took the view that the complainant had failed to produce the written assignment. The magistrate went to the length of not placing on the record, the copy of the agreement/assignment of April 1977. The learned counsel has submitted that the copy of the agreement/assignment of the year 1977 should have been accepted by the magistrate and on its basis he should have taken the view that the complainant was assignee of the copyright and as such entitled to maintain the complaint under S. 63 of the Act.

11. The applicant had filed a letter dated 30-11-80 which was written by one of the authors of the book 'High School Bhautiki' to M/s. Nagin Prakashan asking the latter for taking action against the present opposite parties 2 to 4 for infringement of the copyright in the said work. This letter was proved before the magistrate and marked Ex. 5 on 2-12-80. A copy of this letter has been filed with the petition as Annexure 'K'. Since this letter did not amount to assignment of the copyright, the learned Magistrate was right in not taking it into consideration.

12. It seems that it was for the first time on 23-6-81 that the complainant made an application seeking permission to file a copy of assignment/agreement dated April 1977 to show assignment of the copyright in the book 'High School Bhautiki' in his favour. The magistrate rejected it on the ground that that was no stage for filing a copy of the assignment which was not asked for by him. Perhaps this observation also implied that the complainant was required to file the original. Though the insistence of the magistrate for production of the original was not illegal, in the circumstances of the case, he should have accepted even a true copy or asked the complainant to obtain at least a certified copy of the same from the Income-tax Department in whose custody the original was. The rejection on the ground that on 23-6-81 there was no stage for filing a copy of the assignment, was, in my opinion, not correct. It is true that the evidence had closed on 29-5-81 and thereafter some dates had been fixed for argument but on 23-6-81 which was the date for argument, some reasonable time could be allowed for producing the assignment or its certified copy. This was essential because it was being pressed by the accused who had put in appearance that the complainant had no locus standi to institute the complaint in the absence of assignment of the copyright. The order of rejection dated 23-6-81 cannot, therefore, be taken to be a correct and proper order.

13. The learned counsel for the petitioner has next submitted that the learned magistrate had not understood the meaning of copyright and had on a superficial consideration held that the two books were quite different. The magistrate had not cared to go into the contents of the two books to

find out if there was piracy of the subject-matter of the book 'High School Bhautiki' and if so, to what extent and of what nature and whether it amounted to an infringement of the copyright He has added that the decisions S K Dutt v Law Book Co., AIR 1954 All 570 and R G Anand v Delux Films, AIR 1978 S C 1613 were cited before the learned magistrate to show as to what tests should be applied to find out if one work has infringed the copyright of another, but the magistrate conveniently ignored those decisions and chose to take into consideration only some unimportant and inconsequential external and internal features of the two books He has further contended that on a comparison of the two books it would have been amply clear to the learned magistrate that the book 'New Pattern Gagan Guide' contained a large quantity of the material to be found in the book 'High School Bhautiki' The learned counsel has referred to pages 465, 466, 534, 678 to 680 of the book 'High School Bhautiki' and said that the matter on these pages verbatim tallies with the matter to be found on pages 305, 306, 342, 343 and additional pages 37 to 41 of the pirating book

14. In R G Anand's case (supra) the Supreme Court considered a number of decisions and then indicated the principles and tests which should be applied for determining whether there has been violation of copyright of a work. The Supreme Court held that an idea, principle, theme of subject-matter or historical or legendary facts being common property cannot be the subject-matter of copyright of a particular person It is always open to any person to choose an idea, principle, theme of subject-matter and develop it in his own manner. The violation of the copyright in such cases is confined to the form, manner and arrangment and expression of the idea, principle, theme of subject-matter by the author of the copyrighted work Where two writers write on the same subject similarities are bound to occur because the central idea of both is the same and in such a case the similarities or coincidences by themselves cannot lead to an irresistible inference of plagiarism or piracy In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright

15. S K Dutt's case (AIR 1954 All 570) (supra) was also noticed by the Supreme Cour in R G Anand's case (AIR 1978 S C 1613) In S K Dutt's case the learned Single Judge observed thus (at p 577) —

"In deciding the question whether one book is a copy of the other or not the Court has to keep in mind the two features of the two books namely, the external and the internal features. By external features is meant, 'the get-up and the overall' scope of the publication. By internal features is meant the general lay out of the subject-matter, the manner of the treatment of the subject-matter and the amount of material contained in the book "

16. The principles enunciated by the Supreme Court are general in nature and while applying these principles to a particular case of violation of copyright, the nature of the subject-matter dealt with in the book and the class of readers and the purpose for which it is meant, should also be taken into consideration It is obvious that no person can claim copyright in the principles, theories, definitions, formulae and signs to be dealt with in a Science Book meant for use of students preparing for a particular examination having a definite syllabus. Such books written by two different writers, are bound to have similarities not only in respect of the treatment of the scientific principles, theories, definitions, formulae and signs but also in regard to diagrams and model questions to be set on various aspects of the subject-matter Even the language employed is bound to be similar. in such books there is great need to express various ideas and problems in a language which is precise and concise as well as simple of comprehension A book on Physics or Chemistry subject, on account of the special nature of the subject and the class of readers and purpose for which it is meant, would leave very little room for a personalised treatment of the subject as regards form, manner, arrangement or expression. A writer dealing with a Biology subject, can have greater freedon in these matters but the same cannot be indulged in by a writer on Physics or Chemistry subject, while writing a book for use of students of a particular educational level These considerations should be borne in mind while considering the question of violation of copyright in a Physics book by the writer of another Physics book.

17. Dealing with the question whether the book of opposite parties 2 to 4 had

violated the copyright of the book of the complainant, the learned magistrate observed thus —

"In deciding whether a book is a copy of another the external and internal features of the book should be considered

The name of the book in question on the title cover is altogether different The colour of the title cover is also different New Pattern Gagan Guide contains 394 plus 84 pages while High School Bhautiki contains 392 pages which shows that New Pattern Gagan Guide is much smaller (bigger?) in size than High School Bhautiki New Pattern Gagan Guide is written in the form of questions and answers just to help the students to prepare for examination while the High School Bhautiki is a text-book The external and internal features of both the books are quite different No offence under S 420, I P C, has also been made out "

18. Besides this, in the beginning of his order the learned magistrate said that he had considered the statement of the complainant and the result of the investigation made under S 202, Cr P. C , and was of the opinion that there was no sufficient ground for proceeding against the accused

19. The above quoted paragraphs of the order of the magistrate no doubt gives the impression that the magistrate had considered only four things namely —

(1) The names of the two books are altogether different

(2) The colour of the title covers of the two books are different

(3) The number of pages in the High School Bhautiki is 392 while in the other book it is 394 plus 84 pages, and thus, the other book is much smaller (?) in size

(4) High School Bhautiki is Text while the other book is written in the form of questions and answers to help the students to prepare for examination But the observation in the first para of the order shows that the learned magistrate had also considered the result of investigation made by the police under his direction which was given under S 202 Cr P C The entire record of the investigation was submitted by Sub-Inspector Mahesh Kumar to the magistrate. Though the magistrate has not discussed the result of investigation in his order at length, it cannot, in these circumstances, be said that the magistrate had not considered this material in coming to his conclusion that the two books are quite different. The finding that the two books are quite different and, therefore, there is no question of the infringement of copyright of the complainant, is a finding of fact In proceedings under S 482, Cr P C ordinarily the material concerning a finding of fact is not to be reviewed and reappraised In the instant case too, I do not propose to go into a detailed discussion of that material to examine the propriety and correctness of the finding of the learned magistrate However, I would like to make a few observations, since the magistrate did not choose to discuss the material which came on record as a result of the investigation carried out by the police

20. It is noteworthy that in the complaint the complainant asserted that the accused had in parts stolen exactly the same questions, the same language, the same figures etc , from his book It was also said that the stolen portions were to be found in Chapters 1 and 7 and 41 and 42 of the book published by the accused In the statement under S 200, Cr P C , the complainant said that the pirated material was to be found in Chapters 1 to 7 and 41 and 42 of the book published by the accused Each of the two books contains 42 Chapters and the arrangement of the Chapters is the same The report of the Sub-Inspector shows that perhaps the number of Chapters and the arrangement of the subject-matter of each Chapter is to be the same in each book on the subject in view of certain guidelines laid down by the U P Board Chapters 1 to 7 cover 110 pages and Chapters 41 and 42 cover 26 pages of the book of the complainant, while these Chapters of the other book cover only 91 and 19 pages respectively These pages contain a number of diagrams, questions and answers Some of the questions are those which were set in previous examinations of the Board These pages also contain various formulae No doubt at places the language employed in the two books in these parts is identical but on account of all these similarities it cannot be said that there has been piracy of a substantial amount of the material of the book of the complainant by the accused Here it will not be out of place to point out that the Sub-Inspector took pains to compare the book of the complainant with a third book written by Messrs Garg and Goyal and he found that a large number of diagrams and some illustrations and questions in the two books were similar When the Sub-Inspector Mahesh Kumar was examined as a witness by

the complainant under S 202, Cr P C, in reply to a question he said that about 60% material in the two books was similar This was a general statement and covered diagrams, questions, answers and discussion of the various scientific principles, theories, definitions and formulae Hence the statement of this witness regarding 60% similarity of the material is not to be taken literally Having regard to the nature of the subject dealt with in the two books and the limitations under which the writer has to work, it cannot be said that the offending book namely 'New Pattern Gagan Guide' is a substantial imitation of the book 'High School Bhautiki' and amounts to the violation of the copyright in that work Hence the finding of the learned magistrate is quite well founded Since the view of the magistrate that the two books were quite different was correct, he was right in taking the view that no offence under S 420, Cr P C, was also made out He was right in dismissing the complaint under S 203, Cr P C

21. In view of the foregoing discussion I hold that the impugned order does not suffer from any infirmity and this petition has no merit Accordingly the petition is dismissed. The order staying release of the seized books is hereby vacated

Petition dismissed

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K N SINGH AND B N SAPRU, JJ

Chakreshwar Nath Awasthi, Appellant v Jageshwar Prasad Shukla and others, Respondents

F A F O No 278 of 1974, D/- 11-9-1981 *

Court-fees Act (7 of 1870), S. 7 (iv-A) (as amended in U. P.) — Suit for declaration — Defendant claiming certain rights under alleged forged will — Will not executed by Predecessor-in-interest of plaintiff — Neither he was a party to will — Court-fee would be payable under S. 7 (iv-A) Cl. (2) and not under Cl. (1).

Where the plaintiff had clearly stated in the plaint that the will which had been set up by the defendant was forged and not executed by his predecessor-in-interest, nor his predecessor-in-interest was a party to the will (instrument), the court-fee in the suit for declaration of some rights of plaintiff would be payable under Cl (2) of S 7 (iv-A) and not under Cl (1). (Case law discussed)

(Paras 19, 20)

Cases Referred : Chronological Paras

AIR 1973 SC 2384 : (1973) 2 SCC 524 14
1970 All L J 269 13
AIR 1968 SC 102 : (1968) 1 SCJ 633 12
AIR 1967 All 153 : 1966 All L J 570 9
AIR 1956 All 71 8, 15
AIR 1950 All 231 : 1950 All L J 20 : 1950 All W R 46 11
AIR 1945 Lah 13 : 46 Pun L R 346 * 14

P K Sinha and T P Asthana, for Appellant, S M K Chaudhri and M C Gupta, for Respondents

JUDGMENT :— This is a plaintiff's appeal under S 6A of the Court-fees Act The only question to be determined in this appeal is whether the court below was correct in requiring the plaintiff-appellant to pay the court-fee under Cl (1) of S 7 (iv-A) of the Court-fees Act or it should be charged under S 7 (iv-A) (2)

2. The plaintiff's case, as set out in the plaint, briefly was that one Rameshwar Dayal Shukla out of love and affection which he had for the plaintiff, executed a will dated 29-11-1966 which was registered on 6-12-1966 whereby he bequeathed premises 119/353, Ram Nagar, Darshan Purwa, Kanpur, to the plaintiff and that the said will was the last will of Rameshwar Dayal Shukla Rameshwar Dayal Shukla died on 1-9-1967 of stomach ailments The plaint went on to add that the defendants on the occasion of the funeral ceremony of Rameshwar Dayal Shukla came and started residing in a portion of the premises in suit and subsequently they refused to vacate when the plaintiff asked them to do so. Paragraphs 19 and 20 of the plaint are relevant and are reproduced below

"19 That after the performance of the 13th day ceremony of Shri Rameshwar Dayal Shukla, the plaintiff asked the defendants to vacate the aforesaid accommodation, but they put off on several false excuses and pretexts. The plaintiff therefore was constrained to serve a registered notice dated 16th Oct 1967 on the defendants, but they failed to vacate the aforesaid portion and

*Against judgment and order of O P Garg 2nd Civil J Kanpur, D - 29-4-1974

BY KKV TO RUN NP

denied the ownership of the plaintiff of premises 119/353 and falsely alleged that Shri Rameshwar Dayal Shukla had executed another will dated 20th Aug 1967 and that under it defendant 1 was the owner of all properties left by Shri Rameshwar Dayal Shukla

20 That Shri Rameshwar Dayal, Shukla did not execute any will except the one dated 29th Nov 1966 referred to above and it seems that defendant 1 in order to serve his illegal end has forged some document purporting to be the will of Shri Rameshwar Dayal Shukla The said document is forged and fabricated and void and defendant 1 did not and cannot acquire any rights or interest in the properties left by Shri Rameshwar Dayal Shukla, which solely belong to the plaintiff under the terms of the will dated 29th November 1966 of Shri Rameshwar Dayal Shukla "

3. The reliefs sought by the plaintiff were that (i) a declaration that he was the sole owner of premises 119/353, (ii) the defendants, their family members, servants and representatives be evicted from premises 119/353 comprising of one small room with Chhajja, verandah, courtyard on the first floor and one room and terrace on the second floor and possession of the same be delivered to the plaintiff, (iii) a decree for pendente lite and future mesne profits or damages for use and occupation at the rate of 50 Paise per day against the defendants till the date of their ejectment, and (iv) costs of the suit be awarded The plaintiff had originally valued the suit for the purposes of payment of court-fee at Rs 25,000/- and paid separate court-fee on the above reliefs

4. The court by its order dated 6-10-1970 held that the valuation of the suit property for payment of court-fee was Rs 58,320/- This finding has become final and there is no dispute about it any more. The court-fee on the amount of Rs 58,320/- has been paid

5. In respect of the relief for declaration, the court held that it involved the cancellation or at least adjudging void the will dated 20-8-1967 which was alleged to have been executed by Rameshwar Dayal Shukla in favour of defendant 1, as such the court-fee was payable under S 7 (iv-A), Court-fees Act, and not under Art 17 (i) a of the Second Schedule it was further observed that the order of the court dated 1-1-1970 had been amended by the order dated 6-10-1970 It required the court-fee to be paid on the amount, i.e Rs. 11,664/-, being 1/5th of Rs 58,320/- The defendants challenged this finding and applied for amendment of their written statement to the effect that the court-fee was to be paid under Cl (1) of S 7 (iv-A) and not under Cl (2) as the predecessor-in-title of the plaintiff had executed the will and was a party thereto The amendment was refused by the Court The defendants went in revision to the High Court which allowed it on 1-3-1973 and the written statement was amended and a new para 38 was incorporated Paragraph 38 of the written statement runs as under

"38 That the plaintiff has not paid court-fee ad valorem, rather has paid court-fee on 1/5th of the valuation of the premises in suit A suit when involves cancellation or adjudging void or voidable an instrument including a will executed by predecessor requires payment of full court-fee as the case falls under S 7 (iv-A) Cl (1) and not u/s 7 (iv-A) Cl (2) of Court-fees Act In this view of the matter court-fee paid is insufficient "

6. A fresh issue 12 was framed The issue was decided by the court and it was held that the court-fee was payable under Cl (1) of S 7 (iv-A) of the Court-fees Act and not under Cl (2) thereof

7. Aggrieved by the order of the trial court, the plaintiff has preferred the instant first appeal from that order Section 7 (iv-A) of the Court-fees Act is reproduced below

"7 (iv-A) For cancellation or adjudging void instruments and decree In suits for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market value, or an instrument securing money or other property having such value

(1) where the plaintiff or his predecessor-in-title was a party to the decree or the instrument, according to the value of the subject-matter, and

(2) where he or his predecessor-in-title was not a party to the decree or instrument, according to one-fifth of the value of the subject-matter, and such value shall be deemed to be, if the whole decree or instrument is involved in the suit, the amount for which or value of the property in respect of which the decree was passed or the instrument executed, and if only a part of the decree or instrument is involved in the suit, the amount or value of the property to which such part relates

Explanation — "The value of the property" for the purposes of this sub-section, shall be the market value, which in the case of immovable property shall be deemed to be

the value as computed in accordance with sub-s (v), (v-A) or (v-B) as the case may be "

8. It has been held in the case of Gulab Chand v Jaswant Singh, (AIR 1956 All 71) that a will after the death of the testator becomes an instrument securing money or property within the meaning of S 7 (iv-A) of the Court-fees Act

9. The learned counsel for the appellant relied upon a decision of Mr Justice Dhavan in the case of Smt Gulab Dei v Chief Inspector of Stamps, U P (AIR 1967 All 153) In that case the plaintiff instituted a suit for partition of joint Hindu family property The defendants set up a will in defence In her replication, the plaintiff had alleged that her husband had executed no will and if the defendants had any alleged will in their possession, it was a forgery She pleaded, in the alternative, that it was invalid The learned Judge held that there was a vital distinction between asking for a declaration that a document was void and alleging that a document set up by the defendants was forged The onus was on the party seeking a declaration that the document was void to prove the defect But the learned Judge went on to hold that where the plaintiff sued for partition of joint Hindu family property and the defendants in defence set up a will and the plaintiff alleged that the deceased left no will, he did not have to ask for a declaration that the alleged will was void The learned Judge went on to hold that the appellant was not liable to pay additional court-fee under S 7 (iv-A) of the Court-fees Act in such a case

10. It is necessary to notice here that the present appeal has proceeded on the footing that S 7 (iv-A) applies The case referred to above is a case where the plaintiff had contended and successfully did so that S 7 (iv-A) did not apply

11. The next decision relied upon by the learned counsel for the appellant is the case of Chief Inspector of Stamps v Shri Gopalji Maharaj, (AIR 1950 All 231) In that case the plaintiff had alleged that his predecessor-in-title had made a wakf deed in his favour and thereafter his predecessor-in-title had executed a sale deed in respect of the same property in favour of the defendants. The plaintiff further alleged that the sale deed in favour of the first two defendants was fictitious, bogus and invalid On these allegations the plaintiff claimed possession over the property in suit and because the plaintiff in para 6 of the plaint had alleged that the sale deed executed in favour of the first two defendants was fictitious, bogus and invalid, it was contended on behalf of the Chief Inspector of Stamps that the Court-fee was leviable under S. 7 (iv-A) of the Court-fees Act and the same was payable over and above the court-fee payable for the relief of possession This contention was rejected by the learned Judge on the ground that it was not necessary for the plaintiff to have the sale deed adjudged void in order to claim the relief for possession claimed in his suit This case also falls in the same category of the cases as the decision of Mr Justice Dhawan in the case referred to above

12. Another decision which has been referred to by the counsel is a decision of the Supreme Court in the case of the Vishnu Prataph Sugar Works (P) Ltd v Chief Inspector of Stamps, (AIR 1968 SC 102) In that case the plaintiff had sought an injunction restraining the State from realising sugarcane cess and purchase tax charged under the U P Sugarcane (Regulation of Supply and Purchase) Act, 1953, the Sugar Cane Cess Act, 1956 read with the U P Sugar Cane Cess (Validation) Act, 1961 and the U P Sugar Cane Purchase Tax Act, IX of 1961 In the suit, the appellant company alleged, inter alia, that the Acts were invalid and void and, therefore, the State was not entitled to levy, collect or recover the cess or the purchase tax The appellant Company had paid the court-fee on the said plaint under sub-s (iv-B) (b) of S 7 on the footing that the relief was a relief for injunction The Chief Inspector of Stamps objected to the court-fee being paid under cl (b) of sub-s (iv-B) of S 7 contending that the court-fees payable were as provided under sub-s (iv) (a) of S 7 or under sub-s (iv-A) of S 7 that is to say on the footing that the suit was for a declaratory decree where consequential relief prayed for was an injunction or on the footing that the suit involved cancellation of or adjudging void an instrument securing money or other property having such value The High Court rejected the contention of the Chief Inspector of Stamps that S 7 (iv-A) (a) applied but held that S 7 (iv-A) applied as the said acts were instruments securing money within the meaning of that sub-section and held that though the relief claimed was an injunction, in substance and effect the suit involved adjudgment of the said Acts as void. The Supreme Court held that the Acts were not 'instrument' and so S 7 (iv-A) did not apply The Court went on to observe as follows (at p 105)

"It is true that for purposes of the Court-fees Act, it is the substance and not the form which has to be considered while deciding which particular provision of the Act applies It cannot, however, be gainsaid that the actual relief prayed for in the plaint was an injunction restraining the State and its authorities to cess and the purchase-tax It is clear from the plaint when read as a whole that though the appellant-company alleged that the Acts were void and therefore non est for the reasons set out therein, it did not seek any declaration that they were void The plaint proceeds on the footing that the said Acts were void and that therefore the State of U P or its authorities had no power to realise the said tax and the said cess It may be that while deciding whether to grant the injunction or not, the court might have to consider the question as to the validity or otherwise of the said Acts But that must happen in almost every case where an injunction is prayed for If for the mere reason that the court might have to go into such a question, a prayer for injunction were to be treated as one for a declaratory decree of which the consequential relief is injunction, all suits where injunction is prayed for would have to be treated as falling under Cl (a) of sub-s (iv) of S 7 and in that view Cl (b) of sub-s (iv-B) of S 7 would be superfluous The contention urged by Mr Bishan Narain, therefore, cannot be accepted "

13. A case relied upon by the learned counsel for the respondent is a decision in the case of Vinod Kumar v State Bank of India, (1970 All L J 269) The allegations in the plaint were that the plaintiffs were the owners of the Kothi in question and they were joint with their father Banarasi Das who was defendant 3 and their brother Dev Kumar who was defendant 4. The State Bank of India had obtained a decree against M/s Banarasi Dass Dev Kumar for a sum of Rs 1,50,000/- It was asserted that the money was borrowed by Banarasi Dass for wagering and speculating transactions and the debt was tainted with immorality The plaintiffs claimed that the property was joint Hindu family property and the decree obtained by the State Bank of India against M/s Banarasi Dass Dev Kumar was not executable. The plaintiffs sought a declaration that the decree against M/s. Banarasi Dass Dev Kumar was not binding on the plaintiff and was void and the property in suit was not liable to be sold in execution of the decree The plaintiffs paid court-fee under Schedule 2 Art 17 (iii) of the Court-fees Act A plea was taken by the State Bank of India that the court-fee paid was insufficient The court below held that the court-fee payable was under S 7 (iv-A), sub-cl (1) of the Court-fees Act and it also found that further court-fee was required to be paid The High Court upheld the view of the trial court We find that the suit clearly involved adjudging void or voidable a decree This decision is also distinguishable

14. The learned counsel for the respondents has placed strong reliance on a judgment of the Supreme Court in the case of Shamsher Singh v Rajinder Prasad, (AIR 1973 SC 2384) In that case what had happened was that the father of the plaintiffs had executed a mortgage deed of the property of which he claimed to be the sole owner The mortgagee filed a suit on the basis of the mortgage and obtained a decree When he tried to take out execution proceedings for the sale of the mortgaged property the plaintiffs filed a suit for declaration that the mortgage executed by his father in favour of the mortgagee was null and void and ineffectual as against them as the property was a joint Hindu family property and the mortgage had been effected without consideration and family necessity On the plaint, the plaintiffs paid a fixed court-fee of Rs 19-50 and the value of the suit for the purposes of jurisdiction was given at Rs 16,000/- A preliminary objection having been raised about the court-fee paid, the subordinate Judge held that although the case was covered by S. 7 (iv) (c), Court-fees Act, and the proviso to that section applied and the Judge directed the plaintiffs to pay court-fee on Rs 16,000/- which was the amount at which the plaintiffs valued the suit for the purposes of jurisdiction The court-fee not having been paid, the plaint was rejected The plaintiffs appealed Before the High Court the plaintiffs did not seriously contest the position that the consequential relief of setting aside the decree within the meaning of S 7 (iv) (c) of the Court-fees Act was inherent in the declaration which was claimed with regard to the decree But taking the view that the plaintiffs were not at all bound by the mortgage in dispute or the decree, the High Court held that there was no consequential relief involved since neither the decree nor the alienation bound the plaintiffs in any manner The defendant thereupon appealed to the Supreme Court The Supreme Court held that in a suit by a son for a declaration that a mortgage decree obtained against his father was not binding

on him, it was essential for them to pay adequate court-fee under S. 7 (iv) (c). The quotation extracted by the Supreme Court from the judgment of Lahore High Court in the case of Prithvi Raj v. D. C. Ralli, (AIR 1945 Lah 13) clearly shows that the Supreme Court was deciding the case in the manner it did because a mortgage decree obtained against a Hindu father binds his son and a declaration, therefore, could not be obtained without adjudging void the mortgage deed. It is clear that if a declaration had been sought that the mortgage deed was not binding and the mortgage had been executed by a person other than the father of the plaintiffs then it would not have been necessary for the plaintiffs to have had the mortgage deed adjudged void. This case is not relevant for determining the controversy involved in the present case.

15. The last case referred to by the learned counsel for the respondents is a decision of Allahabad High Court in the case of Gulab Chand v. Jaswant Singh (AIR 1956 All 71) sued for a declaration that he was entitled to a certain share of the property left to him under a will of his father dated 17-3-1941 and an oral will dated 23rd or 24th of March, 1941. It was alleged that the plaintiff's rights were denied by defendant 1 who had put forward another will dated 26-12-1944 which, the plaintiff alleged, was not a valid will as his father Chiranji lal was not in his proper senses and was not in a fit position to execute the will dated 26-12-1944 and the will was a forged paper and not genuine. The plaintiff sought a declaration that he was the owner of a sum of Rs. 7,000/- and of the business to the extent of ½ share and of a house to the extent of 1/6th share. After the institution of the suit, the plaintiff sought an amendment of the relief claimed in the plaint by an addition of the relief in the alternative that if the will dated 26-12-1944 set up by the defendant was found to be genuine then the plaintiff was entitled to a certain share in the property. It was not known whether the amendment application was allowed or not.

16. The court passed an order to the effect that the plaint involved the cancellation of the will set up by the defendant and therefore, the court-fee was payable under S. 7 (iv A), Court-fees Act as amended in Uttar Pradesh. The plaintiff appealed. The first question decided by the High Court was that the will became an "instrument" within the meaning of S. 7 (iv-A) of the Court-fees Act. The next question examined was whether the relief claimed in the plaint involved the cancellation or adjudging void or voidable the will set up by the defendant. It was held by the learned Judge that though the relief claimed in the plaint was only a declaration as to the plaintiff's right in a property yet if the plaint is read as a whole it cannot be denied that "what really the plaintiff wanted was that the subsequent will as put forward by the defendant may be declared ineffective or void or voidable for the reasons mentioned in the plaint. Unless the will put forward by the defendant was considered and a declaration as to its validity or its invalidity given the relief claimed by the plaintiff could not be awarded to him." This is, therefore, a case in which the relief claimed by the plaintiff involved the cancellation or adjudging void or voidable an instrument. The learned Judge went on to hold that if a suit involved the cancellation of an instrument, the court-fee would be payable under S. 7 (iv-A), Court-fees Act. Then the learned Judge went on to say

"If we were to take the alternative relief it is conceded that it involved the adjudging void of the subsequent will. As the will was executed by the predecessor of the plaintiff, court-fee is payable under S. 7 (iv-A), Cl. (1), and not under S. 7 (iv-A) Cl. (2) Court-fees Act."

17. From the last quotation given from the judgment it is clear that the learned Judge decided that cl. (1) of S. 7 (iv A) applies on the footing that the matter of court-fee was governed by the alternative relief claimed by the plaintiff.

18. This case cannot assist the respondents because in the plaint the plaintiff clearly stated that the will which had been set up by the defendant, had not been executed by his predecessor-in-interest and was a forged document. If the plaintiff had claimed that the will had been executed by his predecessor-in interest but was void for any reason the matter would have been governed by S. 7 (iv-A) 1 and not by S. 7 (iv-A) (2) of the Court-fees Act. The distinction between cl. (1) and cl. (2) of S. 7 (iv-A) is that where the plaintiff or his predecessor-in-title was a party to the decree or the instrument cl. (1) will apply and where the plaintiff or his predecessor-in title was a party to the decree or the instrument cl. (2) will apply.

19. In this case on the allegations of the plaint, the predecessor-in-title of the plaintiff was not a party to the will in question and therefore cl. (2) would apply. If this interpretation was not to be accepted a defendant by committing forgery of an

instrument and putting thereon the purported signature of the predecessor-in-title of the plaintiff may compel him to pay the higher court-fee prescribed in cl (1) of S 7 (iv-A) It would put a premium on fraud and the construction which places such a premium must at all costs be avoided.

20. In the result the appeal is allowed, the impugned order of the court below is set aside and it is directed that the court-fee shall be payable under cl (1) (or cl (2)) and not under cl (2) (or cl (1)) of S 7 (iv A) of the Court-fees Act as directed under the impugned order The plaintiff is entitled to his costs

Appeal allowed

1981 ALL. L. J. 1283

K. N MISRA, J

Ram Ashrey and others, Petitioners v Board of Revenue, U P., Allahabad and others, Respondents

Civil Misc. Writ Petns Nos 334 and 335 of 1980, D/- 25-9-1981.

(A) Constitution of India, Art. 226 — Suit under S. 229B of U. P. Act (1 of 1951) - Appeal to Additional Commissioner — Remand of case to trial court to record certain findings of facts — Prejudice caused to petitioner by observations in remand order — Petition against remand order — Maintainable. (U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 229B). Case law discussed. (Para 6)

(B) Civil P. C. (5 of 1908), O. 41, R. 23 — Framing of additional issue — Question of fact crucial and material for decision of case — Plaintiff not leading any evidence in support of his contention — Failure to frame specific issue on such point by trial court is fatal — Remand of case for framing additional issue and for taking evidence of parties on such point is proper. (Paras 7, 8)

(C) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 176 — Joint family property — Mutual partition without fraud and coercion — Valid — Holding in the name of one member can be declared to belong to another member in whose name the land falls and can be so recorded in revenue records. (U. P. Land Revenue Act (3 of 1901), S. 34). 1966 Rev. Dec. 10 (B R), Overruled.

If a joint property has been partitioned mutually in a family settlement the parties thereto acquire exclusive rights in the portion falling in their shares and once a joint property has been partitioned in family settlement and is acted upon the parties to such family settlement would be estopped in resiling from it It can be avoided only on establishing that such family settlement or mutual partition was obtained by practising fraud, misrepresentation, coercion or undue influence. It would be treated to be void if it is violative of some mandatory provisions of law (Para 14)

A holding even if recorded in the name of one member of the family can, by virtue of a mutual partition in family settlement, be declared to belong to another or other member of the family and the name of such person, in whose share the land falls in family settlement, would be liable to be recorded in the revenue records 1966 Rev Dec 10 (B R) Overruled Case law discussed

(Paras 16, 17)

Cases Referred : Chronological Paras

(1979) Civil Misc Writ No 7815 of 1973 D/- 20-3-1979, (All) Dara Singh v Board of Revenue 12
AIR 1976 S C 807 1976 Rev Dec 355 11, 15
(1973) Special Appeal No 675 of 1966, D/- 26-2-1973, (All) Sri Ram v SOC 12
AIR 1969 NSC 12 1969 SC (Notes) 292 1969 Cur L J 464 8
1969 All W R (H C) 182 6
1968 S C (Notes) 489 8
1966 Rev. Dec 10 (B R) 4, 6, 17
AIR 1946 All 200 1945 All L J 452 1945 All W R (H C) 359 11

S. N Srivastava, for Petitioners. Sankatha Rai, Standing Counsel, for Respondents

ORDER :— These two writ petitions are directed against the judgement and order dated 17-10-1979 passed by the Board of Revenue, opp. party No. 1 dismissing the revision filed by the petitioners and confirming the order dated 23rd March, 1978 passed by the Addl. Commissioner, Varanasi remanding the case to the trial court

2. Briefly stated the facts of the case are that Jagdeo Pathak, opp. party No. 3 had filed two separate suits against his brother Sahdeo Pathak, opp party No. 4 Under S. 229B one suit was in respect of plots Nos. 896 and 897 situate in village Jarkuttha district Ballia which is the subject matter of dispute in writ petition No. 334 of 1980, while the other suit was in respect of plots Nos. 1152 and 1153 situate in the aforesaid village which is the subject matter in dispute in the

other writ petition No 335 of 1980 The plaintiff-Jagdeo Pathak filed the aforesaid suits with the allegations that the land in dispute was fixed rate tenancy of one Mahesh Rai and others, who had transferred it through a sale deed dated 20-2-1943 and the petitioner became bhumidhar of the disputed land after the abolition of zamindari It was further pleaded that the name of the defendant-Sandeo was wrongly recorded as sole tenure-holder in the Khataunt of 1372 fash the basis of the alleged order dated 17-4-1963, said to have been passed in Case No 747 asserting that he himself is the sole tenant and is in exclusive possession of the land in dispute and sought for a declaration to that effect It was further contended by the plaintiff that Sahdeo holds no right, title or interest over the land in dispute and his name was wrongly recorded and the entry, in his name was per se wrong and illegal. Sahdeo-defendant did not contest the suit and filed a compromise admitting the claim of the plaintiff The petitioners, on coming to know about the finding of the said collusive suit, applied for their impleadment alleging that the defendant Sahdeo Pathak had executed a sale deed in their favour on 6-5-67 and he had now colluded with the plaintiff and has filed a collusive compromise in favour of the plaintiff, hence they be impleaded in the suit The petitioners were ordered to be impleaded in the suit and a written statement was filed by the petitioner pleading that Jagdeo Pathak and Sahdeo Pathak are the real brothers forming joint Hindu family and the plaintiff Jagdeo Pathak was the head and Karta of the joint family that the land in dispute was acquired by joint family funds and both the brothers had acquired share in it It was further pleaded that in a family settlement and mutual partition of the property among the brothers the land in dispute fell in the share of Sahdeo Pathak, whose name was recorded as the sole bhumidhar, vide order dated 7-5-1963 which was passed in the case No 747 on the basis of the compromise dated 6-4-1963 filed in the said mutation case wherein the plaintiff Jadgeo had admitted that in the family settlement and mutual partition of the property, the land in question had fallen in the share of defendant Saldeo and he is in exclusive possession as the sole owner thereof hence it is recorded in his name The said order dated 7-5-1963 was also incorporated in the Khataunt 1370 Fasli and the defendant Sahdeo was in exclusive possession as sole bhumidhar of the same It was further asserted that the plaintiff Jagdeo was very well aware about the said entries he had obtained the extract of Khataunt 1370-F as back as on 31-10-1964 which has been filed by the plaintiff himself in the present suit The petitioners further pleaded that they are the sole bhumidhars of the land in suit having pu based it from the defendants Sahdeo through a registered sale deed dated 6-5-1967 and neither the plaintiff-Jagdeo nor the defendant-Sahdeo held any right, title or interest in the land in suit hence it deserves to be dismissed

3. The trial court framed as many as eleven issues which are referred in the copy of the judgment of the trial court (annexure '2' to the writ petition) Both, the plaintiff and the defendants, led their oral and documentary evidence in support of their case and the trial court, vide order dated 14-7-1977 dismissed the suit holding that the name of the plaintiff was recorded in the representative capacity being karta of the family and in the private partition the land in suit had fallen to the share of Sahdeo whose name was also recorded on the basis of compromise in the mutation case and the petitioner are bhumidhars of the land in suit having purchased it from Sahdeo Pathak

4. Aggrieved by the said order, Jagdeo filed on appeal which was allowed by the Additional Commissioner, opposite party No 2 vide its order dated 23-3-1978 and the case was remanded to the trial court with a direction to frame an additional issue on the question whether the land in dispute was purchased by the plaintiff Jagdeo through joint family funds or not it was also observed that the trial court failed to consider the oral evidence on record while recording its finding. It was also held that the trial court failed to record a specific finding 'whether the land in suit came to the share of Sahdeo by the alleged family settlement and mutal partition' and that no finding has been recorded on issues Nos 1 and 3 The lower appellate court further observed that no such private partition could be made after the enforcement of U.P Z.A & L R. Act and as such the partition could not be valid if it was not made in accordance with the provisions of the Act It was further observed that the trial court should also have considered whether the compromise filed in a correction of paper case would be binding on the parties or not and placing reliance upon the decision of the Board of Revenue in 1966 Rev. Dec 10 he held that such compromise would not be binding with these observations and findings, he remanded the case to the trial court for decision afresh in the light of the observations made in the judgment

5. Aggrieved by the said order the petitioners filed revisions which were heard and dismissed by the Board of Revenue, vide its order dated 17-10-1979. The petitioners have challenged the aforesaid orders passed by opp parties Nos 1 and 2 in this writ petition. It appears that Sahdeo had died during the pendency of the case and his sons Shambhu Nath Pathak and Bishambhar Pathak were substituted and they are arrayed as the opp parties Nos 4 and 5 in the writ petition.

6. The learned counsel for the opp party No 2 raised a preliminary objection about the maintainability of the writ petition against the order of remand passed by the opp party No 2 which has been maintained by opp party No 1. Reliance was placed on Uma Shanker v. Dy. Director of Consolidation, Etah (1969 All W R (H C) 182), wherein the learned single Judge held that "it was not desirable to entertain the petition against the order of remand as the grounds which have been raised by the learned counsel here would be available to him before the consolidation authorities after the remand." This case is distinguishable. In the present case, the lower appellate court, while remanding the case, has observed that the trial court has omitted to consider that under the provisions of U P Z A & L R Act partition cannot be treated to be valid if it has not been made in accordance with the provisions of the Act itself. He has also recorded a finding that the trial court should also have looked to the fact whether the compromise, filed in a correction of papers case, could be binding or not and placing reliance upon the case of Hira Lal v. Aharwa (1966 Rev Dec 10) (B R) he observed that no such compromise will be binding. Since the opp. party has recorded these findings against the petitioner they will be prejudiced if they would not be permitted to challenge the aforesaid findings in this writ petition although the impugned order passed by the Addl. Commissioner is an order of remand. The petitioner cannot possibly urge anything before the trial court against the aforesaid observations and findings of the opp. party No 2 on the said points recorded in the impugned remand order. The Board of Revenue has also, while rejecting the revision of the petitioner endorsed those findings. In this view of the matter, I am of the opinion, that the aforesaid case relied upon by the learned counsel for the opp. parties is not applicable to the facts of the present case and the writ petition cannot be thrown out on the said preliminary objection which is not sustainable.

7. The learned counsel for the petitioner has argued that there was no necessity for framing any additional issues on the question "whether the land in suit which was purchased in the name of the plaintiff-Jagdeo through the sale deed D/- 6-5-1967, was acquired by joint family funds or not" because the said issue would be covered by Issue No. 1 which is to the effect that "whether the plaintiff is the sole bhumidhar of the land in suit or not". He further contended that both the parties had very well understood the case set up by them and they have also led evidence in support of their case which was pleaded in their plaint and written statement. In these circumstances no specific issue was needed on the point. I am unable to agree with this contention. The main question for consideration, in the present case, would be whether Jagdeo Pathak had purchased the land in suit from his own funds or from the joint family funds. But no issue has been framed on this material question. It is well settled that a member of joint family or even a Karta of joint family can acquire the property for himself and in his own name from his own funds. But if it is acquired with the aid and assistance of the joint family funds, then all the members of the joint family would have a share in it though it may be recorded in the name of an individual of the joint family and he would not be the sole owner thereof. In the present case, therefore it was necessary that a specific issue should have been framed on the point. The petitioners, in their written statement had pleaded that the land was purchased in the name of Jagdeo from the joint family funds and it was recorded in his name as he was the Karta of the joint family. No doubt, it may be that while recording a finding on Issue No. 1 such question may be considered if the parties have led evidence in support of or against their respective contentions on the aforesaid points. The petitioners have not brought on record the evidence which has been led by the parties on the aforesaid points and, as such, it cannot be said that the parties have led evidence on such material point. In the absence of any specific issue on the said point, a finding cannot be recorded against a party on the ground that he has omitted to lead evidence about it and no adverse inference can, thus, be drawn against him for not leading evidence on the said point. The aforesaid question is a crucial question of fact and hence a specific issue, on that point, should have been framed for just and proper decision of the case. There should be a distinct issue for each proposition of law and

fact and an issue should be framed on the point necessary for proper trial and disposal In the present case the said question was very material. A perusal of the order passed by the trial court also indicate that no specific finding on the aforesaid question has been recorded nor he has referred to any evidence on the point that the land in question was acquired by the joint family funds. Since the petitioner have not brought on record, of this petition, the evidence which has been led by the parties on the aforesaid point nor any evidence has been referred in the judgment of the trial court and, as such, I am inclined to accept the contention of the learned counsel for the plaintiff-opp party that, since no specific issue on the said point was raised, the plaintiff could not lead evidence on the said point. The learned counsel for the petitioner also could not refer to any evidence which might have been led by the petitioners in respect of the said fact. In this view of the matter, remand was necessary for deciding the case afresh after framing an issue on the aforesaid material fact so that the parties may not be prejudiced. It is not a case where the parties had led their evidence on the material point in spite of omission of an issue on the particular point. The decision cited by the learned counsel for the petitioner, in support of his contention, that the omission to frame an Issue is not fatal, specifically when in spite of omission of framing an Issue, the points involved in the suit have been correctly understood by all the parties, are distinguishable. In the precent case, as already stated above, the trial court has not yet recorded specific finding on the said material point nor he has referred to any evidence on that point. The petitioner has also not referred to, in the writ petition, the evidence led by the parties on the said point. In this view of the matter, I am of the opinion, that the order passed by the opp. party No. 2 directing the specific issue to be framed on the said question does not suffe. from any illegality.

8. The learned counsel for the petitioners next contended that no order of remand could be passed on the ground that the trial court has not considered the oral evidence while deciding the case. If that was not done the appellate court, instead of remanding the case, could very well consider the evidence [illegible] and record findings on the material [illegible] and after [illegible] the suit [illegible] this contention the learned [illegible] Session of the Supreme [illegible] Army & Public Transport Service Bhaiyan Brothers (1956 S.C. (Notes) 489) and Sunder Singh v. Narain Singh (1969 S.C. (Notes) 292) (AIR 1969 N.S.C. 12) wherein it has been held that "no doubt, it is correct that the trial court should have recorded finding after considering the entire evidence on record but if that has not been done the appellate court, instead of remanding the case, should have considered and recorded a finding on all the material questions of fact and law itself". In the present case, however, the case has been remanded for framing of an issue on the said material question of fact and as such, unless the parties get an opportunity to lead their evidence on the said question, no decision can be given on the evidence available on record. The trial court has not taken into consideration the oral evidence while deciding the case and this fact has been pointed out in the remand order so that after framing an issue and taking the evidence of the parties, the trial court should decide the case after the appraisal of the entire evidence on record. The impugned remand order is not based merely on the ground that the trial court has considered the evidence on record. If that alone would have been the ground, the remand order could not be upheld.

9. The learned counsel for the petitioner further contended that the opp. parties Nos. 1 and 2 have erred in holding that the land could not be mutually partitioned by way of family settlement and unless the partition takes place in accordance with the provisions of the U.P.Z.A. & L.R. Act the private partition, so effected, cannot be recognised as valid. The learned counsel has further contended that the opposite parites Nos. 1 and 2 have erred in holding that the admissions made in the corrections of papers case cannot be relied upon and these findings, apart from being erroneous, should not have been recorded by the opposite parties Nos. 1 and 2 when the the case was remanded to the trial court for decision afresh.

10. The learned counsel for the opposite party No. 3 in reply supported the said observations contained in the remand order and urged that without filing a suit for partition under S. 176 of the U.P.Z.A. & L.R. Act a joint holding could not be mutually divided by the co-tenure-holders and they will not become the sole tenant in respect of the land which falls in their respective shares in mutual partition and family settlement. I do not agree with the arguments of the learned counsel for the opposite parties.

11. It is well settled that a property can be mutually divided by act of family

settlement bona fide arrived at between the parties so as to resolve the family dispute and rival claims by a fair and equitable division or allotment of properties between the various members of the family provided but such settlement must be voluntary and should not be induced by fraud, coercion or undue influence The family settlement might have been oral in which case no registration is necessary (See Kale v D D C., 1976 Rev Dec. 355 (AIR 1976 S C 807) In Abdul Haq v Mohd Hashim AIR 1946 All 200, a Division Bench of this Court held that

"The cosharers in a mahal have a right to effect a partition by private arrangement Partition among the cosharers once effected either through court or by private treaty puts an end to the joint ownership of the parties. Thence forward the parcels of land allotted to different cosharers are absolutely distinct in the eye of law and one has nothing whatsoever to do with the others."

12. This case was referred and relied upon by R. M. Sehai, J. in **Dara Singh** v. Board of Revenue, Civil Misc. Writ No. 2695 of 1977 decided on 20-3-1979 and the Irial court's order dismissing the suit for partition under sec 176 of the U P Z A & L R Act on the ground that the partition was already made in accordance with the mutual partition, was upheld Placing reliance on Abdul Majid's case (supra) (") it was held that "where a property has been partitioned privately then a suit for partition about it is not maintainable" This view has been taken by a Division Bench of this Court in Sri. Ram v S O C, Special Appeal No 675 of 1966 decided on 26-2-1973 I respectfully concur with the principles laid down in these decisions

13. There appears to be no specific bar under the provisions of the U P Zamindari Abolition & Land Reforms Act to the mutual partition of a joint holding by a tenure holder by way of family settlement which, if bona fide arrived at, would operate as estoppel between the parties. On the basis of the mutual partition of a joint holding made in a family settlement the parties are entitled to get their names mutated in the revenue records, as is provided in the Explanation appended to S 34 of U. P Land Revenue Act which reads as follows

"The word "transfer" includes a family settlement by which the holding or part of the holding recorded in the record of rights in the name of one or more members of that family is declared to belong to another or other members (or in exchange of holding under Sec 162 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act 1950)"

The aforesaid Explanation clearly indicates that if a holding or part thereof which is recorded in the name of one or more members of the family, is declared to belong to another member in a family settlement arrived at between the parties it would, for the purpose of mutation in the revenue records, be deemed to be a transfer It is well settled that a family settlement need not be in writing and may be arrived at orally between the parties and on the basis of such family settlement mutation application for recording their names as exclusive tenants of the same would be maintainable in view of the aforesaid explanation appended to S 34 Any compromise or consent application filed in the mutation case admitting exclusive tenancy rights on the basis of family settlement and possession of the applicant in pursuance thereof would be binding on the party consented and he would be estopped in resiling from it unless some fraud, misrepresentation, coercion or undue influence in filing of compromise or consent application is alleged and established.

14. It is thus evident that a joint holding, which stands recorded exclusively in the name of one of the members of the family can be mutually partitioned by way of family settlement declaring it to belong to another or other members of the family In the absence of any provisions, contained in U P Z A & L R Act prohibiting mutual partition by way of family settlement of a holding and in view of the aforesaid explanation appended to S 14 (or S 34) recognising such family settlement for the purposes of mutation in the revenue records, I am of the opinion, that if a joint property has been partitioned mutually in family settlement the parties thereto acquire exclusive rights in the portion falling in their shares and once a joint property has been partitioned in family settlement and is acted upon the parties to such family settlement would be estopped in resiling from it It can be avoided only on establishing that such family settlement or mutual partition was obtained by practising fraud misrepresentation, coercion or undue influence it would be treated to be void if it is violative of some mandatory provisions of law

15. The parties to the family settlement would be bound by it and cannot resile from

it Hon'ble Supreme Court in the aforesaid Kale v Dy Director of Consolidation (AIR 1976 S C 807 at pp 817, 825) (supra) case has laid down that

"A family arrangement being binding on the parties to the arrangement clearly operates as an estoppel so as to preclude any of the parties who have taken advantage under the agreement from revoking or challenging the same Even if the family arrangement was not registered it could be used for a collateral purpose namely, for the purpose of showing the nature and character of possession of the parties in pursuance of the family settlement and also for the purpose, of applying the rule of estoppel which followed from the conduct of the parties who have taken benefit under the settlement keep their mouths shut for full seven years and later try to resile from the settlement"

In the present case, Sahdeo Pathak is said to have received the land in suit in his share exclusively and if the said family settlement was bona fide, voluntary and was not induced by fraud, coercion or undue influence, the plaintiff would be bound by it But whether any such family settlement was, in fact arrived at or not and whether a compromise was arrived or not in the aforesaid correction of papers case admitting exclusive title of Sahdeo Pathak on the basis of mutual partition in family settlement are questions of fact which have got to be determined by the trial court and so I do not express any opinion about it

16. In view of what has been said above, I am of the opinion that a joint holding can be mutually partitioned by way of family settlement provided such mutual partition and family settlement is genuine and has not been made to circumvent the provisions of any other enactment for the time being in force if the family settlement would be bona fide and genuinely made in recognition of pre-existing rights in the land in question it would be valid, effective and binding between the parties It would however, be liable to be ignored by the landholder (State Govt) in case it is found to have been arrived with mala fide intentions in order to circumvent some provisions of law, namely the U P Imposition of Ceiling on Land Holdings Act or such other enactment Under the provisions of said Act even certain declaration and partition decrees of court are liable to be ignored

17. The opp parties Nos 1 & 2 have held that the compromise, filed in a mutation case, would not be recognised and reliance has been placed on an earlier decision of the Board of Revenue in the case of Hira Lal v Aharwa (1960 Rev Dec 101 (B R) wherein it has been held that

"Long standing entries should not be changed under S 33 of the U P Land Revenue Act even if they are agreed to by both the parties The proper remedy in such cases is by way of declaration of title as prescribed in law S 229-B of the Z A & L R Act specifically provides for such declaration"

I am unable to agree with this As already observed above, a holding even if recorded in the name of one member of the family, can, by virtue of a mutual partition in family settlement, be declared to belong to another or other member of the family and the name of such person, in whose share the land falls in family settlement, would be liable to be recorded in the revenue records This can be done irrespective of the fact that the entry in the name of the individual member of the family is of very long standing No suit for declaration would be necessary for recording the name in the revenue records on the basis of family settlement which can be done in view of the provisions contained in Explanation to S 34 of the Land Revenue Act In the present case, the defendants asserted that Sahdeo Pathak had received the land in suit by mutual partition in family settlement and his name was recorded in the revenue records as sole tenant after expunging the name of the plaintiff-Jagdeo to which he had given his consent and orders were passed accordingly The opp parties Nos 1 and 2 have held that no entry in favour of Sahdeo Pathak could be made even if recorded tenure holder had given consent I am unable to agree with this finding The trial court will, however, consider on merits whether the plaintiff Jagdeo had filed any such compromise giving consent for recording the name of Sahdeo as the sole tenant of the land in question or not on the basis of alleged family settlement and mutual partition. On these questions of fact, the trial court will record the findings after considering the evidence which may be led by the parties and I do not express my opinion about it.

18. No other point is pressed before me

19. In the result, both the writ petitions succeed and are partly allowed to the extent

that the observations made and the findings recorded by opp parties Nos 1 and 2 in the impugned orders to the effect that there could be no mutual partition of the holding and the records cannot be corrected on its basis is quashed The order regarding remand of the case to the trial court for decision afresh suffers from no error and is accordingly maintained The trial court will now decide the case in accordance with law and observations made above after framing necessary issue and taking the evidence of the parties, which they may like to produce in support of their case In the circumstances of the case, the parties shall bear their own costs

Petitions allowed partly

1981 ALL. L. J. 1289

A. N. VARMA, J

Santosh Kumar Petitioner v Board of Revenue, Allahabad and others, Respondents

Civil Misc Writ No 4369 C of 1976, D/-23-9-1981

(A) U. P. Consolidation of Holdings Act (5 of 1954), Ss. 54, 52(1), 52(2) — U. P. Consolidation of Holdings Rules (1954), R. 109-A — Application for entering applicants' names in annual register in respect of lands in dispute on basis of order passed by Additional Settlement Officer (Consolidation) in course of consolidation operations — Refusal by Sub-Divisional Officer — Revision — No case or proceeding pending under the Act on date of issue of Notification under S. 52(1) of Act in respect of land in dispute — S. 52(2) not applicable — R. 109-A could not be invoked — Revision not maintainable. (Paras 10, 11)

(B) U. P. Land Revenue Act (3 of 1901), Ss. 33, 39 — Application for entering applicants' names in annual register in respect of lands in dispute — Refusal — Revision — Revision could not be treated as one under S. 333 of U. P. Zamindari Abolition and Land Reforms Act. (U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 333). (Para 14)

(C) U. P. Consolidation of Holdings Act (5 of 1954), S. 54 — U. P. Consolidation of Holdings Rules (1954), R. 109-A — Application for entering applicants' names in annual register in respect of land in dispute — Refusal by Sub-Divisional Officer — Revision — Board of Revenue issuing direction under R. 109A to Sub-divisional Officer to give permission for entering applicants' names in Register — Order of Board of Revenue can be interfered under Art. 226 as orders under R. 109A cannot be called in question in regular suit. AIR 1957 All 205 and 1980 All L J 905. Disting. (Constitution of India, Art. 226). (Para 17)

(D) U. P. Consolidation of Holdings Act (5 of 1954), S. 54 — U. P. Consolidation of Holdings Rules (1954), R. 109A — Application for entering applicants' names in annual register — Objection filed by minor — Rejected on technical ground due to some defect in date of order sought to be set aside — Another application giving correct date of order with prayer for condonation of delay — Allegation that applicant attempted to change date in certified copy of order — Applicant directly not responsible either for delay or attempt to change date — Applicant cannot be refused reliefs prayed for by him. (Para 18)

Cases Referred : Chronological Paras

1980 All L J 905 1981 Rev Dec 18 15
AIR 1957 All 205 1956 All L J 807(1) 15

S. K. Subedar and G. N. Varma, for Petitioner, Sankatha Rai, Faujdar Rai, Standing Counsel, for Respondents

ORDER :— This petition is directed against an order passed by the Board of Revenue dated 19-3-76 accepting the reference made by the Additional Commissioner, Allahabad Division, and after setting aside an order passed by the Sub Divisional Officer, Chail, Allahabad dated 30-1-74, directing the issue of a parvana amal daramad under R. 109A of the Rules framed under the U. P. Consolidation of Holdings Act for the implementation of an order passed by the Additional Settlement Officer (Consolidation) dated 9-1-1969

2. These are the relevant facts The opposite-parties Nos 2 and 3 moved an application purporting to be under Ss. 33/39 of the U. P. Land Revenue Act for Amal daramad (proceeding for execution) of their names in the annual register in respect of the land in dispute on the basis of an order dated 9-1-69 said to have been passed by the Additional Settlement Officer (Consolidation) in course of consolidation

operations conducted in the village where the land in dispute is situate. On this application, a report appears to have been called for by the Sub Divisional Officer from the Tahsildar, Chail, Allahabad, who recommended that amal daramad be made in accordance with the aforesaid order passed by the Additional Settlement Officer (Consolidation).

3. On the basis of the above report, the Sub Divisional Officer passed an order on 30-12-72 directing that amal daramad be made as prayed for by the opposite-parties Nos. 2 and 3. Thereupon, the petitioner, a minor at that time, made an application through his next friend to the Sub Divisional Officer for the setting aside of the order dated 30-12-72 on the ground that the said order had been passed against him without any notice and without giving him any opportunity. This application was initially rejected on a technical ground. Some defect was pointed out as regards the date of the order sought to be set aside. The petitioner, thereafter, filed another application on 12-7-73 giving the correct date of the order and also praying therein that the delay in moving the application be condoned under S. 5 of the Limitation Act.

4. The Sub-Divisional Officer allowed the aforesaid application by the order dated 30-1-74 condoning the delay. He, however, observed that the appropriate course for the opposite-parties Nos. 2 and 3 was to file a regular suit for establishing their rights, as the dispute was not one which could properly be disposed of in a summary manner.

5. Against the aforesaid order dated 30-1-74 the opposite-parties Nos. 2 and 3 filed a revision before the Additional Commissioner under Ss. 33/39 of the U. P. Land Revenue Act, treating the order passed by the Sub-Divisional Officer as one under these revisions. The Additional Commissioner took the view that as the consolidation operations were over the application filed by the opposite-parties Nos. 2 and 3 though described and headed as one under Ss. 33/39 of the U. P. Land Revenue Act, was really one under R. 109A of the Rules framed under the U. P. Consolidation of Holdings Act. The Additional Commissioner further took the view that the revision filed by the opposite-parties Nos. 2 and 3 ought to be treated as one under S. 333 of the U. P. Zamindari Abolition & Land Reforms Act. After making these observations, the Additional Commissioner went into the merits of the dispute and held that on the facts of the present case, the petitioner was not entitled to the benefit of S. 5 of the Limitation Act. There did not exist, in the opinion of the Additional Commissioner, sufficient ground for condoning the delay. In conclusion, the Additional Commissioner held that the Sub-Divisional Officer committed an error in refusing to issue a parvana amal daramad under R. 109A of the Rules framed under the U. P. Consolidation Holdings Act in pursuance of the order passed by the Additional Settlement Officer (Consolidation) dated 9-1-69. With this finding, the Additional Commissioner made a recommendation to the Board of Revenue that the revision be allowed and the Sub Divisional Officer be directed to issue a parvana amal daramad under R. 109A of the Rules framed under U. P. Consolidation of Holdings Act in consonance with the order passed by the Additional Settlement Officer (Consolidation) dated 9-1-69.

6. The Board of Revenue accepted the aforesaid recommendation agreeing with the Additional Commissioner that as the consolidation operations were over and the village had been denotified under S. 52 of the Act, the application of the opposite-parties Nos. 2 and 3 ought to have been treated as one under R. 109A. It consequently set aside the order passed by the Sub-Divisional Officer and directed the issue of parvana amal daramad under R. 109A of the Rules implementing the order passed by the Additional Settlement Officer (Consolidation) dated 9-1-69.

7. Learned counsel for the petitioner submitted, firstly, that both the Board of Revenue as well as the Additional Commissioner fell into a patent error of law in applying R. 109A of the Rules framed under the U. P. Consolidation of Holdings Act to the present case. The second submission was that both these authorities totally failed to comprehend the true scope of the controversy which arose for consideration by them. The third submission was that under the relevant provisions of the Revenue Court Manual, the revision filed by the opposite-parties Nos. 2 and 3 could have been disposed of only by the Lucknow Bench of the Board of Revenue. The other submission was that the Board of Revenue exceeded its jurisdiction in going into the validity of the compromise dated 31-10-1962 referred to in its order.

8. Learned counsel for the opposite-parties Nos 2 and 3 on the other hand, supported the impugned orders and submitted that they were perfectly legal and proper and called for no interference He further argued that no objection having been taken on behalf of the petitioners as to the jurisdiction of the Board of Revenue, Allahabad to hear and decide the revision before the court had passed the order, such an objection ought not to be permitted to be raised for the first time Yet, another objection taken by the learned counsel was that the established view of this Court has been not to interfere with the orders passed by the Board of Revenue in cases in which the only question at issue is whether the name of the petitioner should be entered in the record of rights. Lastly, it was urged that in view of the fact that the petitioner had made attempt to change the date on which the certified copy of the order passed by the Board of Revenue was applied for with a view to explaining the delay in filing the petition, this Court ought not to grant any discretionary relief to the petitioners.

9. Having heard learned Counsel for the parties at some length I am clearly of the view that this petition is entitled to succeed on the first ground mentioned above I am further of the opinion that there does not exist any ground for refusing the relief to the petitioner

10. In my opinion both the Additional Commissioner as well as the Board of Revenue committed a patent error of law in applying R 109A of the aforesaid Rules to the present case R 109A reads as follows —

109-A S 52(2) — Orders passed in cases covered by sub-sec (2) of S 52 shall be given effect to by the consolidation authorities, authorised in this behalf under sub-sec. (2) of S 42 of the Act by the Collector of the district in his capacity as a District Deputy Director, if such authorities are functioning in any part of the district at the time In case there be no such authority the Assistant Collector, in charge of the sub-division, the Tahsildar, the Naib-Tahsildar, the Supervisor Kanungo, and the Lekhpal of the area to which the case relates shall respectively, perform the functions and discharge the duties of the Settlement Officer, Consolidation, Consolidation Officer, the Assistant Consolidation Officer the Consolidator and the Co-ivolidation Lekhpal respectively for the purpose of giving effect to the orders aforesaid

(2) If for the purpose of giving effect to any order referred to in sub-rule (1) it becomes necessary to reallocate affected chaks, necessary orders may be passed by the Consolidation Officer, or the Tahsildar, as the case may be, after affording proper opportunity of hearing to the parties, concerned

(3) Any person aggrieved by the order of the Consolidation Officer, or the Tahsildar, as the case may be, may, within 15 days of the order passed under sub-rule (2), file an appeal before the Settlement Officer, Consolidation, or the Assistant Collector incharge of the sub-division, as the case may be, who shall decide the appeal after affording reasonable opportunity of being heard to the parties concerned, and pass orders which shall be final

(4) In case of possession becomes necessary as a result of orders passed under sub-rule (2) or sub-rule (3), as the case may be, the provisions of Rules 55 and 56 shall mutatis mutandis, be followed "

11. For the application of the aforesaid Rule, sine qua non is the order sought to be mutated must be one which was passed under S. 52(2) of the U P. Consolidation of Holdings Act S 52(2) of the Act provides that if any case or proceeding was pending under the U P Consolidation of Holdings Act on the date of issue of the notification under sub-sec (1) of S 52 of the Act, then the orders passed therein shall be given effect to by such authorities as might be prescribed, and for that purpose the consolidation operations shall not be deemed to have been closed It was not disputed by the opposite-parties Nos 2 and 3 that no case or proceeding was pending on the date of issue of Notification under S 52(1) of the Act in respect of the land in dispute Consequently, S. 52(2) of the Act could not have any application whatsoever to the facts of the present case That being so, it must follow inevitably that R. 109A could not be invoked in the present case Indeed, if R 109A had any application, neither the Additional Commissioner, nor the Board of Revenue would have had any jurisdiction to entertain the revision or to pass any orders therein in view of the provisions of sub-r (3) of R. 109A

12. In view of what has been stated above it is clear that both the Additional Commissioner and the Board of Revenue committed a patent error of jurisdiction in treating the proceedings as one under

R 109A Indeed, confronted with this situation, learned counsel for the respondents Nos 2 and 3 rightly did not attempt to support the impugned orders on that ground He was compelled to take an alternative stand He submitted that the impugned orders though they purport to have been made in proceedings under R 109A of the Rules, should be deemed to have been passed under Ss 33/39 of the U P Land Revenue Act I shall deal with this submission of the learned counsel for the opposite-parties later in this judgment But so far as the main basis of the impugned order is concerned, the same is clearly unsustainable in law

13. For the reasons stated above, I hold that the Board of Revenue as well as the Additional Commissioner both completely misconceived the true nature of the proceedings by treating the same as one under R 109A of the Rules The petitioner is, therefore, entitled to succeed on this ground alone

14. The Additional Commissioner committed another serious error in holding that the revision filed by the opposite-parties Nos 2 and 3 could be treated as one under S 333 of the U P Zamindari Abolition & Land Reforms Act S 333 of the Act could not have the remotest application to the facts of the present case The order passed by the Sub Divisional Officer cannot by any stretch of imagination be regarded as having been passed under any provisions of the U P Zamindari Abolition & Land Reforms Act The Additional Commissioner thus committed another patent mistake as regards the nature of the proceeding which he was called upon to decide

15. The question that next arises is whether the petitioner should be refused the relief on any of the grounds urged by the learned counsel for the opposite-parties The first ground advanced by the learned counsel for the opposite-parties was that this court has been consistently refusing to entertain petitions which are directed against orders passed in proceedings under Ss 33/39 of the Land Revenue Act In support, learned counsel placed reliance on two decisions of this Court, namely —

1 Jaipal v Board of Revenue AIR 1957 All 205.

2 Lekhraj v. Board of Revenue 1981 Rev Dec 18. 1980 All L J 905

16. Having given the matter a careful consideration, I find no substance in this objection In both these decisions, this Court has held that a petitioner, who challenges purely mutation proceedings has an alternative remedy by way of a regular suit under S 40-A of U. P Land Revenue Act The ratio of these cases is that mutation proceedings do not in themselves create or result in any substantive rights, and that the order passed therein are always subject to a regular suit, whereby the aggrieved party can establish his right or title

17. The situation in the present is materially different Here we find that the Board of Revenue has issued a direction under R 109A asking the Sub Divisional Officer to issue a parvana amal daramad for the implementation of the order passed by the Additional Settlement Officer (Consolidation) dated 9-1-1969 Orders or directions under R 109A have entirely different legal incidence and effect from those passed in proceedings merely for mutation or correction of papers This is plain from a perusal of the various provisions of R 109A of the Rules The party in whose favour a direction is issued under R 109-A can straightway apply for re-allocation of chaks under R 109-A(2) The implications of an order under R 109A of the Rules are thus much more serious than orders passed under S 33/39 of the U P Land Revenue Act, which are subject to the result of a regular suit Orders passed under R 109A of the Rules cannot be called in question in a regular suit Even though, therefore, R. 109A did not apply to the facts of the present case, inasmuch as by the impugned order a definite direction has been issued to the Sub Divisional Officer purporting to be under R 109A, the petitioner will suffer serious prejudice if the impugned orders are left undisturbed, and this Court refuses to interfere on the ground suggested by the learned counsel for the opposite-parties Nos 2 and 3 On the peculiar facts of this case, therefore, this Court would not be justified in refusing the relief to the petitioner

18. Coming to the objection of the learned counsel for the opposite-parties as regards the alleged attempt to change the date on which the application for certified copy of the order passed by the Board of Revenue was made from '9-9-76' to '9-4-76', while I find that it may be possible to say that in the certified copy filed with the petition the date of the application was originally

'9-9-76' which appears to have been changed into '9-4-76' by rubbing off or erasing a part of the digit '9' so that the date now reads '9-4-76', the petitioner himself does not appear to have been responsible for any such attempt. The petitioner has filed a counter-affidavit of one Vidya Dhar Pandey in reply to the application filed by the opposite-parties Nos. 2 and 3 in this Court for taking action against the petitioner under S. 471 I P C. In this counter-affidavit, the deponent has asserted that the petitioner had engaged Sri S K. Subedar, an Advocate in April 1976. He had also verified an affidavit in support of the petition in April 1976 itself. It is further stated in para 3 of the counter-affidavit that the petitioner does not know the reason why Sri S K. Subedar did not file the petition in April 1976 itself. In paragraph 6 of this counter-affidavit, again, it is asserted that the petitioner did not apply for the certified copy. It was applied for by some Kishore Yadav, whom the petitioner does not know. It does not seem to me that the petitioner was directly or indirectly responsible either for the delay in filing the petition or even for the supposed attempt to change the date in the certified copy of the order passed by the Board of Revenue. Furthermore, there was no such undue delay in filing the petition which may have induced the petitioner to resort to any unfair means. On the facts of the present case, therefore, I am not satisfied that this court should refuse the reliefs prayed for in this petition on the ground urged on behalf of the respondents Nos. 2 and 3.

19. In the view which I have taken on the first point urged in support of the petition, it does not seem necessary to consider the other submissions raised on behalf of the petitioner in support of this petition. However, if the Board of Revenue comes to the conclusion that the case ought to be heard by its Lucknow Bench, it may transfer the reference to that Bench.

20. In the result, the petition succeeds and is allowed. The impugned order passed by the Board of Revenue dated 19-3-1976 is quashed. The Board of Revenue shall dispose of the reference according to law having regard to the observations made in this judgment.

21. The parties shall bear their own costs of this petition.

Petition allowed.

1981 ALL. L. J. 1293

M. P. MEHROTRA, J.

Smt. Phulmati, Petitioner v. 7th Additional District Judge and others, Respondents.

Civil Misc. Writ Petn. No. 2635 of 1980, D/- 18-9-1981.

(A) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), Ss. 12-A Proviso cl. (d), 5(6), (1) — Applicability — Cl. (d) applies only to transfer deeds disregarded under S. 5(6) — Ceiling proceedings — Transfer made by tenure-holder disregarded under S. 5(1) — His option for surplus land accepted — Challenge by transferee — Held, transferee had no locus standi to challenge option.

In the ceiling proceedings initiated against a tenure holder, the gift deed executed by him after 8-6-1979 was disregarded under S. 5(1) and his land was declared surplus. Eventually the Tenure holder died. The legal representatives of the Tenure holder opted to give the land covered by the gift deed as surplus. The option of the legal representatives was accepted. The transferee challenged the option so exercised by the legal Representatives of the tenure-holder on ground that it contravened cl. (d) of proviso to S. 12A and on ground that as the surplus land vested in the State Govt. there was no question of an option being exercised by the Tenure-holders.

Held, S. 12A proviso cl. (d) applies only to transfer deeds disregarded under S. 5(6) and as in the instant case the gift deed was disregarded under S. 5(1), cl. (d) to proviso of S. 12A had no application. 1978 All L J 1099. Foll. (Para 7)

Held further, that a tenure-holder could exercise his choice till his rights are lost in proceedings under S. 14, but as S. 12A proviso cl. (d) had no application in the instant case the donee (transferee) had no locus standi to contest the option exercised by the legal representatives of tenure-holder, irrespective of whether the land in dispute vested in the State Govt. or remained with the tenure-holder's legal representative. 1979 All L J 646 Disting. (Paras 9, 13, 16)

(B) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), Ss. 12A, 14 — Choice proceedings — Right of tenure-holder to partake — Scope — Tenure-holder can

KY/LY/F62/81/VVG

exercise his choice till his rights are lost in proceedings under S. 14. 1977 All L J 375 and 1978 All L R (SOC) 92. Foll. (Para 13)

Cases Referred :	Chronological	Paras
AIR 1980 S C 840	1980 All L J 358 (1980)	1
Lab L J 222		6
1980 All L J 123	1980 U P L R 115	6
1980 All L J 858		5, 11
1980 All L J (NOC) 71		6
1979 All L J 189		6
1979 All L J 646		6, 9
1978 All L J 1042	1978 Lab I C NOC 117	
1978 All W C 446		6
1978 All L J 1099		6, 7, 9
AIR 1978 NOC 140 (All)	1978 All L R (SOC)	
66	1978 Rev Dec 43	6
1978 All L R (SOC) 92		11, 13
(1978) 3 A C 583	James Gardner v. Edward	
A. Lucas		6
1977 All L J 375	1977 All W C 407	11, 13
A.I.R 1976 S C 1471	(1976) 3 S C C 37	6
AIR 1970 S C 1630	1970 Cri L J 1396 (1970)	
2 S C J 29		6
AIR 1953 Bom 183	55 Bom L R 1	6
AIR 1946 P C 66	(1946) 1 Mad L J 426	6

H. P. Dubey, for Petitioner. H. Upadhyaya, for Respondents.

ORDER :— This petition arises out of the proceedings under the C. P. Imposition of Ceiling on Land Holdings Act, 1960.

2. The facts, in brief, are these. One Har Prasad was the tenure-holder to whom the notice under S. 10(2) of the Act was issued. The objections were filed and they were decided by the Prescribed Authority. It seems that there was a gift deed dated 5-9-1974 which had been executed by the said tenure-holder Har Prasad in favour of the petitioner. On the basis of this gift-deed, it seems that a contention was raised that the land covered by the said gift-deed could not be included in the holding of the said tenure-holder Har Prasad. It is stated in the order of the Prescribed Authority and the appellate court that the petitioner herself had appeared before the Prescribed Authority and she based her claim in respect of the land in dispute on the said gift-deed. She contended that she was in possession of the land in question and that her name had been recorded in the revenue papers and that separate Ch ks and receipts used on during consolidation proceedings. However, this contention was not accepted and the gift-deed was held to be liable to be ignored under the provisions of the ceiling law. It seems that the matter was taken before the appellate court and again his contention was pressed that the land covered by the gift-deed could not be included in the holding of the tenure holder, Har Prasad. However, the appellate court also dismissed the said contention and then the matter was brought to this court in a writ petition. However, the writ petition also was dismissed. It seems that on 25-10-1977 the legal representative of Har Prasad (who had died in the meanwhile) moved an application giving the land in dispute in choice as surplus land. This application was allowed on 30/6-1978. On 19-1-1979, the petitioner moved an application before the appellate court praying that the aforesaid order dated 30/6-1978 should be set aside and the land in question should not be allowed to be given in choice as surplus land. The said application of the petitioner dated 19-1-1979 was rejected by the Prescribed Authority by his order dated 5-11-1977 and a true copy of the same is Annexure I to the petition. Thereafter, the petitioner filed an appeal but the same was dismissed by the appellate court by its impugned judgment dated 21-1-1980, a true copy whereof has been annexed to the petition. A certified copy of the said judgment is also on the record.

3. Feeling aggrieved, now the petitioner has come up in the instant writ petition and in support thereof, I have heard Sri H. P. Dubey, learned counsel for the petitioner. In opposition, the learned Standing Counsel has made his submissions.

4. Sri Dubey made the following points :—

I Cl. (d) of the proviso to S. 12A of the Act was brought in this case. The said provision is as under :—

"(d) Where any person holds land in excess of the ceiling area including land which is the subject of any transfer or partition referred to in sub-section (9) or sub-section (10) of Section 5, the surplus land determined shall as far as possible be land other than land which is the subject of such transfer or partition and if the surplus land includes any land which is the subject of such transfer or partition the transfer or partition shall in so far as it relates to the land included in the surplus land, be deemed to be and always to have been void."

It is therefore contended that it was not open to the tenure-holder or the legal representative to give land covered by the gift-deed as a choice as surplus land and the prescribed Authority was not competent in accepting the choice of the legal representative of the

deceased tenure-holder to include the said land (the subject matter of the gift-deed) in the surplus land of the said deceased tenure-holder.

1-A. S 5(8) of the Act which declares certain transfer deeds to be void, is prospective and not retrospective

2 A reference was made to S 14(3) of the Act

3 It was contended that there could be no question of exercising choice under S 12-A of the Act after possession of the disputed plot was claimed by the State to have been obtained in the proceedings under S 14 of the Act

5. In this connection a reference was made to the State's stand taken in this Court that the possession over the land in dispute had been obtained on 19-12-1976. This is clear from paras 6 and 10 of the counter-affidavit of Kamla Prasad Srivastava, Naib Tahsildar (Ceiling), District Allahabad who filed the counter-affidavit on behalf of the State. The learned counsel in this connection placed reliance on Uttam Narain Singh v State, (1980 All L J 858).

6. The learned counsel cited the following case law —

1 Mahanand Singh v State of U P (1978 All L J 1042)

2 Smt Kunwar Rani Sushila Devi v State (1978 All L J 1099)

3 1978 All L R (SOC) 66 : (AIR 1978 NOC 140)

4 1979 All L J 189, Mahendra Singh v State of U P

5 1979 All L J 646, Hukum Singh v State of U P

6 1980 All L J (NOC) 71, Rajendra Singh v. State of U P

7. 1980 All L J 358 . (AIR 1980 S C 840), Managing Director, U. P. Warehousing Corpn. v. Vijay Narayan Vajpayee

8 1980 All L J 123, Raudan Singh v. State of U P

9. AIR 1976 S C 1471, Sri Jayalakshmi Rice Mill v. State of Andhra Pradesh

10 AIR 1970 S C 1636 (1639), Nani Gopal Mitra v State of Bihar.

11. AIR 1953 Bom 383, Syedna Taher Saifuddin v. Tyebbhai Moosaji.

12 Vol 1946 P C 60 (71), Punjab Province v. Daulat Singh

13. (1978) 3 A C 583, James Gardner v Edward A Lucas (590, 597, 598, 603)

7. So far as the first contention of the learned counsel is concerned, namely, that there was a breach of cl (d) of the proviso to S 12A of the Act, it should be seen that the said clause will not be applicable to the facts of the instant case The gift-deed in question was admittedly executed after 8-6-1973, which is the material date for determining the ceiling area and the surplus land of a tenure-holder under S 5(1) of the Act A transfer-deed executed after the said date has to be disregarded because the document is of a date subsequent to the relevant date for the determination of the ceiling area and the surplus land of a tenure-holder under S 5(1) of the Act The document is disregarded under S 5(1) of the Act The document is not disregarded under S. 5(8) of the Act which is confined to such documents of transfer as were executed between 24-1-1971 and 8-6-1973 This has been so laid down by this Court in Kunwar Rani Sushila Devi v State (1978 All L J 1099) (supra) In this view of the matter, cl (d) of the proviso to S. 12A did not apply to the facts of the instant case because the said provision has been explicitly made applicable to the deeds of transfer which have been disregarded under S 5(6) of the Act

8. In the said view of the matter, it is not necessary to consider the second submission of the learned counsel which he developed at great length, namely, that the gift-deed in question could not be treated to be a void document under S 5(8) of Act because, according to the learned counsel, the said provision of law was placed on the Statute Book by the U P Amending Act (U P Act No 20 of 1976) and the date of commencement of the said Amending Act was laid down retrospectively as with effect from 10-10-1975, and, therefore, S. 5(8) of the Act could not be held applicable to the deeds of transfer which were executed before 10-10-1975 The learned counsel cited a few cases in support of his aforesaid contention Such cases have been detailed in the aforesaid list of cases relied upon at the Bar It is not necessary to notice them in detail.

9. It is not necessary to advert to the said contention because, in my view, even if for the sake of arguments, it be accepted that S. 5(8) of the Act did not apply and the document, therefore, could not be treated as void under the said provision, still, the petitioner could not be granted any relief

because in view of S 12A of the Act, the choice of the tenure-holder was bound to be accepted by the Prescribed Authority as far as possible and since cl (d) of S 12A of the Act was not applicable to the document in question (the same being disregarded not under S 5(6) of the Act, but under S 5(1) of the Act), therefore, the petitioner could not have any locus-standi in the choice proceedings She could have a locus standi in the said proceedings only on the basis of the applicability of cl (d) of the proviso to S 12A of the Act and not otherwise Therefore, Hukum Singh v State of U P (1979 All L J 646) (supra) is distinguishable on the said ground In the said case the transferee was held to have a locus standi on the basis of cl (d) of the proviso to S 12A of the Act As I have held above on the authority of Kr Kunwar Rani Sushila Devi v State (1978 All L J 1099) (supra), the said clause did not stand attracted to the case of the petitioner, and, therefore, the Prescribed Authority was justified in accepting the choice given by the deceased tenure-holders' legal representatives giving the land of the gift-deed in the surplus land of the deceased — tenure-holder

10. So far as the reference to S 14 (3) of the Act is concerned, it has to be seen that the said provision, as it exists today, is as follows —

"Where the Collector has taken possession of any surplus land or ungathered crops or fruits of trees under sub-section (1) or sub-section (2), such land, crops or fruits of trees shall, with effect from the date of his taking possession, stand transferred to and vest in the State Government free from all encumbrances, and all rights, title and interests of all persons in such land shall, with effect from such date, stand extinguished "

Provided that the encumbrances if any, shall attach to the amount payable under S 17 in substitution for the surplus land "

11. The learned counsel has referred to me the decision in Uttam Narain Singh v State of U. P (1980 All L J 858) In the said case I observed as follows (at p 861) —

'In view of the law laid down by a learned single Judge in Bharat Singh v. State of U P., (1977 All W C 407) (1977 All L J 375), which stands affirmed by the Division Bench pronouncement in Mehraban Singh v S D. M., (1978 All L R (SOC) 92), I think the petitioner's prayer should be accepted subject to the qualification that if the petitioner has not lost his rights in the surplus land in any of the proceedings under S 14 of the Act, the Prescribed Authority will allow him to express his choice and such choice as far as possible will be accepted in accordance with the provisions of S 12A of the Act It has been repeatedly emphasised by the Court that the clear legislative intention is that a conscientious effort be made to accept the choice of the tenure-holder and I direct accordingly "

12. I think the said observation in the instant case does not support the petitioner If the tenure-holder lost his rights in certain land declared as surplus then such rights came to vest in the State If the tenure-holder's rights subsist then his choice, as far as possible, is bound to be accepted under S 12A of the Act Therefore, if S 14 (3) was applicable to the land in dispute then the petitioner did not have any locus standi because exhypothesi the land in question would stand vested in the State However, if the rights of the tenure-holder did not stand extinguished under S 14 of the Act, then in view of the case law of this Court, I hold that the tenure-holder continues to have the right to exercise his choice under S 12A of the Act I shall deal with this aspect of the matter in some more detail hereafter

13. So far as the learned counsel's contention that there was no question of exercise of choice after the possession of the surplus land had been taken by the State in Dec., 1976, it has to be seen that there is dispute as to whether the possession of the land in question was or was not taken by the State. Throughout, the writ petition it has been asserted th. t the land in question is still in possession of the petitioner She has not accepted the State's case that the possession of the land in question was taken by the State in the proceedings under S 14 of the Act It is not necessary in this petition to decide as to which version is correct, namely, whether the possession of the land in question was or was not taken. If the possession of the land was not taken by the State then undoubtedly it was open to the legal representatives of the deceased tenure-holder to give in choice, the land in question in view of the law laid down by this Court in the aforementioned case in Bharat Singh v State of U. P (1977 All L J 375) (supra), which was affirmed by the Division Bench in Meharban Singh v S D M (1978 All L R (SOC) 92). It is open to the tenure-holder to exercise his choice till his rights are lost in the proceedings under S 14 of the Act. S 14 (3) of the act lays down

that such rights are lost when the Collector takes the possession of the land If the petitioner's contention is correct that she continued to be in possession and that the State had not taken over the possession of the land in question, then undoubtedly the tenure-holder's legal representatives were entitled to give this land in choice and the Prescribed Authority was justified in accepting this choice on 30-6-1978

14. However, if the State's case be correct, that possession of the land in question was obtained in Dec. 1976 then obviously, the petitioner did not have any locus standi to move an application on 17-1-1979 contending that the land in question should not have been allowed to be given in surplus by the Prescribed Authority by his order dated 30-6-1978, because, in that case, the land would have been vesting in the State on the date when the said application dated 17-1-1979 was given by the petitioner

15. I wish to emphasise the petitioner had already failed in the ceiling proceeding which were taken against the tenure-holder concerned, namely, Har Prasad She had pressed her objection in the said ceiling proceedings claiming to be the real tenure-holder of the land in question on the basis of the gift deed dated 5-9-1974 Her claim was based on the said gift-deed coupled with the plea that in the consolidation proceedings a separate Chak had been carved out in her favour However, in the said ceiling proceedings the petitioner failed and it was held that the land in dispute remained in the holding of the said tenure-holder, namely, Har Prasad In this view of the matter, it was not open to the petitioner to seek a second innings by asserting her title over the land in dispute in the subsequent proceedings (arising out of the choice given by the legal representatives of the deceased tenure-holder by their application dated 15-10-1977) Her claim of title was barred by the principle of res judicata However, she might be having some claim in the said subsequent proceedings if she could show that her case was covered by cl (d) of the proviso to S 12-A of the Act. However, I have already held above that the said provision did not apply to her case

16. Therefore, in either case-whether the possession of the land in dispute was taken by the State in the proceedings under S 14 of the Act or whether such possession was not taken by the State, the petitioner had no locus standi to question the order passed by the Prescribed Authority on 30-7-1978 accepting the choice as given by the legal representatives of the deceased tenure-holder by their application dated 25-10-1977

17. This petition fails and is hereby dismissed but there will be no order as to costs

Petition dismissed

1981 ALL. L. J. 1297

K C AGRAWAL AND V K KHANNA, JJ

Shiv Mangal Singh, Petitioner v Registrar, Co-operative Societies, U P., Lucknow and others, Respondents

Civil Misc Writ Petns Nos 11367 etc of 1981, D/- 14-9-1981

(A) U. P. Co-operative Societies Act (11 of 1966), Ss. 113 and 29 — U. P. Co-operative Societies Rules, 1968, Rr. 439, 440, Proviso and 441 — Election of members — Registrar can postpone election as well as schedule of election.

S 113 confers power on the State Government to exempt any co-operative society from any of the provisions of the Act and it is further empowered to direct that such provision shall apply to such society with such modifications as may be prescribed Under the section, therefore, the State Government has power to modify the provisions of the Act and to apply the same to a society with those modifications The term "modifications" implies an alteration and the word is equally applicable whether the effect of the alteration is to narrow or enlarge the provisions By virtue of Rr 439 and 440 the Registrar has ample authority under these rules to not only change the date of the poll but also to lay down the manner in accordance with which the elections have to take place The expression "control" has to be given a wide meaning so that it achieves the purpose for which the power had been conferred upon the Registrar The Registrar is over-all incharge of the Co-operative Societies This was the reason that sub-rule (1) of R 439 provides that election of a Co-operative Society would be held under the superintendence, direction and control of the Registrar (Paras 16, 17)

The proviso to R 440 empowers the Registrar to allow extension in time schedule A time schedule of an election does not only consist of the poll It implies within itself the entire process commencing from the date of

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filing of the nomination paper to the date of the final election. The only restriction placed is that the time schedule fixed should not travel beyond the period for which the administrator has been appointed under S. 39. (Para 20)

(B) U. P. Co-operative Societies Rules (1968), R. 440, Proviso — Extension of time for election — Registrar can exercise power in special circumstances.

Existence of special circumstances is a condition precedent for exercise of power by a Registrar under the proviso. Unless there are special circumstances time schedule of an election cannot be postponed. The words "special circumstances" are wide, comprehensive and flexible and the rule making authority intended them to be so. (para 24)

As to what is special circumstances is to be decided by the Registrar and not by the High Court. In the instant case the circumstances mentioned were relevant for the purpose for which the power of postponement of the time schedule had been ordered. Each one of the circumstances taken individually and jointly aim at achieving the object of a broad-based election assimilating as many members as possible. (Para 25)

Cases Referred : Chronological Paras

AIR 1959 S.C. 586 1959 S.C.J. 390 16

S. A. Kumar, for Petitioner.

K. C. AGRAWAL, J.:— These nine writ petitions raise common questions of law and are thus being decided by a single judgment.

2. For deciding the points raised, we may take facts from Writ Petition of Sheo Mangal Singh v. Registrar, Co-operative Societies and others (of Ballia).

3. Sheo Mangal Singh was a member of the general body of the U. P. State Co-operative Land Development Bank Ltd. He was also a member of the U. P. State Co-operative Land Development Bank Ltd., Ballia branch, Ballia. The U. P. State Co-operative Land Development Bank Ltd. is a notified bank under the proviso to sub-sec. (3) of S. 29 of the U. P. Co-operative Societies Act, 1968 (hereinafter referred to as the Act). The terms of the Committee of Management of the U. P. State Co-operative Land Development Bank Ltd., Ballia expired on 30-6-1979. As by that time elections had not been held, an Administrator under sub-sec. (4) of S. 29 of the Act was appointed by an order dated 1-12-1980, the Registrar directed all the District Magistrates to hold elections of the delegates of the branches out of the members of the U. P. State Co-operative Land Development Bank Ltd., on 9-2-1981 in accordance with law. The Election Officer notified the election programme and the last date for filing the nomination was 1-2-1981. The Registrar, Co-operative Societies stayed the election to the future date to be notified later. On 20-4-1981, the Registrar fixed 7-7-1981 as the date for the elections in pursuance of the notification issued by the District Magistrate 25-6-81 was the date fixed for filing the nomination papers. On that date the petitioner filed his nomination for being elected as the delegate of the members of the Ballia branch of the Land Development Bank Ltd. After scrutiny the nomination papers of the petitioner was found to be in order. No objections were filed to his nomination. However the Registrar in exercise of the power conferred by R. 440 of the Rules allowed extension in time schedule of the Co-operative Societies and fixed 7-9-1981 as the date for poll of the Branch and 29-7-81 for apex. In view of the change of the time schedule, the Election Officer, as was required by R. 441 displayed the following programme of election :—

(i) the date for display of provisional voters' list . 24-8-1981

(ii) the date, time and place for filing objections and their disposal 26-8-1981

(iii) the date for display of final voters' list 28-8-1981.

(iv) the date, time and place for filing nominations 31-8-1981

(v) the date, time and place for withdrawal of nomination 31-8-1981.

(vi) the date, time and place for allocation of election symbols and display of final nominations 3-9-1981

(vii) the date, time and place of poll 7-9-1981

4. Challenging the order of the Registrar dated 8-7-1981 extending the time schedule of the election and refixing the date of poll, the petitioner has filed the present writ petition. His case was that he had filed the nomination papers previously in accordance with the time schedule notified by the Election Officer and as on the date of the filing of the nomination paper, no other candidate had filed his nomination, the petitioner was entitled to be declared elected unopposed. The Registrar had no power under R. 440 to allow extension in time

schedule (of election) of the Co-operative Societies He could at the most only change the date of the poll and not for filing of the nomination papers The petitioner alleged that by the extension in time schedule of the elections, the petitioner had been deprived of a right which was illegal

5. We have heard Sri A Kumar and other learned counsel who appeared in support of their writ petitions as well as Sri V N Khare, the Chief Standing Counsel of the State of U P

6. Before dealing with the points raised we wish to mention some of the relevant provisions of the Act and the Rules

7. S 3 of the Act authorises the State Government to appoint a person to be the Registrar of the Co-operative Societies for the State Sub-sec (3) to S 3 entitles the State Government to confer on any person all or any of the powers of the Registrar under any provisions of this Act

8. S 4 requires every society to be registered S 17 lays down the qualifications necessary to become a member of a Co-operative Society S 20 provides that every member of a Co-operative Society shall have one vote in the affairs of the society S 29(1) of the Act lays down that the management of every Co-operative Society shall vest in a committee of Management constituted in accordance with this Act, the Rules and the Bye-laws, which shall exercise such powers and perform such duties as may be conferred or imposed by this Act, the Rules and the Bye-laws Sub-sec (2) provides that the term of the elected members of the Committee of Management shall be such as may be prescribed in the rules or the bye-laws of the society R 445 of the Rules lays down the term of the Committee of Management as three co-operative years, which expression has been defined in the Act itself Sub-sec (3) of the S 29 provides that it shall be the duty of the Committee of Management to take steps before the expiry of its term for election of members of the Committee of Management But the proviso to sub-sec (3) carves out an exception with regard to the notified societies It provides :—

"that the State Government may by notification direct that in respect of such clause of Co-operative Societies as may be specified, the superintendence, direction, control and conduct of elections of the members and Chairman and Vice-Chairman of the committee of management shall vest in the Registrar and such election may be held otherwise than in any meeting, notwithstanding anything contained in cl (b) of S 32"

Sub-sec (4) confers power on the Registrar to appoint an Administrator for the management of the affairs of the society after the expiry of the term for which the Committee of Management is appointed Upon his appointment as an Administrator, he is required to arrange for the re-constitution of the Committee of Management in accordance with the Act. This has to be done within the time specified in sub-sec (6) By sub-sec (3) an Administrator, appointed by the Registrar under sub-sec (4) shall, subject to any direction that the Registrar may give, have the power to perform all or any of functions of the Committee of Management The explanation added to sub-sec. (6) of S 29 which is material for our purposes is as follows

"Explanation — Notwithstanding that the process of election may have commenced before the appointment of Administrator under sub-sec (4) a fresh process of election shall be commenced after such appointment."

9. R 84A of the Rules deals with the manner in accordance with which the general body of such class of co-operative societies as may be notified under sub-sec (3) of S 29 of the Act has to be constituted Part IV of the Rules deals with election registered (sic) in respect of Co-operative Societies notified under sub-sec (3) of S 29 of the Act Sub-rule (1) of R 432 provided that District Magistrate of the District in which the head-quarters of the society is situated shall take steps to organize the election under the superintendence, direction and control of the Registrar. Sub-rule (2) of this Rule Provides —

"the election in a co-operative society or societies or a class or classes of Co-operative Societies shall be held on such date or dates as the Registrar may by order fix and the District Magistrate concerned shall, on such dates being so fixed appoint by order, one or more, election officers or different election officers for different class or classes of societies or for different areas for this purpose "

10. The two provisos to R 440 with which we are concerned in the present case read as under :—

Provided that the District Magistrate of the district in which the branch/branches of the U P Land Development Bank Ltd., Lucknow or the sub-office of such societies having area of operation extending to more than one revenue district is situated shall arrange the election of delegates of members to the general body of such societies on the date specified by the Registrar

Provided further that the Registrar may, in special circumstances after recording reasons therefor, allow extension in time schedule of a co-operative society or class or classes of co-operative societies or of co-operative societies of any area or areas but such extension in time schedule shall be subject to the provisions of S 29 of the Act

11-12. R. 441 confers power on the Election Officer to notify in the local newspapers the date or dates of election of co-operative societies falling in his jurisdiction. Sub-rule (2) of Rule 441 enjoins upon the Election Officer to give notice of not more than 30 days but not less than 15 days from the date of poll intimating the programme of election as specified in sub-rules of R 3 to various classes of persons and societies enumerated in para (i) to (iii) of sub-rule (2) of R 441. Sub-rule (3) requires the Election Officer to display on the notice board of the society the programme of election. R 443(1) confers power of declaration of the result of those persons against whom nominations do not exceed the number of persons to be elected

13. Reverting to the argument, the first point submitted before us was about the validity of the notification issued under S. 113 of the U P Co-operative Societies Act As noted above, the Administrator had been appointed for the period of one year on July 1, 1979. His term expired on 30th June, 1980

14. The elections of the delegates of members of State Co-operative Land Branches were not held As the elections of the delegation had not taken place, the Committee of Management also could not be constituted. Upon the notification under S. 113 being issued appointing a fresh Administrator, the Registrar directed the District Magistrates to hold elections of the delegates of members of the various branches of the State Co-operative Land Development Bank on 9-2-1981 This also did not succeed as the Committee of Management was not constituted before 30-6-1981, the Governor issued another notification on 30-6-1981 The relevant portion of this notification is quoted below —

"And whereas the State Government, in exercise of the powers under section 113 of the said Act made an order published in Government notification No. 1760C/IFC/-C-1-Bhu 37-76 dated September 30, 1980, directing that the provisions of sub-sec (6) of S 29 of the said Act, shall, in respect of the said bank, apply with the modification that the Administrator appointed under cl. (b) of sub-sec (4) of S 29 of the said Act, shall take action to hold election of the Board of Management of the said Bank within nine months from the date of the said notification, and the said Administrator shall continue to exercise powers as Administrator of the said Bank till June 30, 1981 or till the constitution of the Board of Management of the said Bank whichever is earlier.

And whereas it is likely to take some more time to make preliminary preparations for holding the said elections as the General body of the said Bank is to be constituted in accordance with rule 84A and proviso (1) to R. 440 of the Uttar Pradesh Co-operative Societies Rules, 1968."

15. As a result of this the new Administrator was appointed About the validity of the appointment of the Administrator by the notification mentioned above, Sri A. Kumar, the learned counsel for the petitioner had no objection to make However Sri B. Dixit who was the counsel of another writ petition submitted that the Governor has no power under S 113 of the Act to change the notification dated 30-6-1981 His submission was that the Act contemplates for the appointment of an Administrator under cl (b) to sub-sec (4) of S. 29 only once S. 29(4) does not confer any power to make second or subsequent appointment of Administrator. He also contended that section 113 of the Act would not be utilised for a purpose which nullifies sub-sec (4) of S 29 of the Act

16. We do not find any merit in the aforesaid submission. S. 113 confers power on the State Government to exempt any co-operative society from any of the provisions of the Act and it is further empowered to direct that such provisions shall apply to such society with such modifications as may be prescribed. Under this section, therefore, the State Government had power to modify the provisions of the Act and to apply the same to a society with those modifications. The

term "modification implies an alteration and the word is equally applicable whether the effect of the alteration is to narrow or enlarge the provisions" See Western India Theatres v Municipal Corporation, Poona, AIR 1959 S C 586 According to our view S 113 has a very wide scope This confers power on the State Government to exempt an Administrator with the requirement to arrange for the constitution of a Committee of Management within one year By this notification, the State Government has empowered the Administrator to hold election of the Board of Management of the Bank within 9 months The Administrator of the said Bank till 30-6-1981 or till the constitution of the Board of Management of the said Bank, whichever is earlier There is nothing in the Act which prohibits or conflicts with the impugned notification dated 30-6-1981 issued by the State Government In case such an interpretation is not accepted, confusion (confusion?) might arise when there would be nobody to administer the co-operative society On the interpretation of Sri B Dixit being accepted, a curious situation might arise which could have never been intened by the State Legislature, hence we are not prepared to accept the argument of Sri B. Dixit

17. Sri A Kumar, the learned counsel for the petitioner urged that under the proviso to R 440, the Registrar had no power to change the entire schedule He could only change the date of the poll and not the date for filing nominations Under sub-rule (1) of R 439 the election is to be organized under the superintendence, direction and control of the Registrar The power conferred on the Registrar is of a very wide nature Sub-rule (2) of R 439 says that the election in a co-operative society shall be held on such date or dates as the Registrar may by order fix Taking these two provisions together, we find that the Registrar has ample authority under these rules to not only change the date of the poll but also to lay down the manner in accordance with which the elections have to take place The expression "control" has to be given a wide meaning so that it achieves the purpose for which the power had been conferred upon the Registrar. The Registrar is overall in charge of the Co-operative Societies. This was the reason that sub-rule (1) of R 439 provides that election of a Co-operative Society would be held under the superintendence direction and control of the Registrar.

18. Sub-rule (2) further shows that the election of the Co-operative Society shall be held on such date or dates as the Registrar may by order fix The expression 'election' has been used in this sub-rule of Rule 439 in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate It covers the whole procedure whereby an elected member is returned whether or not it be found necessary to take a poll Doubtless, in its ordinary meaning it implies some act of choosing But this term has not been used in the narrow sense Considering the context and the background, to us, it appears that the word "election" used in this rule bears the wide meaning referring to the entire process which consists of several stages and embraces many steps

19. We are now required to deal with the second proviso to R 440, on the basis of which, the learned counsel for the petitioner submitted that the Registrar could only extend the date of the poll and not other dates which had been fixed by the Election Officer

20. We are unable to find any merit in this submission The proviso empowers the Registrar to allow extension in time schedule A time schedule of an election does not only consist of the poll It requires many other things to be done to hold an election to be mentioned therein It was wrong to suggest that the power of extension granted by the Proviso could be exercised by the Registrar only for changing the date of the poll and not of the entire schedule preceding it The power conferred is for extension of the time schedule The time schedule does not only talk of the poll. It implies within itself the entire process commencing from the date of filing of the nomination paper to the date of the final election The expression "extension" has been deliberately used to bring within its hold the lengthening out of time previously fixed for holding of the elections This expression lends itself to variety of meanings which must in each case be gathered from the context. It means enlarge than the original limit As already observed above, if the power conferred by the Proviso is interpreted in the context, one would lead to the conclusion that a restricted meaning, if given, is likely to defeat the object and purpose for which the power has been conferred on the Registrar The only restriction placed is that the time schedule fixed should not travel beyond the period for which the Administrator has been appointed under S 29

21. In the instant case, the Registrar had fixed two dates, (1) for the holding of the elections of the Branches of the U P State Co-operative Land Development Bank Limited, and (2) for the constitution of the Committees of Management of the peak body, that is, the U P State Co-operative Land Development Bank Limited These dates were 7-9-1981 and 29-9-1981 respectively After having fixed these two dates, the rest of the details were required to be arranged by the Election Officer Such a direction, we have already held above, could be rightfully given by the Registrar in exercise of the powers conferred upon him by R 439 That rule provides for holding of the elections under the supervision and control of the Registrar In exercise of this power the Registrar has stated in the impugned notification that the elections had to take place de novo

22. In pursuance of the power conferred on the Election Officer by R 443, the scheme was changed and a new date for filing of nomination papers was notified The Election Officer was fully justified in doing so

23. The counsel next urged that the power of extension in time schedule of a co-operative society could be exercised by the Registrar only in special circumstances after recording reasons therefor, and since in the instant case the Registrar failed to point out special circumstances the extension was invalid In the impugned order we find the reasons stated by the Registrar for extension in time schedule These reasons were –

(i) excessive rains, which obstructed the voters from participating at the elections of the branches,

(ii) declaration of result of the candidates against sub-rule (1) of R 443,

(iii) for preparing a voters list afresh which may include those who were enrolled recently,

(iv) for finding out those who were disqualified

24. The question is whether these reasons could be considered as special circumstances Existence of special circumstances is a condition precedent for exercise of power by a Registrar under the said proviso Unless there are special circumstances time schedule of an election cannot be postponed The words "special circumstances" are wide, comprehensive and flexible and we think that the rule making authority intended them to be so and no court can or ought to lay down any exhaustive definition of these Circumstances which may be special in one case, in another would not be such The circumstances stated as special in an order of the Registrar have to be considered as a whole If they are taken piecemeal it would be easy to find that each separate element is insufficient by itself and to conclude therefore that the sum total must also be insufficient But a factor which, standing alone, would be insufficient may have altogether a different value when found in combination with some other factor or factors

25. In this case we find that the circumstances mentioned were relevant for the purpose for which the power of postponement of the time schedule had been ordered Each one of the circumstances taken individually and jointly aim at achieving the object of a broad-based election assimilating as many members as possible.

26. We wish to note that as the special circumstances were relevant to the exercise of power we cannot hold that the postponement of the election is in contravention of the law As to what is special circumstance is to be decided by the Registrar and not by this court Had the reasons given been thoroughly irrelevant, it could have been different This is not so in the present case Since proper and adequate reasons were given there can be no complaint

27. In the instant case the direction had been issued by the Registrar for holding of the election afresh In pursuance of that direction, that the Election Officer notified fresh dates The display on the notice board of the Society of the changed programme of the election was not invalid being in accordance with Rule 443

28. For the reasons given above, we do not find any merit in these petitions which are dismissed under the proviso to Rule 2 of Chapter XXI of the Rules of the Court.

Petitions dismissed

1981 ALL. L. J. 1302

C S P SINGH, J

Sudarshan Dharma Setu Samiti and others, Petitioners v Swami Rangacharya and others, Respondents

Civil Misc. Writ Petn. No 9637 of 1980, D/- 21-8-1981

D:/KY/E15b/b1/AAJ/MVJ

Civil P. C. (5 of 1908), O. 39 R. 2, Proviso (d) (U. P.) — Expression "Society" — Interpretation and meaning of — It is not confined to educational society alone — It includes an unregistered samiti constituted to look after the affairs of a deity and its properties — (Words and Phrases — "Society").

The word "society" in O 39 R 2, Proviso (d) has been used so as to include societies of all description whether registered or not It also includes an unregistered samiti constituted to look after the affairs of a deity and its properties Hence the Sudarshan Dharma Setu Samiti in the instant case which was constituted under a will with the object of managing the properties and affairs of the deity would be a society as it was an association of persons by mutual consent for a common purpose i e for looking after the affairs of the deity and its properties and as such no interim injunction could be issued against the members of this society so as to affect the internal management and affairs of the society (Paras 7, 8)

The question arises as to whether a restricted meaning should be given to the word "society" under O 39 R 2 Proviso (d) The proviso prohibits the grant of an injunction so as to affect the internal management or affairs of any educational institution including a University or a Society If the intention of the legislature was to confine the word "society" to an educational society alone, the word "society" would be a surplusage for such a society would be covered by the word "educational institution" (Para 7)

ORDER :— This petition is directed against an interim injunction issued against the nine petitioners in a suit filed by opposite parties 1 & 2

2. The opposite party No. 2 to the petition is a deity, and opposite party No 1 is the Sarvakar and Sabait of the deity The deity and Swami Rangacharya, the Sarvakar and Sebait have filed suit No 64 of 1980 in the court of the Munsif, Hardwar The present petitioners were arrayed as parties as defendants. The first defendant, according to the plaint was an unregistered society, and the remaining, members of that society It was alleged in the plaint that Swami Sudarshanacharya had purchased a piece of land, and built a temple, and installed a deity, who is opposite party No. 2 in the petition, and plaintiff No. 1 in the suit All these properties had been dedicated by Swami Sudarshanacharya to the deity, and he remained a Sarvakar and Sebait of the deity during his lifetime On 15-6-1963 he executed a registered will and appointed Swami Rangacharya to be the Sarvakar and Sebait after his death A reference at this stage may be made to the will, which is Annexure II to the counter affidavit filed on behalf of opposite parties Nos 1 & 2, who were plaintiffs in the suit The will after the recital of the fact that the deity had been duly installed goes on to state that as the testator has reached a ripe age, it was necessary to make provision for the worship of the deity, and the management of the properties of the deity He constituted a committee, and nominated Swami Rangacharya as the prospective Sarvakar and Secretary Thereafter eight other persons were nominated by him to be the members of the committee, they were Laxmi Kant Pitti, Ramanujacharya, Gajadhar Somani, Nathmal Somani, Babban Misra, Amar Nath, Ram Krishna Somani and Badri Narayan Acharya The will expressly stated that till such time Swami Sudarshanacharya is alive, he will look after the management, and the committees will exercise its power after his death Provisions were made for filling up the vacancies of members of the committee and that of the Sarvakar in the event of certain contingencies So far as the Sarvakar was concerned, the right of nominating the new Sarvakar was given to the person who would succeed Swami Sudarshanacharya as the Sebait Clause 2 of the will named the committee as the 'Sudarshan Dharma Setu Samiti' Clause 7 of the will enjoined the Secretary, i e , Swami Rangacharya to call the meetings of the committee after due notice Clause eight of the will laid down the duties and powers of the committee It enjoined the members of the committee to make arrangements for the daily worship etc of the deity, and to utilise the property and other income, which may be received by donation or otherwise for the purposes of the deity, and the Sarvakar was enjoined to follow the direction given by the Samiti In the later part of clause eight a provision was made for advice being given by the committee to the Sarvakar and in case the advice given was not followed by the Sarvakar, the committee was given the power to remove the Sarvakar and to appoint another Sarvakar Clause nine of the will prohibited the committee from interfering with the day to day management of the affairs of the committee by the Sarvakar It also enjoined that the Sarvakar would be bound by the advice given by the committee regarding the management and

improvement of the dedicated property It is not necessary in the present case to refer to other portions of the will It is not disputed by the plaintiffs opposite parties that Nathmal Ji Somani, petitioner No 2, Babban Ji Misra, petitioner No 3, Amar Nath Ji Agarwal, petitioner No 4, Badri Narayanacharya, petitioner No 5 are the members of the Samiti appointed under the will It is now necessary to come back to the (sic) it is averred that Swami Ramanujacharya and Gajadhar Ji Somani had died during the lifetime of Swami Sudarshanacharya In paragraph 8 of the plaint, it is averred that Swami Sudarshanacharya had during his lifetime got a society registered under the Societies' Registration Act (Act 21 of 1980) in the name and style of 'Sudarshan Dharma Setu Samiti' It was however averred that the aforesaid society could not be registered under that Act, and the registration of the society could in no way affect the property or affairs of the deity In paragraph 10 of the plaint there is an averment that the defendants informed Swami Rangacharya, plaintiff No 2 that the registered society was similar to the Samiti constituted under the will In paragraph 11 of the plaint, it was alleged that Nathmal Ji Somani, defr No 2 became antagonistic to the plaintiff No 2, and prevailed upon Swami Rangacharya, plaintiff No 2 to call a meeting and to appoint Rameshwar Prasad, Basudeo Somani and Swami Madhvacharya as members of the Samiti in place of Raja Laxmi Lal Ji Pitti, Gajadhar Ji Somani and Swami Ramanujacharya The plaintiff goes on to state that he took legal advice and was informed that the society could not be registered and all the acts and meetings of the society were illegal, and without effect In paragraph 14 it is stated that Swami Rangacharya, plaintiff No. 2 called a meeting of the existing members of the Samiti constituted under the will, but the meeting was not attended by defendants 2 to 6. In paragraph 17 of the plaint, it is stated that on 17-7-1980 in a meeting held of the members of the Samiti appointed under the will Om Prakash Ji Bhatt, Ravi Shankar Ji Kaushal and Mrityanjai Pandey were appointed as members in place of Swami Ramanujacharya, Gajadhar Ji Somani and Raja Laxmi Lal. The plaint then goes on to state that the defendants were calling meetings of the registered society which had no legal existence, and were passing resolutions and taking actions prejudicial to the interest of the plaintiffs It was alleged that certain monies belonging to the deity were deposited in Banks in Bombay, and the defendants were convening meetings in order to injure the interest of the plaintiff, and to withdraw the amounts from the Banks in Bombay It was asserted that a meeting could be convened by only Swami Rangacharya, and that too at the head office, which was situate in Hardwar, and at no other place The plaintiff claimed a permanent injunction restraining the defendants from holding any meeting or doing any act, which would directly or indirectly affect the properties of the deity or interfere with the working of Swami Rangacharya as a Sarvakar The trial court granted the injunction An appeal was filed by the petitioners before the Civil Judge The appellate authority held that Swami Sudarshanacharya had nominated Swami Rangacharya as his successor as Sarvakar and Sebait by a will, which was executed earlier to the registration of the society It also held that inasmuch as the entire property had been dedicated by the founder to the deity before the execution of the will Swami Sudarshanacharya could only lay down the line of succession of the Sarvakar, and could impose no other restriction on his successor Sarvakar, as regards the management of the property and affairs of the deity It also held that it was doubtful as to whether a religious society could be registered under the Societies' Registration Act, and inasmuch as it was clear that Swami Rangacharya was appointed as the Sarvakar by Swami Sudarshanacharya by his will, he alone had the right to call meeting of the Samiti constituted under the will, and the defts could not as such interfere with his functions. The injunction order restraining the defts. from calling any meeting, passed by the trial court was confirmed also on the consideration that it was intimately connected with the management of the property of the deity

3. Sri Jagdish Swarup appearing on behalf of the defts. has contended that the view of the appellate authority to the effect that Swami Sudarshanacharya could only appoint a successor Sarvakar is patently incorrect, inasmuch as there was restriction on the right of the founder to nominate a Sarvakar after his death, and also to lay down as to how the dedicated property was to be managed. It was as such contended that even if the plaintiff's case was accepted, no injunction could be issued against the members of the Samiti constituted under the will

4. It was next submitted that the provisions of O. 39 R. 2(d) of the C P C. bar

the court from granting an injunction affecting the internal management of affairs of a society It was contended that neither the members of the Samiti constituted under the will nor the members of the society could be restrained by an injunction, in view of Order 39 R 2(d) of the C P C

5. Sri B D Agarwal, appearing on behalf of the plaintiff very fairly conceded that as Swami Rangacharya had been appointed as Sebait by a will he was bound by its terms and the members of the Samiti appointed under the will could exercise all powers given to them under that document, and plaintiff No 2 was bound to comply with the directions given by the members of the Samiti He however, contended that meeting could be convened only at head office at Hardwar by the Sarvakar, i.e Swami Rangacharya, and the meetings held by the members of the Samiti on their own were not binding on the plaintiff

6. So far as O 39 R 2(d) is concerned, it was contended on his behalf, that the word 'society' occurring in that clause has to be interpreted so as to apply only to educational societies, and not societies in general This contention is founded on the rule of 'ejusdem generis', i.e. companionship rule

7. Now, it is clear that an injunction has been issued to members of the Samiti constituted under the will, who are also members of the society registered under the Societies' Registration Act It was pointed out on behalf of the plaintiff that on account of the society not seeking renewal of its registration, the society had become an unregistered society This however, is not very material, as O 39 R 2 refers to a society without insisting that a society should be a registered one In Black's Law Dictionary the following meaning has been given to the word 'society'.

"SOCIETY — An association or company of persons (generally unincorporated) united together by mutual consent, in order to deliberate, determine, and act jointly for some common purpose In a wider sense, the community or public, the people in general "

Now, if this general meaning is adopted the members of the Samiti constituted under the will as also the members of unregistered society would be a society, for they form an association of persons by mutual consent for a common purpose, i.e. for looking after the affairs of the deity and its properties. The question however arises as to whether a restricted meaning should be given to the word 'society' under O 39 R 2(d) The proviso may be extracted here

"to affect the internal management or affairs of, any educational institution including a University, or a society "

It will be seen that the proviso prohibits the grant of an injunction so as to affect the internal management or affairs of any educational institution including a University or a society If the intention of the Legislature was to confine the word 'society' to an educational society alone, the word 'society' would be a surplusage for such a society would be covered by the word 'educational institution' It is also relevant to note that the word 'or' which is a disjunctive separates educational institution including a University from a society Thus, it is not possible to agree with the contention made on behalf of the plaintiff that only educational societies are covered by O 39 R 2(d) In my view the word 'society' has been used so as to include societies of all description whether registered or not.

8. Thus, even on the assumption that the society could not be registered under the Societies' Registration Act, its members constituted a society as generally understood, and in any event the members of the samiti constituted under the will form a society on account of the fact that they acted as members of the Samiti after the death of Swami Sudarshanacharya with the object of managing the properties and affairs of the deity as envisaged under the will Thus, in view of O 39 R 2(d) of the C P C no interim injunction could be issued in the circumstances of the case for the order interferes with the internal management and affairs of the society

9. The writ petition succeeds The order of injunction passed by the courts below is set aside There shall be no orders as to costs

Petition allowed

1981 ALL. L. J. 1305

A. N. VARMA, J

Santosh Kumar Shah, Applicant v The Elgin Mills Co. Ltd., Respondent

Civil Revn No 443 of 1980, D/- 19-9-1981 *

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*Against judgment and decree passed by L. R. Kohli, 1st Addl Dist. J., Kanpur, D/- 28-7-1981.

U. P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act (13 of 1972), S. 20(2)(a) — Suit for eviction on ground of default — Notice requiring tenant to vacate accommodation on expiry of six months after paying all rent due by them — It cannot be regarded as notice under S. 20(2)(a) but is a notice under S. 106 of T. P. Act — Tenant cannot be evicted on ground of default — (T. P. Act (1882), S. 106).

A notice which requires a tenant to vacate the accommodation on the expiry of six months after paying all the rent due by then is perfectly consistent with the demand which is made in the usual course while determining the tenancy under S 106 of the T P Act and, therefore, it cannot, by any stretch, be regarded as notice of demand as required under S 20(2)(a) Consequently, the tenant cannot be evicted on ground of default in paying arrears of rent AIR 1967 All 40 Distinguished (Paras 11, 12, 14, 15, 17)

The landlord who seeks to rely on default as a ground for eviction must give a clear notice of demand to the tenant calling upon him to pay the arrears of rent within one month of the service of notice The demand must be clear and unequivocal It must, in any case, be a demand calling upon the tenant to pay the arrears of rent (Para 11)

Cases Referred : Chronological Paras

AIR 1967 All 40 1965 All L J 266 16

S C Tripathi, for Applicant, B R Tripathi, for Respondent

ORDER :— This is a tenant's application in revision under S 25 of the Provincial Small Cause Courts Act It arises out of a suit filed by the plaintiff opposite party for the eviction of the defendant from a portion of premises 10/465 Khalasi Lines, Kanpur, as well as for recovery of some arrears of rent as well as for recovery of Rs. 900/- as damages for use and occupation A decree for pendente lite and future damages was also claimed at the rate of Rs. 15/- per day The court below has decreed the suit It may be mentioned that under the relevant local law, the suit was tried as a small cause by learned I Additional District Judge, Kanpur, who was invested with the powers of Small Cause Court

2. Shortly stated the plaint case was that the plaintiff was the owner of the accommodation in question The accommodation was given to the defendant as a licencee to fabricate tents for the plaintiff which was engaged in the business of supplying tents to the Government and others. The defendant used to pay Rs. 200/- as licence fee for the use and occupation of the premises The licence was terminable at will After the plaintiff made his own arrangements for the fabrication of tents, it terminated the licence of the defendants and required him to vacate the same The defendant, however, failed to vacate Thereafter, with a view to avoiding any controversy, the plaintiff served a notice dated 8-11-1973 on the defendant stating that though the defendant was not its tenant, in order to put an end to the dispute, the plaintiff was treating the defendant as a tenant to whom the premises were given for manufacturing purposes. The notice further stated that the plaintiff did not wish to continue the defendant as a tenant by means of this note the defentant was called upon to vacate the accommodation within six months after paying all the dues. The said notice was duly served on the defendant on 6-12-1973 but the defendant failed to comply with the same The accommodation was used and was intended to be used a factory within the meaning of the Factories Act for industrial purposes namely for manufacturing and processing tents The defendant did not pay any rent after 1-6-1973 Consequently, the plaintiff was entitled both to a decree for eviction as well as for recovery of arrears of rent from 1-6-1973 to 6-6-1974 and for damages at the rate of Rs 15/- per day from 7-6-1974 onwards

3. The suit was contested by the defendants on a variety of grounds which it is not necessary to set out in detail in view of the discussion which follows.

4. On the pleadings of the parties, the court below framed a number of issues. One of the controversies raised before the court below was whether a valid notice of demand such as contemplated under S. 20(2)(a), U. P. Act No. XIII of 1972, had been given to the plaintiff The court below construed the notice dated 8-11-1973 and held that in its opinion, the said notice was a valid notice of demand under S. 20(2)(a) of the said Act. On a further finding that the defendant-applicant had not paid the arrears of rent from 1-6-1973 within one month of the service of the notice dated 8-11-1973, the defendant must be deemed to have committed default thereby rendering himself liable for eviction. The net result of the various findings recorded by the

trial court was that the suit of the plaintiff-opposite party was decreed both for eviction as well as for arrears of rent and damages

5. Learned counsel for the applicant raised two points for my consideration, in support of this revision —

1 The suit of the plaintiff-opposite party could not be tried as a small cause as it was not a suit by a lessor for the eviction of a lessee from a building simpliciter. It was a suit for the eviction of a tenant from a factory which consisted of machineries fixed in the earth in regard to which a court exercising powers of Judge Small Cause Court could not take cognizance of Such a suit could be tried only on the regular side

2 The notice dated 8-11-1973 was not a notice of demand as required under S 20(2)(a) of the aforesaid Act and consequently the defendant could not be held to have committed any default The view of the court below to the contrary is manifestly unsustainable in law

6. Learned Counsel for the plaintiff-opposite party on the other hand supported the decision of the court below on the validity of the notice of demand and urged that the same fulfilled all the requirements of a valid notice under S 20(2)(a)

7. Having heard learned counsel for the parties I am clearly of the view that this revision is entitled to succeed on the second point urged by the learned counsel for the defendant-applicant In the view which I am taking on the second point urged by the learned counsel for the applicant, I do not consider it necessary to go into the first point urged by him

8. In order to appreciate the controversy it will be useful to set out the substance of the notice dated 8-11-1973 which has been the main subject of debate at the bar In this notice which was given by the plaintiff's lawyer, there is first an assertion that the premises were given to the defendant only as a licencee for the purpose of fabricating tents for the plaintiff. The licence fee was Rs 200/- The notice recites in para 3 thereof that the defendant used to pay Rs 200/- as fee He paid Rs 200/- per month for the period 1-1-1969 to 31-5-1973 The next recital is that after the plaintiff had made their own arrangements for fabrication of the tents they terminated the licence and required the defendant to vacate the premises but the defendant failed to vacate the same Still further, it was asserted in the notice that as the defendant was wrongfully asserting that he was a tenant, the plaintiff had decided to treat the defendant as a tenant with a view to putting an end to the controversy and for cutting short the matter There is then para 9, the crucial portion of the notice which may be reproduced in extenso

"9 That my clients now do not want to continue your tenancy any more They hereby terminate your tenancy by this notice of six months Your tenancy shall stand determined upon expiry of six months from the date of receipt of this notice and you are hereby called upon to vacate the accommodation in question on the said date after paying all the rent due by then "

9. In the end there is that usual threat that if the defendant did not comply with the said notice, the lawyer had instructions to file a suit for ejectment of the accommodation as well as for recovery of arrears of rent and damages

10. At this point, it would be useful to have the relevant statutory provision namely, S 20(2)(a) of the aforesaid Act extracted here

"20(2)(a) That the tenant is in arrears of rent for not less than four months, and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand "

11. Having perused the notice dated 8-11-1973, I have no manner that it is a plain and simple notice under S 106, T P Act It was clearly intended to be nothing more than a notice of determining the lease In my opinion, whether para 9 of the notice is read in isolation or in conjunction with the rest of the notice, including para 3, upon which the learned counsel for the plaintiff-opposite party placed considerable stress, it cannot, by any stretch, be regarded as a notice of demand as required under S 20(2)(a) For, however, liberally and broadly we may construe S 20(2)(a) the landlord who seeks to rely on default as a ground for eviction must give a clear notice of demand to the tenant calling upon him to pay the arrears of rent within one month of the service of notice The demand must be clear and unequivocal It must, in any case, be a demand calling upon the tenant to pay the arrears of rent A notice which primarily purports to be one under S 106, T P Act and in that context requires the tenants to pay all sums of money which might be due from the tenant up to the date of the expiry of the period of notice

cannot, in my opinion, take the place of a notice of demand under S 20(2)(a) It is true that according to the decided cases the landlord may combine the two notices, namely, for termination of the tenancy and demand But the requirements of both the notices ought to be fulfilled keeping the two things separate and distinct so as not to leave the tenant guessing or in doubt

12. In the present case I find that the notice dated 8-11-1973 is perfectly capable of being construed as a notice simpliciter under S 106, T P Act The demand therein that the tenant should vacate the accommodation on the expiry of six months after paying all the rent due by them is perfectly consistent with the demand which is made in the usual course while determining the tenancy under S 106, T P Act The notice in question thus stops only at that

13. Learned counsel for the plaintiff-opposite party, however, contended that in para 3 of the notice dated 8-11-1973 it was clearly asserted that the rent had been paid up to 31-5-1973 The notice was given on 8-11-1973 It must follow as contended by the learned counsel for the plaintiff-opposite party, as a necessary corollary, that the defendant was in arrears of rent from 1st of June 1973 till the date of the service of the notice which would make the defendant in arrears for more than four months That being so, it was urged, when the plaintiff asked the defendant to vacate after paying of the rent due by that date it must inevitably lead to the conclusion that the defendant was in arrears of more than four months and that he was called upon to pay the same within six months of the date of the receipt of the notice

14. I cannot accept the above contention While it may be argued by stretching the language of the notice that the plaintiff had conveyed to the defendant that he was in arrears of rent for the period subsequent to 31-5-1973, I find it difficult to hold that there was also a clear demand for the payment of the said amount within one month of the receipt of the notice In my opinion, the recitals in para 9 of the notice cannot be treated as a demand for the arrears of rent within the meaning of S 20(2)(a) of U P Act No. 13 of 1972 As already observed, the notice in question purports to be nothing more than a simple notice of termination of tenancy under S 106 T P Act

15. I, therefore, hold that the notice dated 8-11-1973 was intended only to be a notice terminating the tenancy of the defendant calling upon him to vacate the premises and to pay the arrears of rent which might be outstanding by the date on which the period of notice expired I do not agree with the construction placed by the court below on the notice in question

16. Learned counsel for the plaintiff-opposite party cited the following decisions of this court namely those reported in 1967 All L J 746 (?), AIR 1967 All 40 in support of his contention that for the validity of a notice of demand it is not essential to mention the precise amount which might be due from a tenant It is sufficient that a demand is made from the tenant and the tenant fails to pay the arrears of rent due from him which should be for more than four months

17. I do not find either of these cases of much assistance The defect in the notice under consideration is not that it does not mention the precise amount of arrears of rent. The invalidity of the notice lies in the fact that there is really no unequivocal demand of the arrears of rent as contemplated by S 20(2)(a) In both these cases cited by the learned counsel for the plaintiff-opposite party there was a clear demand for the arrears of rent. In the present case, in my opinion, there is no such demand

18. The result of the aforesaid discussion is that this revision succeeds and is allowed The judgment and decree passed by the lower appellate court are set aside in so far as the decree for ejectment is concerned The suit for ejectment filed by the plaintiff-opposite party is hereby dismissed The suit for damages is also dismissed The decree passed by the courts below for the arrears of rent is, however, affirmed The parties shall bear their own costs both of this court as well as of the court below Any amount which the defendant-applicant may have deposited towards the decretal amount shall be liable to be adjusted.

Revision allowed

1981 ALL. L. J. 1309

V. K. MEHROTRA, J

Bhola Nath and others, Appellants v Baba Damodar Das, Respondent

Second Appeal No 778 of 1974, D/- 4-9-1981 *

Civil P. C. (5 of 1908), S. 9 — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 209, 331 Expl. — Original suit for injunction only filed in civil court — Relief for recovery of possession sought subsequently by an amendment — Jurisdiction of Civil Court — Not barred.

Where the plaintiff alleging to be a bhumidar filed a suit in the Civil Court for permanent injunction restraining the defendant from interfering with his possession and an amendment was sought for relief of possession later on, on account of the subsequent action of the defendant of encroaching upon a part of the suit land during the pendency of the suit, then on account of this subsequent need for claiming the relief of possession which is cognizable under S 209 of the Act, the Civil Court could not be said to be divested of its jurisdiction to proceed with the matter 1970 All L J 505, AIR 1968 S C 466 Rel on (Paras 10, 18)

Cases Referred	Chronological Paras
1981 All L J 647	1981 All W C 469 17
1977 All L J 74	1976 All W C 721 AIR 1977 NOC 72 (All) 15
AIR 1973 S C 2391	(1974) 1 S C J 401 7, 16, 17
1970 All L J 505	1970 All W R (H C) 312 12
1968 All L J 313	AIR 1968 S C 466 (1968) 2 S C J 225 11, 18
1968 All L J 1108	AIR 1969 All 526 1968 All W R (H C) 731 (F B) 6

Sankatha Rai, for Appellants; S K Singh, for Respondent

JUDGMENT :— This is a plaintiff's second appeal

2. The plaintiffs went to court primarily with the allegation that they were recorded bhumidhars of the suit land which formed part of Khata No. 53, having purchased it through a registered sale-deed dated Dec 23, 1965 from Satyavrat Rai, the bhumidhar The defendant, according to the plaintiff's allegation, had nothing to do with the suit land He was interfering with the plaintiff's possession The relief that was sought in the suit, initially, was that the defendant be restrained by an injunction from interfering with the plaintiff's possession The plaintiffs subsequently sought an amendment in the plaint by alleging that the defendant had demolished a part of his boundary wall which enclosed the suit land and encroached upon a portion of the suit land by raising some construction thereon The plaintiffs, consequently, sought relief of possession over the portion of his land so encroached upon

3. The main plea that the defendant took was that the plaintiffs were not the bhumidahrs of the area in dispute and that it was the defendant who was in cultivatory possession thereof for a long time He was, therefore, its sirdar The plaintiffs were not entitled to the reliefs claimed

4. On the aforesaid basic pleas, the trial court framed as many as seven issues The first of these issues was whether the plaintiffs were bhumidhars in possession of the land in suit forming part of plot 53 This issue, on consideration of the evidence led by the parties, was answered in favour of the plaintiffs It was held that the plaintiffs were the bhumidhars in possession of the land in suit and were rightly recorded as such.

5. The plea of the defendant, claiming sirdari rights, led to issue 5 being framed in the case to the effect whether he was a sirdar of the land in suit This issue was answered against the defendant. It was held by the trial court, on the basis of the evidence on record, that the defendant had raised the disputed construction during the pendency of the suit He was not, according to the trial court, in adverse possession as claimed by him

6. The defendant had also pleaded that the suit was not cognizable by the civil court Issue 6 in this respect was "whether the suit is cognizable by this court?" The trial court held that since the main relief was for permanent injunction, the suit was cognizable by the Civil Court It followed the decision of a Full Bench of this court in the case of Ram Awalamb v. Jata Shanker (1968 All L J 1108). The suit was decreed by the trial court both for the relief of permanent injunction restraining the defendant from interfering with the plaintiff's possession as well as for recovery of possession over the encroached

*Against judgment and decree of Chandra Mohan, 2nd Addl. Dist. J., Varanasi, D/- 15-12-1973.

portion Feeling aggrieved, the defendant appealed

7. The lower appellate court posed the first point for determination by it in the appeal to be whether the suit was cognizable by the Civil Court or should it have been filed in the revenue court under S 209 of U P Act No I of 1951 It felt that having regard to the fact that relief of possession had also been sought in the suit which was obtainable by the plaintiff before the revenue court by recourse to a suit under S 209 of U P Act No I of 1951, the suit would be cognizable by the revenue court It relied upon the decision of the Supreme Court in Chandrika Misir v Bhaiyalal (AIR 1973 S C 2391) On its view in this regard, the lower appellate court felt that the plaintiff's case deserved to be dismissed on this ground alone Reversing the trial court decree, it dismissed the plaintiff's suit The plaintiffs have now approached this court in the present second appeal

8. The submission of Sri Sankatha Rai, appearing for the plaintiffs-appellants is that the view of the lower appellate court that the suit was cognizable by the revenue court was not correct and that the decree of that court deserved to be reversed The submission is that the suit was cognizable by the civil court and the lower appellate court ought to have decided it on merits

9. It has been noticed earlier that the suit primarily was for the relief of injunction restraining the defendant from interfering with the plaintiff's possession on the assertion that the plaintiffs were the bhumidhars of the plot in suit and were recorded as such The defendant, according to the plaintiff's case, was interfering with their possession on which account arose the necessity for a suit claiming the relief of injunction Later, by an amendment, the plaintiff claimed the relief of possession on the ground that the defendant had encroached upon a portion of his property during the pendency of the suit

10. On the allegations made in the plaint, it is clear that the plaintiffs were seeking to enforce their rights as bhumidhars in respect of the plots in suit over which they were actually recorded as bhumidhar They were not seeking any declaration about their status as a bhumidhar On the plea so taken, it is obvious that the relief of injunction could be sought by the plaintiffs only in the civil court The relief became necessary for the plaintiffs [illegible] the relief of possession as well which relief could be granted by the revenue court, could not be held to divest the civil court of its jurisdiction to deal with the case

11. In Smt Sonawati v Sri Ram (AIR 1968 S C 466), it was ruled by the Supreme Court that the jurisdiction of the civil court to try a suit, which was within its competence when filed, could not be divested by a subsequent event of the necessity for the plaintiff to seek a relief which could also be given to him by the revenue court In that case, the suit was originally filed in the civil court for the reliefs of declaration and injunction It was cognizable by the suit court Subsequently, the defendant obtained possession of the land from the criminal court, under whose custody the land was in proceedings before it This necessitated the claim for the relief of possession as well at a subsequent stage in the suit The Supreme Court repelled the submission made on behalf of the defendant that on account of the claim for the relief of possession, which the revenue court was competent to give the jurisdiction of the civil court to proceed with the suit came to an end

12. In Parsottam v Narottam (1970 All L J 503) a Division Bench of this court had occasion to deal with the question as to whether the civil court would have jurisdiction to try a suit where the plaintiff's claim was supported by the revenue entries and he was seeking the relief only of an injunction The Bench observed (in para 9) as follows —

"In the instant case the plaintiff had acquired the bhumidhari sanad under S. 137 of the Act after payment of the requisite amount of compensation to the Government and the entry in the revenue papers supports his claim In such a situation one fails to see as to why the plaintiff should have filed a suit against the State Government or the Gaon Sabha. The entries in the revenue records being in favour of the plaintiff, he was entitled to assume that the Government or the Gaon Sabha was not opposd to his claim nor is there anything on the record to show that the State Government or the Gaon Sabha wanted to contest the plaintiff's claim The only persons who disputed the plaintiff's claim were the defendants The plaintiff was, therefore, perfectly justified in filing the suit against the defendants and not against the State Government or the Gaon Sabha. A suit of this nature is obviously not covered by S. 229-B of the Act and would be cognizable by a civil court because the civil court had

the jurisdiction to entertain all kinds of suits between the litigating parties."

Later (in para 11) it further observed as follows —

"To us the legal position appears to be that where a plaintiff has a grievance against the village records which are maintained by the State Government and Gaon Sabha the suit will lie in revenue court under S 229-B and any other person who disputes the plaintiff's title shall also be impleaded as a defendant but if the village record support the claim of the plaintiff, the suit will not lie under S 229B but will be cognizable by a civil court in case the plaintiff's right is disputed by a third person"

13. These observations clearly apply to the facts of the instant case where also the plaintiff's claim is supported by the entries in the revenue records and is being contested only by the defendant

14. It has been urged on behalf of the defendant-respondent that the suit being for recovery of possession also, over the portion of the property said to have been encroached by the defendant, relief was available to the plaintiff before the revenue court through a suit under S 209 of U P Act No I of 1951 As such, having regard to the Explanation to S 331 of that Act, the suit was exclusively triable by the revenue court Reliance was placed by the learned counsel, in support of his submission upon some decisions which may now be noticed

15. In Smt Bhagwati Devi v Radhey Shyam (1976 All W C 721 (1977 All L J 74) Satish Chandra, J (as he then was) held that in a case where the plaintiff claimed that he was bhumidhar of the plot over which constructions stood and had been illegally dispossessed therefrom by the defendant, the suit for possession over the construction and the Sehan land lay before the revenue court and the civil court had no jurisdiction to entertain it. From the report, it does not appear clearly as to whether the plaintiff was also recorded as a bhumidhar in revenue records Besides, the suit was for possession simpliciter over the area in question which, having regard to the definition of the word 'land' contained in S 3(14) of U P Act No 1 of 1951 was held to be land in respect whereof a suit for possession was cognizable under S. 209 of that Act Dealing with the submission that the suit did not relate to possession over land but involved the demolition of the constructions as well, the learned judge observed that when the plaintiff was dispossessed from the constructions, he would be deemed to have been dispossessed from their site as well and that relief for possession over the constructions and Sehan could be effectively given only after dispossessing the defendant from the site and then giving possession to the plaintiff over the site along with constructions According to the learned Judge the suit was in law, for possession over the land with its constructions and, as such, it lay before the revenue court It is obvious that the suit, even as initially framed, was found to be one for possession over land which relief could be given by the revenue court

16. In Chandrika Misir v Bhaiyalal (AIR 1973 S C 2391) upon which reliance was placed by the lower appellate court, and also by the learned counsel for the defendant-respondent in this court, the facts were that the plaintiffs claimed that as next reversioners of the recorded bhumidhars of the plot in suit, they had title to the property It was alleged by them that the respondent was interfering with their possession so that relief for restraining them from doing so was claimed by way of an injunction In the alternative, relief of possession was also asked for The Supreme Court took the view, on these facts, that the plaintiffs having been found to be the bhumidhar of the land in suit of which the defendant had been retaining possession contrary to law, and was thus a trespasser, the suit fell in the category of cases covered by S 209 U P Act I of 1951 The suit for ejectment of persons occupying land without title could only be filed before the revenue court so that the civil Court had inherent lack of jurisdiction to entertain it It is noticeable that the Supreme Court was not dealing with a case wherein the plaintiff was recorded as a bhumidhar in the revenue records and on that basis the relief of injunction was being sought by him The Supreme Court proceeded to decide the case on its view that the case was cognizable under S 209, U. P Act, 1 of 1951, and related to recovery of possession from a person who was retaining it contrary to law

17. In Dr Ajoydhya Prasad v Gangotri Prasad (1981 All L J 647), a Division Bench of this court, following the decision aforesaid of the Supreme Court, held that the civil court had no jurisdiction to entertain the suit with which the Bench was dealing That was a case wherein the plaintiff had instituted a suit in the Civil Court for the relief of declaration that he was the Sirdar of the land

in dispute and for possession in case he was found to be out of possession He had also claimed the relief of cancellation of a sale deed executed by defendant 1 in favour of the other defendant in respect of the holding in dispute and for an injunction The Bench observed (in para 7) that "In view of the Explanation to S 331 even if the relief for injunction was included in the plaint the suit would be cognizable by the revenue court because the revenue court could give an effective relief by way of declaration and, if necessary, by possession over the land in suit " It drew support from the decision of the Supreme Cort in Chandrika Misir's case (AIR 1973 S C 2391) for this view It is clear that where it is necessary for a plaintiff to seek declaration of his rights of an agricultural holding, the revenue court would be the proper court

18. The present is a case in which the suit, as originally framed, was cognizable by the civil court for the relief of injunction The relief of possession had to be sought later on account of the subsequent action of the defendant of encroaching upon a part of the suit land during the pendency of the suit as found by the trial court On account of this subsequent need for claiming the relief of possession, however, the civil court could not be said to be divested of its jurisdiction to proceed with the matter in view of the law declared by the Supreme Court in Smt Sonawati v Sri Ram (AIR 1968 S C 466) In the circumstances, the lower appellate court was not right in taking the view that the civil court had no jurisdiction to entertain the suit and that the plaintiff was liable to be refused relief on that ground alone Its decree, dismissing the plaintiff's suit, cannot be upheld

19. The appeal is allowed. The decree of the lower appellate court is set aside. Since the lower appellate court did not go into the merits of the controversy between the parties of the various issues, arising between them, but declined relief on its view that the suit was not maintainable, it is necessary that the matter should be heard and decided afresh by the lower appellate court on its merits I direct accordingly. The parties shall, however, bear the costs of this appeal themselves. The record of the case shall be sent down to the court below at an early date

Appeal allowed

1981 ALL. L. J. 1312

DEOKI NANDAN, J

M/s Kashi Ram Phool Chand, Petitioner v S Kripal Singh, Respondent

Review Appln No 132 of 1980 (in S A No 2047 of 1970), D/- 12-10-1981

Limitation Act (9 of 1908), Sch. I Art. 64 — Suit filed in 1963 — Provisions of Act of 1908 would apply. S. A. No. 2047 of 1970, D/- 11-4-1980 (All) Reversed.

In the instant case, an agreement dated 21st May 1960 did not contain any promise by the defendant to pay the amount on any future date but it did entitle the defendant to pay the amount of Rs 4,075/-, acknowledged by him to be due, by means of instalments or by lump sum as he considers expedient up to 22nd April, 1963, and the plaintiff agreed not to file any suit for recovery of the amount up to that date The plaintiff further agreed not to charge any interest from the defendant if the amount was paid on or before 22nd April, 1963 It would, therefore, be clear that if Art 64 of the First Schedule to the Limitation Act, 1908 applied, the amount of the debt acknowledged by the defendant to be due by the agreement could be said to have been simultaneously made payable at a future time, that is latest by 22nd April, 1963 and that time, by which the amount of debt was so made payable could not be said to waive until the date 22nd April, 1963. The limitation of three years for the suit had, therefore, to be computed from 22nd April, 1963, and when so computed the suit filed on 18th September, 1963 would be well within time S A No 2047 of 1970, D/- 11-4-1980 (All) Reversed Case law discussed (Para 4)

Cases Referred :	Chronological	Paras
AIR 1967 S C 181	(1967) 2 S C J 387	7
AIR 1953 S C 225	1953 S C J 315	6
AIR 1947 Bom 135	48 Bom L R 727	7
1944 All L J 447 (1)	ILR (1945) All 35	5
AIR 1941 Pat 282	22 Pat L T 278	6

Radha Krishna, for Petitioner, Rajeshwari Prasad, for Respondent

ORDER :— By this application for review of my judgment dated 11th April, 1980 in the above Second Appeal, the plaintiff, who was the respondent in the appeal and is the applicant for review, contends that the judgment suffers from an error of law

apparent on the face of the record The error, as pointed out by Mr Radha Krishna, learned counsel for the applicant for review, is that, while holding that the suit was barred by limitation, I had omitted to consider the provision of Art 64 of Sch 1 to the Indian Limitation Act, 1908, which is in the following terms —

(See below for Schedule)

The suit having been filed in the year 1963, it is the Act of 1908 which applies to the present case and not the Limitation Act, 1963, nevertheless, it may be stated that the corresponding Article in the Schedule to the 1963 Act is Art. 26, the terms of which are identical with those of Art 64 of the 1908 Act

2. The argument was that the accounts were stated by the writing dated the 31st March, 1960 and the sum of Rs 4,075/- was found due from the defendant to the plaintiff vide Ext 1. According to learned counsel Ext 2, the agreement dated 21st May, 1960, which has been treated to be an acknowledgment of liability extending the period of limitation, by allowing the computation of a fresh period of three years from its date, may be said not to contain any promise by the defendant to pay the amount at any future date and in that sense it may be that the accrual of the cause of action for the suit when filed on the basis of the agreement was not postponed by it But the fact remained that the terms of the agreement did make the amount, which was again acknowledged by the defendant thereby to be due from him, payable at a future time, that future time being the 22nd April, 1963 before which date a suit for its recovery could not be filed in accordance with those terms Therefore, learned counsel argued that, under Art. 64 of the First Schedule to the Limitation Act, 1908, the limitation of three years for the suit had to be computed from the date by which the amount was made payable, and that date being the 22nd April, 1963, the limitation of three years had to be computed from that date

(contd. on col 2)

3. Having heard Mr Radha Krishna for the plaintiff-respondent-applicant and Mr Rajeshwari Prasad for the defdt-appellant-opposite-party on this review application, I find that there is force in the aforesaid contention raised by Mr Radha Krishna and my judgment dated 11th April, 1980 does suffer from an error of law apparent on the face of the record

4. The agreement dated 21st May, 1960 does not contain any promise by the defendant to pay the amount on any future date but it does entitle the defendant to pay the amount of Rs 4,075/-, acknowledged by him to be due, by means of instalments or by lump sum as he considers expedient up to 22nd April, 1963, and the plaintiff agreed not to file any suit for recovery of the amount up to that date The plaintiff further agreed not to charge any interest from the defendant if the amount was paid on or before the 22nd April, 1963 It is, therefore, clear that if Art 64 of the First Schedule to the Limitation Act, 1908 applied, the amount of the debt acknowledged by the defendant to be due by the agreement could be said to have been simultaneously made payable at a future time, that is latest by the 22nd April, 1963 and that time, by which the amount of debt was so made payable, could not be said to arrive until the date 22nd April, 1963 The limitation of three years for the suit had, therefore, to be computed from 22nd April, 1963, and when so computed the suit filed on 18th September, 1963 was filed well within time

5. Mr Radha Krishna also invited my attention in this connection to an observation in the case of Kunjilal Ramgopal v. Dwarka Prasad (ILR (1945) All 35) 1944 All L J 447 (1) which had been cited by Mr. Rajeshwari Prasad at the hearing of the appeal and is referred to in my judgment sought to be reviewed That observation is

"If this letter could be treated as a fresh contract between the parties, then of course

64. For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	Three years	When the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives

there would be a cause of action on the expiry of eight or nine days, but it is nobody's case that this letter embodied a fresh contract

6. Mr Radha Krishna contended that the agreement dated 21st May, 1960 did constitute a fresh agreement between parties for the payment of the debt which had been found due from the defendant to the plaintiff But, as observed in the judgment sought to be reviewed, the agreement did not contain any promise by the defendant to pay the amount at any future date and, therefore, it cannot be said that the accrual of the cause of action was postponed on that account I do not think that the aforesaid observation relied upon by Mr Radha Krishna can have any impact on the decision Even as implying a promise to pay, the agreement could not extend limitation more than three years beyond its date It is the language of Art 64 which requires the computation of limitation from the date when the time for payment as fixed by the agreement arrives Mr Radha Krishna also cited a decision of the Patna High Court in Debi Radha Rani v Ram Dass (AIR 1941 Pat 282). It was held in that case that forbearing of a wife to sue her husband for maintenance on the husband's agreement to pay her a monthly allowance by way of maintenance is an agreement supported by consideration It has not been contended before me that the agreement dated 21st May, 1960 between the parties was not supported by consideration Indeed it was not disputed that the agreement dated 21st May, 1960 could be a valid basis of the suit in view of the decision of the Supreme Court in Hiralal v Badkulal (AIR 1953 S C 225)

7. Mr Rajeshwari Prasad, on the other hand, contended that it was not a suit for money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them He said that the term accounts stated had a technical meaning and there must be reciprocal demands between the parties in the mutual dealings entered in their account books before a suit could be said to be for money found due on accounts stated between the parties. It is not possible to accept this contention of Mr Rajeshwari Prasad The idea of reciprocal demands between the parties comes in when a suit is for balance due on a mutual, open and current account, where the start of the period of limitation is the date of the close of the year of accounts [illegible] the last item admitted or proved is [illegible] In the case of a suit from money found due on accounts stated between the parties, the date of the start of limitation is the date on which the accounts are stated in writing signed by the defendant and the money is found due to the plaintiff It is not necessary in a suit of this kind that there should have been reciprocal demands between the parties All that is necessary is that the parties should settle the accounts between them and the person against whom the balance is found due should acknowledge that it is due, in writing signed by him My attention was invited to Manekla! Mansukhbhai v Jwaladutt Pilani (AIR 1947 Bom 135) and Siqueira v Noronha (AIR 1934 PC 144) in this connection These cases do not support the contention of Mr Rajeshwari Prasad They rather expound the meaning of the term 'accounts stated' in the sense in which I have understood it Indeed, I am fully supported in the view which I have taken by the law declared by the Supreme Court in Gordon Woodroffe & Co v Sk M A Maiid & Co (AIR 1967 S C 181, para 15)

8. Since the only point raised and decided in the second appeal was of limitation and the decision on that point has been found hereinabove to be erroneous, it is not necessary to hear this second appeal over again and to pass any separate judgment thereon

9. In the result, the review application succeeds and is allowed with costs The judgment dated 11th April, 1980 in the second appeal is set aside Instead the second appeal is dismissed with costs and the decree under appeal for recovery of Rs 4,900/- with pendente lite and future interest at 6 per cent per annum against the defendant is maintained with costs throughout

Application allowed

1981 ALL. L. J. 1314

V K MEHROTRA, J

Gopi Nath and another, Appellants v Nagar Mahapalika, Respondent

Second Appeal No 2518 of 1967, D/- 1-9-1981 *

(A) Civil P. C. (1908), Ss. 100, 101 — U. P. Nagar Mahapalika Adhiniyam (2 of 1959), S. 327 — Unauthorised construction — Notice requiring owner to demolish structure,

*Against decree of Jahnvi Prasad, 2nd Addl Civil J, Kanpur, D/- 10-8-1967

KY/KY/F109/81/AAJ

issued under S. 327 — Plaintiff alleging that, finding of lower Courts that the structures were new and were raised after the area was included within limits of Nagar Mahapalika was not sustainable as it was perverse — Evidence on record not showing any perversity in the finding of lower courts — Finding would be sustainable. (Para 10)

(B) U. P. Nagar Mahapalika Adhiniyam (2 of 1959), Ss. 315, 316, 327 and Schedule I Part D — Construction without notice under S. 316 — Proceeding under S. 327 — Notice requiring owner to demolish is valid — Owner cannot seek injunction.

'A' raised a boundary wall above the plinth level to a height of six feet partitioning two chambers of a shed It was not in dispute that one of the boundary walls raised adjoined an open land lying between the street and the plot in dispute 'A' did not issue notice under S 316 to the Mukhya Nagar Adhikari The Mukhya Nagar Adhikari served a notice on 'A' asking him to demolish the structure 'A' claimed injunction against the action of demolition

Held, that as the construction raised by 'A' was clearly in the nature of 'erection of a building' as defined in S 315 and as he failed to issue notice under S 316, the Mukhya Nagar Adhikari was competent to proceed under S 327 asking 'A' to demolish the structure A's claim for injunction restraining the authority to demolish the structure could not be allowed (Para 13)

(C) U. P. Nagar Mahapalika Adhiniyam (2 of 1959), Ss. 119(1)(d), 327, Schedule 1, Part D — Unauthorised construction — Issuance of notice for demolition — Deputy Mukhya Nagar Adhikari, appointed to officiate as Mukhya Nagar Adhikari, delegating function of issuance of notice under S. 327 to the Revenue Inspector and the Kshetriya Adhikari — Notice issued by Revenue Inspector is valid — Issuance of notice under S. 327 is not one of those functions which are specified in Part D of the Schedule I and which cannot be delegated. (Constitution of India, Art. 245). (Para 13)

Y S Saxena, for Appellants; N D Pant, for Respondent.

JUDGMENT :— This is a plaintiffs' second appeal in a suit for injunction which was decreed by the trial court and dismissed by the lower appellate court

2. The case of the plaintiffs was that on plot No 879, Jajupurwa, Kanpur, they were running a milk dairy In connection with their business, they had set up some structure long ago when the area was not included within the limits of the Kanpur Nagar Mahapalika Subsequently, the area was brought within the boundaries of the Nagar Mahapalika It is alleged that the plaintiffs incurred displeasure of a locally influential person in connection with the proposed election to the Nagar Mahapalika whom they refused to oblige As such an incorrect notice, falsely alleging that the plaintiffs were raising some structure without permission of the Nagar Mahapalika which they were asked to remove, was issued This was on March 16, 1965 The plaintiffs were served with another notice on March 25, 1965 requiring them to remove the unauthorised constructions allegedly raised by them within a period of three days failing which it was to be demolished by the Nagar Mahapalika Since the effort of the plaintiffs to convince the Mahapalika authorities about the fact that the structures were old, failed and there was imminent danger of demolition by the Nagar Mahapalika of the structures standing on the land, the necessity arose for the suit for restraining it by an injunction

3. The main defence of the Nagar Mahapalika was that during the routine inspection, it was discovered by the Mahapalika Inspector, who also appeared in the witness box on its behalf, that the plaintiffs were raising unauthorised constructions without obtaining permission of the Nagar Mahapalika They were served with notice asking them to desist from doing so. Since the plaintiffs were adamant, another notice was served upon them requiring them to remove the unauthorised constructions within three days The plaintiffs were not entitled to any relief in the suit

4. One of the pleas that the plaintiffs had taken was that the notice aforesaid had not been issued by an authority competent to do so Their case was that it was only the Mukhya Nagar Adhikari who was authorised to issue a notice himself or delegate the power for doing so on some other servant of the Mahapalika. In the instant case one Sri Laghate, who was Deputy Mukhya Nagar Adhikari, had authorised the Revenue Inspector and the Kshetriya Adhikari, Zone 1 to issue these notices He could not have done so. The trial court framed issue No 2 on this aspect of the matter The issue was 'whether the notices have been issued by incompetent authority". The trial court felt

that the Deputy Mukhya Nagar Adhikari was not authorised in law to delegate the power of issuance of the impugned notices to the Revenue Inspector and the Kshetriya Adhikari These notices were, therefore, invalid.

5. The trial court, after considering the evidence led by the parties, came to the conclusion that the constructions were not old as alleged by the plaintiffs but were new and had been raised after the area in question had become a part of the limits of the Nagar Mahapalika It also found that the plaintiffs had not obtained any permission from the Nagar Mahapalika for raising them In view, however, of its finding on the second issue, the trial court felt that the plaintiffs were entitled to an injunction restraining the Mahapalika from demolishing the disputed structures on the basis of the notices, dated March 16, 1965 and March 25, 1965 It decreed the suit accordingly

6. The Nagar Mahapalika assailed the decree in an appeal The plaintiff filed a cross-objection against the finding recorded by the trial court about recent nature of the construction

7. The first question which was posed by the lower appellate court for determination was whether disputed constructions were old and existed before the area was included within the limits of the Municipal Corporation This question was answered by the lower appellate court, on reappraisal of the evidence on record, against the plaintiffs It held, like the trial court, that the plaintiffs had raised the offending structures recently after the area had been included in the corporation limits and that the structures were not standing on the plot from before as claimed by the plaintiffs.

8. The third point for determination posed by the lower appellate court was "whether the notices in dispute were issued by the competent authorities and were legal?" On the point the lower appellate court differed from the view taken by the trial court. It took the view that Sri Laghate had been appointed to officiate as the Mukhya Nagar Adhikari in the Nagar Mahapalika through a notification dated Nov. 28, 1964 While so officiating, he had delegated the power of issuance of the disputed notices to the Revenue Inspector and the Kshetriya Adhikari which was in accordance with law On these findings, the lower appellate court held that the plaintiffs were not entitled to the relief of injunction which had been granted by the trial court It set aside the decree of the trial court and dismissed the suit This is how the plaintiffs have come to this court in the present second appeal.

9. The appeal was initially heard by Hon'ble H. N Kapoor, J (since retired) who remitted an issue to the lower appellate court for a finding thereon by his order dated July 22, 1976 The issue was 'whether on 12-11-1964 Sri Laghate was acting or officiating as Mukhya Nagar Adhikari and whether he was competent to delegate powers under S 119, U P Nagar Mahapalika Adhiniyam, as done by order No 12415-K-1/JH dated 12-11-1964?" He directed that the parties may be given opportunity to lead evidence The matter went back to the lower appellate court which has, by its order dated Nov 23, 1978, returned a finding on the issue The finding is that at the relevant time Sri Laghate as officiating Mukhya Nagar Adhikari, was competent to make the delegation

10. It has been urged by the learned counsel for the plaintiffs that the conclusion of the two courts below that the offending structures were new and had been raised after the area was included within the limits of the Nagar Mahapalika was not sustainable as it was perverse In spite of hearing him for quite sometime on this aspect of the case, it is not possible to accept his submission The finding recorded by the two courts below concurrently on this question is sustainable on the evidence on record It has not been shown to be perverse in the sense that on the material on record, no reasonable person would have arrived at it. The challenge to this finding must, therefore, fail

11. The second submission of the learned counsel is that an officiating Mukhya Nagar Adhikari was not competent to delegate the function of issuance of a notice under S. 327, Nagar Mahapalika Adhiniyam, upon some other servant of the Nagar Mahapalika and that the lower appellate court had erred in taking a view to that effect. This submission does not appear to be correct. S. 119, U. P Nagar Mahapalika Adhiniyam, 1959, provides, in its material part, that subject to other provisions of the Act and the Rules, and subject to such conditions and restrictions as may be specified by the Mahapalika the Mukhya Nagar Adhikari may delegate to any municipal servant any of the functions other than those specified in part D of Schedule I. The function of issuance of a notice under S 327 of the Act is not one of

those functions which are specified in part D of the first Schedule By his appointment to officiate as Mukhya Nagar Adhikari Sri Laghate was competent to exercise all the powers and discharge all the functions which the Mukhya Nagar Adhikari was competent to do. He could, therefore, also delegate the function of issuing the impugned notices to the officers, who have actually issued them, under S 119 (1) (d) of the Act.

12. It was also urged by the learned counsel for the appellants that the case was not covered by S 327 of the Adhiniyam at all so that the two notices could not be issued Their precise submission is that for raising the kind of structure that was allegedly raised by the plaintiffs, no notice had to be given to the Nagar Mahapalika nor was its permission necessary to be sought. As such, the action was not contrary to the provisions of the Act and the Rules

13. The impugned action of the plaintiffs included raising of a boundary wall above the plinth level to a height of six feet, partitioning the two chambers of a shed, which was clearly in the nature of erection of a building as defined in S 315 of the Adhiniyam. It is not in dispute that one of the boundary walls raised adjoined an open land lying between the street and the plot in dispute. Such erection requires notice to be given to the Nagar Mahapalika under S. 316 of the Adhiniyam The Mukhya Nagar Adhikari or his delegate was, therefore, competent to proceed under S. 327 of the Adhiniyam in respect of the offending constructions

14. The action of the defendant-respondents in requiring the plaintiffs to remove the offending structures within the time specified was fully justified by the provisions of the U. P Nagar Mahapalika Adhiniyam. It is apparent that in these circumstances the plaintiffs could not claim the relief of injunction restraining the Mahapalika from requiring them to remove the offending structures. The lower appellate court did not commit any error of law in refusing relief to the plaintiffs. The plaintiffs could always approach the Nagar Mahapalika for condoning their lapse in proceeding to raise the structure without seeking permission from it. The Mahapalika could if it so wished, have granted relief to the plaintiffs in exercise of its statutory powers in that regard

15. The appeal has no merit and is dismissed but, in the circumstances of the case, the parties are directed to bear their own costs

Appeal dismissed

1981 ALL. L. J. 1317

R M SAHAI, J

Anand Babu Agarwal, Appellant v Ayodhya Prasad Tewari and others, Respondents

Second Appeal No 1209 of 1979, D/- 1-10-1981.*

(A) U. P. (Temporary Control of Rent and Eviction) Act (3 of 1947), S. 16 — Civil P. C. (1908), S. 9 — Order passed under U. P. Act (3 of 1947) — Order passed against principles of natural justice — Jurisdiction of Civil Courts cannot be excluded.

The jurisdiction or otherwise of Civil Court depends on whether the order under challenge was in conformity with fundamental principles of judicial procedure In the instant case, order passed by District Magistrate cancelling allotment was ex parte This was despite report of R C & E. O that the person had entered into possession and the order should be passed after hearing him Held Prima facie the order of District Magistrate was contrary to the principles of natural justice, jurisdiction of Civil Courts could not be excluded AIR 1969 S C 78 Foll.

(Para 4)

(B) Specific Relief Act (47 of 1963), S. 38 (2) and (3) — Scope — Obligation in favour of plaintiff — What amounts to.

In the instant case a suit was filed and claim was based on allotment order which was cancelled ex parte by the D M If order allotting premises in favour of plaintiff is found to be valid then its cancellation, release of premises etc were acts without authority and there arose an obligation in favour of plaintiff which he was entitled to enforce by suit for permanent injunction. It would also be covered under sub-cl. (3) of S. 38 as the authorities invaded or threatened to invade the plaintiff's right or enjoyment of property

(Para 6)

(C) Specific Relief Act (47 of 1963), Ss. 37 and 34 — Suit whether for permanent

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*Against judgment and decree of S R Bhargava, 2nd Addl. Dist. J., Kanpur, D/- 26-4-1979.

injunction or declaration — Primary and ancillary relief — Determination has to be made on basis of pith and substance. AIR 1950 All 89, Rel. on : (Words and Phrases — Doctrine of "pith and substance") (Para 5)

(D) Civil P. C. (5 of 1908), S. 9 — Jurisdiction of Civil Courts — Order violating principles of natural justice — Can be challenged in Civil Court.

An order passed under an Act may be challenged in appellate or revisional jurisdiction for testing legality, correctness or propriety of it But an order without jurisdiction or an order based on erroneous assumption of facts as a consequence of which jurisdiction in it is lacking can be challenged by way of suit It is against fair play and natural justice to pass an order against a person who entered into possession on assumption that the order obtained by fraud without affording any opportunity to him to prove otherwise The threatened invasion on strength of such an order could always be challenged Therefore the argument that the order cancelling allotment could not be challenged in collateral proceedings cannot be accepted, as an order passed in violation of principles of natural justice is an order passed without jurisdiction Such an order is liable to challenge both in writ jurisdiction and before Civil Courts. Case law discussed (Para 9)

(E) Contract Act (9 of 1872), Ss. 17, 18, 19 and 20 — Fraud, misrepresentation collusion and mistake — Are different from each other.

Fraud, misrepresentation, collusion and mistake are different concepts in law They have been defined in Ss. 17 to 20 of the Contract Act They do not overlap except that their effect may be common Presence of any one of them may render the agreement void When applied to judicial proceedings it may make the order unenforceable or liable to be ignored But uniformity in result does not render them one and the same. Each of them arises in different set of circumstances and in order to record a finding that any one or all of them are established there has to be different facts. (Para 10)

(F) Contract Act (9 of 1872), S. 17 — Fraud — What amounts to.

Going to the office regularly for any work and meeting a person familiar with persons in dealing, not to infer from it that the person has approached or he had in such circumstances obtained order by means which were otherwise would not be proper and no fraud could be inferred under such circumstances (Para 12)

(G) U. P. (Temporary Control of Rent and Eviction) Act (3 of 1947), S. 16 — Failure to contact landlord by Inspector — No collusion could be inferred (Contract Act (9 of 1872), S. 17 — Collusion.)

Letting or non-letting of an accommodation under the Act is the jurisdiction of District Magistrate Landlord comes in the picture only if he occupies a portion of the premises Failure on the part of Inspector to contact the landlord, therefore, could not give rise to collusion between the Inspector and allottee (Para 13)

Cases Referred :	Chronological	Paras
AIR 1981 S C 1473	1981 Cri L J 876	(1981) 3 S C C 132	8
AIR 1980 All 89		5
1975 All L R 659		14
AIR 1972 S C 631	(1972) 1 S C J 543	17
AIR 1972 All 354	1972 All W R (HC) 173	17
1972 All L J 587	1973 Ren C J 762	17
AIR 1971 S C 2361	1970 All L J 1143 (1970) 2 S C J 683	8, 9
1971 All L J 1042	1972 Ren C J 16	14
AIR 1969 S C 78	(1969) 1 S C J 925	4
(1969) 1 All E R 208	(1969) 2 A C 147 (1969) 2 W L R 163 Ansminic v Foreign Compensation Commissioner	8, 9
AIR 1967 S C 295	(1966) 2 S C J 623	15
(1967) 3 All E R 986	(1968) 2 Q B 862 (1967) 3 W L R 382 Ansminic v Foreign Compensation Commissioner	8
(1966) C M N No 5213	D/- 1-3-1966 (Allahabad) Gokul Chand Sarraf v R C & E O	14
AIR 1962 S C 370	(1962) 2 S C J 437	7
AIR 1921 Cal 34	24 Cal W N 723 (F B)	8

S. P Srivastava, for Appellant, Trilokt Nath, for Respondents.

JUDGMENT :— Little realising that termination of tenancy for non-payment of rent in exercise of his legal right shall land him in litigation which is yet as fresh as it was in 1965. Ayodhya Prasad Tewari, since deceased, served notice u/s 106 of Transfer of Property Act on 20-12-1964 on M/s Central India Radio and Talkie Services through Sri J. Saxon How did the appellant know Saxon

is not clear but he certainly became interested in the premises, a shop, situated at. The Mall Road, Kanpur. In fact anybody having commercial interest would be May be to achieve this objective he not only rendered financial assistance to Saxon but ultimately even purchased his interest on Jan , 1965 And Saxon being obliged to him was willing to vacate the premises in his favour only What legal effect it had on the right of parties shall be examined later As the shop was governed by Act III of 1947 the willingness or even consent of Saxon could not have resulted in allotment or possession of appellant therefore he moved an application on 16-1-1965 for allotment of the shop before Rent Control & Eviction Officer, (hereinafter referred to as R C & E O) as the shop was likely to fall vacant On this the inspectorial movement in the office was swift May be little abnormal But neither illegal nor immoral 17th was Sunday And on 18th when the Inspector made spot inquiry Saxon informed him that he had already intimated R C & E O that as he has suffered loss in business he was intending to close it. He also informed that he was willing to vacate, 'provided it was allotted to the appellant' The Inspector submitted his report on the same day and apart from intimating likely vacancy he made a recommendation in favour of appellant In doing so he definitely went beyond the inquiry The authorities however, do not appear to have taken any notice of it or acted upon it But the report of likely vacancy was neither incorrect nor inaccurate Even the appellate court found that there was a vacancy

2. After ascertainment of vacancy the second phase, namely, allotment of the premises in the office of District Magistrate was set in motion by notifying vacancy and inviting applications up to 23rd Jan. 1965 No one turned up It surprised the Additional District Magistrate (heremafter referred to as A D.M) obviously because the shop is located in the busiest business centre of Kanpur He expressed it in the report to District Magistrate (heremafter referred to as D M) and suggested that the premises be allotted to Air India who were in search of accommodation probably on Mall Road. This was approved by D.M and an order was passed on 27-1-1965 to contact District Sales Manager, Air India. Efforts went on thereafter, the local manager was contacted, he expressed his willingness also but when asked to move formal application he refused Then the A D M suggested notification of vacancy in newspapers to ensure wide publicity which was done through assistance of District Information Officer on 11th Feb 1965 inviting applications till 20-2-1965 Unfortunately the press note which appeared in National Harald on 16th Feb was wholly unsatisfactory Nobody could have followed anything form it Nor any application was filed. But when the file was submitted to D M he again insisted that Manager of Air India be persuaded These efforts finally failed on 8th March, 1965 and the District Magistrate allotted the premises to appellant on 18th March, 1965 who obtained possession, on 26th March, 1965 in pursuance of formal order issued by R C & E.O on 23rd of March, 1965

3. With allotment and taking of possession the second phase came to an end On 30-3-1965 the landlord filed an application before District Magistrate in the nature of complaint against Saxon It was stated that Saxon was under heavy liability and was trying to transfer the tenancy to some other person in lieu of handsome amount Against such step he had warned Saxon but despite his warning he now wants to transfer the said tenancy on the same old rent when the current prevailing rent of shop was nearabout Rs 500/- per month. The landlord further expressed his apprehension as he saw a fresh sign-board hanging on the shop He complained that he wanted the shop to be released in his favour Therefore, he requested the D M not to allow Saxon to take law in his own hand This application set in motion, the third phase which led to cancellation of allotment and release of accommodation in favour of respondent. On 3rd April, 1965, the D M stayed implementation of the allotment order and directed R C & E O to make personal enquiries regarding the person, 'who gave the intimation about vacancy' 'What enquiry was made to check up vacancy', 'if owner or the tenant did not give the intimation', 'what action was taken to publicise the vacancy', 'who was the inspector who made the enquiries,' and 'was he permanent or temporary' In the end it was observed, 'I understand, with the connivance of the previous tenant and after paying heavy premium the only candidate in this case managed to get the allotment order On 5th April, 1965 R C & E O submitted his report and suggested that as allottee has entered into possession the landlord, the allottee and the previous tenant may be called and heard and the matter be decided on merits On 8th April, 1965 the landlord filed application for

release and the District Magistrate without issuing notices or hearing any of the parties, cancelled the allotment order, ex parte because he was acting administratively Pursuant to this order he directed R C & E O to get possession restored and release accommodation in favour of landlord on 15-4-1965 Being faced with one after the other order passed ex parte, without hearing, the appellant had no way out except to file the present suit for perpetual injunction challenging the orders cancelling the allotment order directing R C & E O to get the possession restored and release the accommodation in favour of landlord The trial court decreed the suit. It repelled the contention that the suit was barred by S 16 of Act III of 1947 as the order cancelling allotment was without jurisdiction On merits it was held that allotment order was not vitiated by fraud, collusion and concealment or misrepresentation In appeal the finding on jurisdiction was not set aside In fact it does not appear to have been raised even The appellate Court held that on the date when allotment order was made i e 18th March, 1965 vacancy of the shop did exist, but he held the allotment order to be vitiated by fraud, collusion, concealment, misrepresentation etc It did not find any merit in the argument of the appellant that no specific allegation in respect of fraud was raised in the written statement. It was held that it was not necessary to give details or particulars of fraud although a perusal of the pleadings indicated it beyond doubt that it was 'littered with' allegations of fraud The appellate Court found that 'in isolation' every circumstance or fact may look innocent but their cumulative effect may be sufficient to draw inference of collusion etc The appellate Court based the finding on fraud etc on incorrect address of the landlord in the application for allotment moved by the appellant, absence of intimation of vacancy on 16-1-1965, visiting of R.C. & E.O Office by appellant several times before allotment, taking delivery of allotment order by hand, 'ugly haste' in enquiry and report recommending allotment in favour of appellant and Saxon's willingness to vacate premises in favour of appellant only

4. Before considering whether the finding of appellate court that allotment order was obtained by fraud, collusion concealment or mis-representation, certain legal objections raised by learned counsel for respondent to the maintainability of the suit and jurisdiction may be disposed of Learned counsel urged that S 16 of U P Act III of 1947 expressly barred the jurisdiction of Civil Court in respect of any order passed under the Act According to him the order cancelling the allotment or releasing the premises in favour of respondent was an order made under the Act therefore, the suit filed in Civil Court was not maintainable S 16 read as under

"No order made under this Act by the State Government or the District Magistrate shall be called in any Court"

It, therefore, expressly barred jurisdiction of Civil Court in respect of any order passed under the Act The question however, is whether the orders which are under challenge can be said to be orders passed under the Act and even if they were, can they be considered to be such which could be considered beyond the pale of Civil Court's jurisdiction Controversy on exclusion of Civil Court's jurisdiction arose before the Supreme Court in Dhulia Bhai v State of M P (AIR 1969 S C 78) At page 89, the Hon'ble Court after reviewing diverse view called certain principles One of the principles laid down was

"Where the statute gives a finality to the orders of the special tribunals the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure"

From this it is clear that the jurisdiction or otherwise of Civil Court depends on whether the order under challenge was in conformity with fundamental principles of judicial procedure. It is admitted that order passed by District Magistrate cancelling allotment was ex parte This was despite report of R C & E.O that appellant had entered into possession and the order should be passed after hearing him Prima facie the order of District Magistrate was contrary to the principles of natural justice, therefore, the order was within the mischief of principles laid down by Hon'ble Court Whether Civil Court has jurisdiction to declare such an order nullity in collateral proceedings shall be considered later. But it certainly did not oust the jurisdiction of Civil Court Presumably, it was for this reason that the finding of the trial Court was not challenged in appeal

5. The next legal objection was that on facts disclosed in plaint no decree of permanent injunction could be granted Learned counsel maintained that the appellant should have filed a suit for declaration According to him the appellant could not be permitted to adopt the subterfuge of seeking declaration in the garb of injunction The controversy, however has to be decided on pith and substance of the allegations made in the plaint (See Mohd Usman Khan v Mohd. Ghani, AIR 1980 All 89) The primary relief sought is of injunction Mere declaration would have been of no consequence On the allegations relief of declaration is ancillary only

6. It was then urged that under S 38 of the Specific Relief Act there must be a breach of obligation which had been defined in sub-cl (a) of S 2 of the Act as including 'every duty enforceable by law' Learned counsel urged that as the suit did not contain any pleading on sub-secs (2) and (3) of S 38 the suit was liable to be dismissed The argument does not appear to have any substance The appellant has filed the suit and based his claim, on allotment order which was cancelled ex parte by the D M. If order allotting premises in favour of appellant is found to be valid then its cancellation, release of premises etc were acts without authority and there arose an obligation in favour of appellant which he was entitled to enforce by suit for permanent injunction It would also be covered under sub-cl (3) of the S 38 as the respondent invaded or threatened to invade the appellant's right to, or enjoyment of, property

7. It was also urged that appellant was prevented from seeking assistance of Court on principle of part delicto He urged that appellant was in possession in pursuance of an order which was vitiated by fraud and collusion, therefore, he was not entitled to approach a Court of law to get his grievance redressed According to learned counsel, fraud, collusion, misrepresentation etc are various shades of the same thing, namely whether consent obtained was free and if it is found in negative then the order should be taken to be vitiated. And the party who is responsible for it should not be permitted to enforce the illegal act by way of suit. The argument proceeds on assumption that appellant was guilty of fraud. For applicability of principle of part delicto fraudulent act must arise out of illegal act of both and then the question arises whether the party who is guilty of fraud fails because he comes to the Court first Even where such situation arises it was held in Immani Appa Rao v G Rama Linga Murthi, (AIR 1962 S C 370), "therefore we are inclined to hold that the paramount consideration of public interest requires that the plea of fraud should be allowed to be raised and tried and if it is upheld, the estate should be allowed to remain where it rests" The appellant is not enforcing any cause of action which arose out of fraudulent plan to which he and respondent or D M who passed the order allotting or cancelling that order were party or to quote the words of Immani Appa Rao's case (Supra) were confederates in fraud

8. It was also urged that the order of D M passed in exercise of powers conferred under the Act could be challenged under that Act only and not by way of civil suit According to learned counsel if the order was bad it could not be set aside as it was utmost an error in exercise of jurisdiction and not inherent lack of jurisdiction For highlighting the difference in the two the learned counsel placed reliance on well known dictum of Sir Ashutosh Mukerji in H Nath Roy v R C Barna Sarana (AIR 1921 Cal 34 (36)) (F B) Reliance was placed on Gokaraju Rangaraju v State of A P (AIR 1981 S C 1473); Ramji Bas v Trilok Chand, (AIR 1971 S C 2361), Anismmic Ltd v. Foreign Compensation Commissioner (1969) 1 All E R 208) and Anismmic Ltd v F C. Commissioner ((1967) 3 All E R 986) The former was placed in extenso and attention was drawn to paragraphs G and J at page 225 G at 228, F and G at page 229, E at 232 and F at 233 Reliance was placed on Judicial Review of Administrative Act by De Smith IVth Edition p 110 and Wades Administrative Law 14th Edition (ivth?) p 28 The learned counsel urged that violation of principle of natural justice and error apparent on the face of records may furnish material for issuing a writ in exercise of extraordinary jurisdiction under Art 226 of the Constitution of India but they cannot be ground on which a Civil Court can declare an order to be invalid or grant an injunction on it

9. An order passed under an Act may be challenged in appellate or revisional jurisdiction for testing legality, correctness or propriety of it But an order without jurisdiction or an order based on erroneous assumption of facts as a consequence of which jurisdiction is, although it is lacking can be challenged by way of suit In (1969) 1

All E R 208 (233) it was observed by Lord Pearce, J.

"Lack of jurisdiction may arise in various ways There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry Or the tribunal may at the end make an order that it has no jurisdiction to make Or in the intervening stage while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice, or it may ask itself the wrong questions, or it may take into account matters which it was not directed to take into account Thereby it would step outside its jurisdiction"

The order of the D.M examined on this touchstone was without jurisdiction It was against fair play and natural justice to pass an order against a person who entered into possession on assumption that the order was obtained by fraud without affording any opportunity to appellant to prove otherwise The threatened invasion on strength of such an order could always be challenged. It was not an 'error in exercise of jurisdiction' as was in Ramp Das's case (AIR 1971 S C 2361) (supra) The argument therefore, that the order cancelling allotment could not be challenged in collateral proceedings cannot be accepted, as an order passed in violation of principles of natural justice is an order passed without jurisdiction Such an order is liable to challenge both in writ jurisdiction and before Civil Courts

10. Having cleared various legal obstacles which the learned counsel attempted to create to avoid any examination of the finding recorded by appellate court on question of fraud, collusion etc it may now be seen if the finding that allotment order was obtained by fraud can be said to be well founded and can be sustained It cannot be disputed as has been found by appellate court that fraud has to be inferred from the circumstances of the case and proved facts But fraud, mis-representation, collusion and mistake are different concepts in law. They have been defined in Ss 17 to 20 of the Contract Act They do not overlap except that their effect may be common. Presence of any one of them may render the agreement void. When applied to judicial proceedings it may make the order unenforceable or liable to be ignored. But uniformity in result does not render them one and the same Each of them arises in different set of circumstances and in order to record a finding that any one or all of them is established there has to be different facts The circumstances on which the finding has been recorded have been pointed out above They may now be examined one by one to find out if any of them individually or collectively could result in the finding that the order was vitiated by fraud, collusion, mis-representation etc. It is surprising that appellate authority has recorded what may be termed, as cumulative finding in this regard That it has committed an error of law in recording such finding cannot admit of any doubt

11. Coming to the various circumstances from which inference of fraud and collusion have been raised the mention or omission to mention the name of landlord in the application for allotment could not lead to the conclusion that it was fraudulent or collusive This is on the assumption that address was not given at the time of filing of application. Although appellant's case has been that in the application as prepared the address was not mentioned but this was done after ascertaining prior to filing of application In any case assuming the finding of appellate Court to be correct how did it result in any mis-representation because of which the D M. allotted the premises to the appellant? At least the name and address was there when D M passed the order There is no finding that it was interpolated after the order was passed

12. It was then found that appellant had visited the Rent Control Office several times before the allotment He took hand delivery of the allotment order It is thus evident that he had approaches in Rent Control Office' These observations belie complete ignorance of working in the offices Any person anxious to get a house or shop by allotment in big cities has not only to visit these offices a number of times but every day, may be morning or evening Moreover, was there anything inherently wrong in it? Did the appellant act fraudulently in visiting the R C & E.O's office a number of times? Was taking delivery of allotment order by hand contrary to any rule or in violation of any official or moral principle, could these things establish 'approaches' of appellant in the office of Rent Control Officer? Going in the office regularly for any work may make a person familiar with persons in the office but to infer from it that the person has approaches or the appellant in such circumstances obtained order by means which were otherwise is a little too much There appears to be no basis for it

13. The appellate court further saw ugly haste' in the enquiry made by the Inspector Why because movement was fast Assuming that enquiry was made as appellant was interested then does it by itself render the enquiry fraudulent or collusive? Who would not be interested in getting the shop allotted situated at Mall Road, Kanpur? How the anxiety of the appellant to get the shop allotted and to request the Inspector to submit report at the earliest could result in any collusion or mis-representation? The basis of allotment order is vacancy or likely vacancy of a premises If the shop was likely to fall vacant and the appellant approached the Inspector to submit an early report how could inference be drawn that the movement of Inspector was for reasons otherwise Could the enquiry made on 18-1-1965 i e two days after filing of application stand on a different footing than if the enquiry would have been made, say after 15 days? In fact after coming to know of likely vacancy the Inspector should normally have moved on his own at the earliest but in deteriorating efficiency in our offices if the Inspector moves only because the request is made by a person interested then it did not render the enquiry in 'ugly haste' or in 'hateful hurry' For enquiring likely vacancy the Inspector was not required to contact the landlord If he would have, probably that would have been better but his failure to do so did not establish that the Inspector was in collusion with the appellant even if his movement was generated by appellant Letting or non-letting of an accommodation under the Act is the jurisdiction of District Magistrate Landlord comes in the picture only if he occupies a portion of the premises

Failure on the part of Inspector to contact the landlord, therefore, could not give rise to collusion between the Inspector and appellant nor could it establish that there was a pact between appellant and Saxon, under which Saxon agreed to oblige to vacate it in favour of appellant Once Sexon intimated that the shop was likely to fall vacant the jurisdiction to allot arose He might have refused to oblige anyone and to vacate the shop only if it was allotted to the appellant. May be for certain consideration or as alleged by respondent for a handsome 'pugree' which has become an order of the day in commercial towns where there is dearth of shops in good locality But this could not result in obtaining collusive order from the D M. Authorities have not acted on the report of the Inspector that Saxon was willing to vacate it in favour of appellant only · Then the appellate court found that the local Sales Manager of Air India did not apply for allotment of the premises as Saxon was willing to vacate it only in favour of appellant This was also taken as a circumstance to conclude that appellant was in collusion with Saxon As pointed out earlier whatever relation the appellant might have developed with Saxon this could not render the order of D M collusive or fraudulent The appellate Court further found that publication in newspaper was wholly unsatisfactory May be so but how the appellant could be responsible for it? In any case there was no procedure provided under the Act or Rules for notifying the vacancy through papers It is apparent that the D M did not act in ignorance of any fact There is no finding that facts on which he passed the order were untrue Rather, the fact of vacancy was found to be true The D M was all the time aware that no one was willing to make an application for the premises and that A D M. had not only expressed his apprehension but suggested for allotment to Air India and then publication in newspapers Then D W 5 admitted that on Mall Road there was common talk, 'Charcha' regarding vacancy of the shop in dispute It has not been found that appellant suggested any fact to the District Magistrate which he believed not to be true Nor any material has been brought on record to prove concealment of a fact of which appellant had knowledge or belief On the material on record no finding of fraud could be recorded Similarly it is not a case where it could be held that appellant misrepresented by asserting any fact which was not warranted by the information which he had Nor could it be held that the report of the Inspector, which was the basis of vacancy and the allotment, was based on information which were incorrect As pointed out above the fact of vacancy has been found to be correct not only by trial Court but by appellate court as well After intimating vacancy the Inspector had no control over what happened thereafter Even fact of notifying vacancy is not disputed but its effect has been attempted to be minimised because of unsatisfactory publication in newspaper

Then the basic fact that large number of applicants were not coming forward to apply for allotment was known to District Magistrate He did not act on information which was concealed from him In a case where the entire fact is known to the authority and the order is passed on it, it is difficult to say that such an order can be called to be fraudulent or collusive The finding of

appellate court that the order was obtained by fraudulent means, collusiveness or misrepresentation or concealment cannot be upheld

14. It may now be considered if order dated 9th April, 1965 cancelling allotment order in favour of appellant can be upheld Admittedly it was ex parte and without affording any opportunity to appellant to show that allotment order passed on 26th March, was in accordance with law While considering legal objection raised by learned counsel for respondent it has been seen that such an order suffers from error of jurisdiction It was, however, urged by the learned counsel for respondent that the order being in exercise of administrative power it could not be held to be invalid or beyond jurisdiction only because it was passed without issuing any notice to appellant Reliance was placed on R S Jog v R C & E O (1964 ALJ (F B) 2012(*)) and Prabhu Mal v State of U P (1975 All L R 659) and it was urged that the right of landlord to get the allotment order cancelled or get the premises released is not affected by allotment order and even allottee's entering into possession does not take away this power The principle was extended further and it was urged that if observations in these decisions are correct then the appellant could not claim right of hearing in cancellation proceedings nor could he challenge it on the ground that it was ex parte. The only decision which touches the controversy is Prabhu Mals' case Even in this it was laid down that allottee should have entered in possession surreptitiously. In A R Ansari v. S Mahmmud, (1971 All L J 1042) it was held that an authority passing an allotment order has inherent jurisdiction to recall it but that order must be passed after giving notice and hearing the allottee An order passed in violation of this principle is without jurisdiction In C M N. No 5213, Gokul Chand Sarraf v. R C. & E O, decided on 1-3-1966 an allotment order was cancelled ex parte on representation of landlord that premises had already been released in his favour and the order was obtained by misrepresentation of fact It was held by Hon'ble R S Pathak, J as he then was, 'it was necessary in the interest of justice and fair play that the petitioner should have been heard before the allotment order was cancelled'

15. Even on merits the order of D M [illegible] maintained From 25-1-1965 when [illegible] brought to the notice of D M that no one else has applied for the premises and premises be allotted to Air India, till 18-3-1965 when the allotment order was made every proceedings took place under the direction of D M He did not smell any rat in it But suddenly on 30-3-1965 when a complaint was received from Ayodhya Prasad Tewari, everything became clear to him He not only called for a report, and stayed the proceedings but went to the length of making enquiry whether the inspector who made the enquiries was permanent or temporary' and then probably terminated his services, as well' He did not have the patience to wait for the report of R.C & E O on a complaint which according to D W. 6 was handed over in office but also formed an opinion that allotment order was obtained, with the connivance of the previous tenant after paying heavy premium From where did he get this information? How did this dawn upon him because Karuna Shanker Tewari D W 6 son of Aydhoya Prasad Tewari admitted that he or his father never met the D.M. He also stated that he was told by his father that the complaint was handed over by him in the office of D.M and not personally to him What could be other possible source from which the information percolated to D.M about heavy premium and connivance? At least there is nothing on record In fact from his order it appears he had made up his mind on 30-3-1965 the moment the complaint was received about the action he proposed to take The principle of fair play and natural justice was thrown to the winds To quote his own words, "I have also made confidential enquiries into the matters and since these are not judicial proceedings I am entitled to utilise the information so gathered in dealing with this matter administratively ' The entire allotment record was before Courts below and certified copies of each document were filed but there does not appear to be any whisper or note or anything to indicate what confidential enquiry was made by D.M. If he was drawing on his personal knowledge even that should have been placed on record. There is nothing to indicate what was that confidential enquiry which made him adopt such an extraordinary procedure of passing an order against a person who had entered into possession without hearing him and ignoring the report of R C. & E.O However high an authority may be and whatsoever the nature of power he may exercise, administrative, judicial or quasi-judicial he cannot act arbitrarily. That which is contrary to the principles of natural justice and basic requirement of hearing a person against whom an order is passed is

arbitrary. It cannot be countenanced in a court of law. Even where orders are required to be passed on subjective consideration it has to be based on material on record (See Barium Chemical Ltd. v Company Law Board (AIR 1967 S C 295)). Administrative exercise of power is not an umbrella for arbitrariness.

16. An attempt was made to argue that the D M was a relation of appellant and the unusual manner in which the order was cancelled was due to this reason. To support this, certified copy of respondents' statement in another suit paper No. (Ext A-33) was filed. Respondent also filed another certified copy of the same statement. There is conflict in the two. But it is not necessary to decide this controversy as the order of D M has not been found to be in accordance with law irrespective of the consideration whether he was related to respondent or not. It may however, be observed that D W 6 did not act fairly in casting aspersion on A D M in his statement only because he happened to be of same caste as appellant because from what has been narrated above it cannot be disputed that A D M. always placed the record straight before D.M.

17. Learned counsel for respondent urged that there was no bar in releasing an accommodation even if allottee was in possession. Reliance was placed on Masood Ahmad v R.C & E.O. (AIR 1972 S C 631), Sajjan Singh v Rameshwar Sahai (AIR 1972 All 354) and Mangal Sen v. R C & E.O (1972 All L J 587). The jurisdiction to release even if allottee is in possession cannot and has not been disputed. But it could not be done without intimation to allottee. He acquires right to remain in possession under the Act. That could be taken away in accordance with law and not behind his back in ex parte proceedings.

18. For the reasons stated above the decree and order passed by the appellate Court setting aside the order and decree of trial Court and dismissing the suit is set aside. The plaintiff's suit shall now stand decreed. He shall be entitled to costs.

Appeal allowed.

1981 ALL. L J. 1325

K G AGRAWAL AND V K KHANNA, JJ

Committee of Management of Sarvodaya Inter College and another, Petitioners v Deputy Director of Education, 5th Region, Varanasi and others, Respondents

Civil Misc Writ Petn No 7397 of 1981, D/- 24-9-1981

(A) U. P. Intermediate Education Act (2 of 1921), S. 16-A (7) (as inserted by U. P. Act 1 of 1981) — Scope and applicability — District Inspector of Schools deciding dispute as regards Manager of a College before insertion of S. 16-A (7) — Dispute cannot be raised before Deputy Director of Education after insertion of S. 16-A (7).

Where the District Inspector of Schools had decided, before the insertion of S 16A (7) as to who was the Manager of the College, the matter could not be reopened before the Deputy Director of Education after insertion of S 16-A (7). (Para 19)

The matters which had been adjudicated upon by the District Inspector of Schools before the insertion of S 16-A (7) could not be reopened and brought before the Deputy Director of Education on the pretext of a new forum having been provided for the said purpose. By S 16-A (7), the Deputy Director of Education was conferred the power to decide the dispute. This only brings about the change of forum. The Deputy Director of Education is not an appellate authority over the District Inspector of Schools in respect of the cases earlier decided by the District Inspector of Schools. The power of the Deputy Director of Education is the same as used to be exercised by the District Inspector of Schools. Section 16-A (7) is not a substitute for the Civil Court. (Para 19)

The District Inspector of Schools had jurisdiction to decide the question as to who was entitled to function as the Manager. He had the jurisdiction to decide the same rightly or wrongly. Merely because he is an authority inferior to the Deputy Director of Education, that would not entitle the parties before him to ignore the decision given against either. (Para 20)

(B) Civil P. C. (5 of 1908), S. 11 — Res judicata — Plea of, can be raised on basis of decisions of administrative Courts. The plea of res judicata on general principles can be

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successfully taken not only in respect of courts of exclusive jurisdiction, like the revenue courts and land acquisition courts, but administrative courts as well. AIR 1953 SC 33 Rel. on. **(Para 20)**

Cases Referred :	Chronological	Paras
(1980) Civil Appeal No. 206 of 1980 D/- 28-1-1980 (S. C.)		18
AIR 1978 S. C. 1283	1978 Lab. I. C. 1111	1978
S. C. C. (Lab.) 438		22
AIR 1953 S. C. 33	1953 S. C. A. 22	20

A. K. Sharma, for Petitioners. Standing Counsel and R. A. Yadav, for Respondents.

K. C. AGRAWAL, J.:— This writ petition was filed on 22-5-1981 seeking a Writ of Prohibition directing the Deputy Director of Education, Vth Region, Varanasi not to proceed with the notice dated May 5, 1981 and to quash the same.

2. The brief facts are these. There is an Intermediate College at Adhawar in district Mirzapur which is known as Sarvodaya Intermediate College, Adhawar. This institution has been recognised under the provisions of the U. P. Intermediate Education Act and is run in accordance with the Scheme of Administration framed under S. 16-A of the U. P. Intermediate Education Act (hereinafter referred to as 'the Act'). Clause 7 of the aforesaid Scheme lays down the term of office-bearers of the Committee of Management as three years.

3. According to the petitioners, the last election of the Committee of Management was held on June 3, 1979, in which Ram Raksha Singh was elected as President and Kamal Singh as Manager. Immediately after the elections were over, an intimation was sent to the District Inspector of Schools along with the papers for approval and attestation of the signatures of Kamal Singh, the Manager. Dr. Jawahar Singh, Respondent 3, made a representation to the District Inspector of Schools challenging that the petitioner 2 Kamal Singh had not been elected on the aforesaid date as the Manager, and that he was not entitled to the attestation of his signatures. On July 9, 1979, the District Inspector of Schools attested the signatures of Kamal Singh recognising him as the Manager.

4. Aggrieved by the attestation, Dr. Jawahar Singh filed suit No. 210 of 1979 and also applied for injunction restraining the defendant (petitioner 2 Kamal Singh) from managing the Sarvodaya Intermediate College. An interim injunction was granted in favour of Respondent 3 but, on appeal being taken by Kamal Singh, the then District Judge allowed the appeal and set aside the injunction issued against the petitioners on 21st July, 1979.

5. Having lost the battle in the suit, Jawahar Singh successfully persuaded the Deputy Director of Education to pass an order on Oct. 30, 1979, for appointment of an authorised controller under S. 6 (3) of U. P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971. On this date, the petitioners were called upon to show cause which was submitted, but still on 1-4-1980 no authorised controller was appointed under S. 6 (3) of the said Act. Against the said order, an appeal was filed by the petitioners to the Director of Education under S. 7 along with an application for stay. Stay order was granted, but against the granting of stay a man of the camp of Dr. Jawahar Singh filed Writ Petition No. 4723 of 1980 challenging the order of the Director of Education. This Writ was, however, subsequently dismissed on 24-7-1980.

6. On 8-8-1980, the Director of Education directed Respondents 1 and 2 to remove some of the defects in the management of the College, and further called upon them to intimate to the petitioners about the deficiency which was required to be made good by the petitioners. Respondents 1 and 2 did not act in accordance with the directions of the Director of Education and, in the meantime, a writ petition was filed on 8-12-1980 in which a stay order was also obtained. On 15-1-1981, the appeal preferred under S. 7 by petitioner 2 was allowed and the authorised controller was directed to hand over charge to petitioner 2. This information was sent by the Director of Education to the Deputy Director of Education and the District Inspector of Schools on 15-1-1981. In pursuance of the said order, the charge was given to petitioner 2 on 24-1-1981.

7. However, before the order dated 15-1-1981 had been passed, Respondent 3 started claiming the right of management on the basis of fresh elections alleged to have been held on 3-3-1980. On that basis, Respondent 3 also applied to the District Inspector of Schools for approval of the said elections. On 15-12-1980, the District Inspector of School passed an order on the representation of Dr. Jawahar Singh, respondent 3, rejecting

the same holding that as the petitioner 2 Kamal Singh had already been recognised as the Manager, it was not open to him to recognise respondent 3 on the basis of the election alleged to have been held on 3-3-1980 The District Inspector of Schools opined that respondent 3 could approach the court of law for the remedy A copy of this order has been filed as Annexure '2' to the writ petition

8. Against the aforesaid order dated 15-12-1980, refusing to recognise respondent 3, and the order of the Director of Education dated 15-1-1981 whereby the Director of Education had passed the order quashing the appointment of the authorised controller, Dr. Jawahar Singh, respondent 3, filed two writ petitions 1813 of 1981 and 1858 of 1981 These petitions were dismissed by a Bench on 12th March, 1981, on the ground that since respondent 3 had concealed or suppressed the fact of having filed a civil suit, the said respondent was not entitled to any relief.

9. After the charge was taken over by petitioner 2, on 24-1-1981, respondent 3 withdrew his suit 210 of 1979 In the meantime, on 5-5-1981, upon the insertion of S 16A(7) in the Act, respondent 3 again approached the Deputy Director of Education Vth Region, Varanasi, who issued notice on the same, calling upon petitioner 2 to appear before him for finding as to whether new elections were held on 3-3-1980 in which Dr Jawahar Singh, respondent 3, was elected as the Manager The petitioner, thereafter, filed the present writ petition seeking prohibition directing the Deputy Director of Education not to proceed in pursuance of the notice issued under S. 16A(7) on 5-5-1981

10. On 22-5-1981, the writ was listed before the Bench of Hon. M. N. Shukla, J., and Hon. N. N. Mittal, J. The Bench directed the writ to be listed for orders after a month However, the Court passed the following order on the application for stay

"Further proceedings before the Deputy Director of Education, Vth Region, Varanasi, in this case shall remain stayed but the Deputy Director of Education is directed to decide within a month of the communication of this order the preliminary question as to whether really any dispute attracting his jurisdiction under S. 16A of U. P. Act No. I of 1981 has arisen or not on the facts of the case"

11. In pursuance of the aforesaid order of the High Court the preliminary question was decided by the Deputy Director of Education on 23-6-1981 By this order, the Deputy Director of Education held that a dispute existed between the parties and he had jurisdiction to decide the same under S 16A(7)

12. Subsequently, the writ petition was admitted on 12-8-1981 and counter and rejoinder affidavits were exchanged The petitioners thereafter filed an application for amendment of the writ petition seeking to challenge the order of the Deputy Director of Education dated 23-6-1981 on the ground that the said order was illegal and without jurisdiction The amendment application was not opposed and was thus allowed by us at the time of hearing of the writ petition

13. In the counter-affidavit filed on behalf of respondent 3, the allegations made mainly were that no election was held in 1979 in which petitioner 2 alleged himself to have been elected as the Manager Respondent 3 claims that the last general elections were held on Mar 3, 1980, whereas the earlier election was held in 1978 Respondent 3 asserted that he remained the Manager throughout this period The allegation of petitioner 2 that respondent 3 had made a representation to the District Inspector of Schools about the recognition of himself as the Manager on the basis of the election alleged to have been held on 3-3-1980, had not been accepted Respondent 3, however, claims that the finding arrived at by the District Inspector of Schools in the order dated 15-12-80 was erroneous According to him, the order was not, in fact, an order adjudicating upon the dispute with respect to the management of the College or validity of the two elections, viz, the one alleged by petitioner 2 to have been held on 3-6-79 and the other alleged by respondent 3 to have been held on 3-3-1980. Respondent 3 claims that a dispute with regard to management still exists and needs decision under S. 16A(7)

14. Sri A K Sharma, learned counsel appearing for the petitioners, urged that the validity of the elections set up by the petitioners held on 3-6-1979 had been upheld by the District Inspector of Schools on two occasions and there was no dispute left about its validity requiring any further decision under S 16A(7) In that connection, counsel also urged that as the election of 3-6-1979 was valid and it was found by the District Inspector of Schools while approving the same that petitioner 2 was elected as the

Manager, respondent 2 could not either hold any election on 3-3-1980, nor it had actually taken place

15. For the purpose of recognition and approval of the election held on 3-6-1979, the petitioner's counsel referred to the two orders of the District Inspector of Schools, one which was passed on 9-7-1979 and the other which had been made on 15-12-1980 The earlier order had been passed after affording opportunity to both the parties By that order, the District Inspector of Schools had found that Kamal Singh, petitioner 2, had been elected as the Manager on 3-6-1979 He had further directed that respondent 3 could seek his relief by invoking the jurisdiction of the civil courts Respondent 3, in fact, went to the civil court and applied for an interim stay order, but on failing to get the same in the appeal, the said respondent withdrew the same From these facts, it is clear that in between petitioner 2 and respondent 3, the dispute relating to the election held on 3-6-1979 had been decided by the District Inspector of Schools This question again had been attempted to be raised by asserting that respondent 3 had been elected on 3-3-1980 by means of a representation, which was rejected on 15-12-1980

16. Counsel for respondent 3 urged that whereas the earlier order passed by the District Inspector of Schools on 9-7-1979 was in respect of the election set up by petitioner 2, by the said order the validity of the election pleaded by respondent 3 held on 3-3-1980 could not be decided This election raised a dispute which had not been the subject matter of the earlier decision. It is true that on 9-7-1979, the validity of the election dated 3-3-1980 could not be gone into as the election set up by respondent 3 is alleged to have taken place on 3-3-1980 but the fact remains that respondent 3 could not hold the election on 3-3-1980, when the elections had taken place on 3-6-1979 The claim of respondent 3 was that after 1975 the election in which he was elected as the Manager was held on 3-3-1980, and no election in between the two dates were held. This would show that the decision about the holding of the election by respondent 3 could not be decided on its own without holding that the election of 3-6-1979 had not taken place. The two matters were interlinked. About the first election, there was a finding of the District Inspector of Schools given on 9-7-1979 This very finding was reiterated by him on 15-12-1980 In this view of the matter, respondent 3 was not right in saying that the election held on 3-3-1980 had nothing to do with the earlier election dated 3-6-1979 and was required to be independently enquired into In fact, after the earlier order passed on 9-9-1979 by the District Inspector of Schools, a suit was also filed but was subsequently withdrawn. The suit would have decided the controversy about the validity of the elections pleaded by petitioner 2 Respondent 3 having withdrawn the suit has to suffer the consequences of the same

17. Assuming that the election held on 3-3-1980 was an independent transaction, which was required to be decided without being mixed up with that of the election of 3-6-1979, by the rejection of the prayer made by respondent 3 for his recognition on the basis of that election by the District Inspector of Schools on 15-12-1980, the dispute in regard to the same should be deemed to have been adjudicated upon in so far as the District Inspector of Schools was concerned

18. In Jaswant Singh v District Inspector of Schools, (Civil Appeal No. 206 of 1980 decided on 28-1-1980), the Supreme Court had an occasion to consider the desirability of investigation of such a question by the District Inspector of Schools It held

"The District Inspector of Schools could not have arrogated to himself the jurisdiction of the civil court, and that such a matter could be appropriately gone into only by civil courts"

19. The question that now arises is about the validity of the notice issued by the District Inspector of Schools on 5-5-1981 and about the correctness of the order passed on the preliminary question on 23-6-1981 To us, it appears that the forum now provided by S 16A(7) is only a substitute for that what was being decided by the District Inspector of Schools under S. 5 of the Payment of Wages Act. Our High Court has held in several cases that for the purposes of enabling himself to pay the salaries to the teachers on the bills submitted by a Manager it was necessary for the District Inspector of Schools to recognise him and to decide the dispute relating to his right without challenge Such a decision was, of course, summary in nature and was subject to the decision of a civil court. As there were serious doubts about the desirability of the District Inspector of Schools being conferred such a power, by U P Act I of 1981 a new forum was created. By S. 16A(7), the Deputy Director of Education was conferred the power to decide the dispute. This only brings about the change

of forum. The Deputy Director of Education is not an appellate authority over the District Inspector of Schools in respect of the cases earlier decided by the District Inspector of Schools. The power of the Deputy Director of Education is the same as used to be exercised by the District Inspector of Schools. Section 16A(7) is not a substitute for the civil court. The decision given by the Deputy Director of Education would also be of a summary nature, subject to the decision of the civil court. In our opinion, therefore, the matters which had been adjudicated upon by the District Inspector of Schools before the insertion of S. 16A(7) could not be reopened and brought before the Deputy Director of Education on the pretext of a new forum having been provided for the said purpose.

20. In the instant case, the District Inspector of Schools had on two occasions found that petitioner 2 was the Manager who was entitled to function and had directed respondent 3 to file a civil suit for vindication of his rights. To direct a party to file a civil suit in a matter like the present is also a decision which will be final between the parties and cannot be raked up again and again. The District Indpector of Schools had jurisdiction to decide the question as to who was entitled to function as the Manager. He had the jurisdiction to decide the same rightly or wrongly. Merely because he is an authority inferior to the Deputy Director of Education, that would not entitle the parties before him to ignore the decision given against (either). The plea of res judicata on general principles can be successfully taken not only in respect of courts of exclusive jurisdiction, like the revenue courts and land acquisition courts, but administrative courts as well (See Smt. Raj Lakshmi Dasi v. Banamali Sen, AIR 1953 S.C. 33).

21. The principle of res judicata is concealed in larger public interest which requires that all matters must, sooner than later, come to an end. This principle applies to judicial as well as quasi judicial proceedings. To permit a party to raise the same question over and again would not be in public interest. The District Inspector of Schools had rightly or wrongly recognised petitioner 2 as the Manager on the basis of the election held on 3-6-1979. That order of the District Inspector of Schools was subject to the decision of a civil court. Respondent 3 could not get over the said order by simply pleading the election of a later date. However, as already stated above, even with regard to this election, there is an implied, if not express, finding by the District Inspector of Schools given on 15-12-1980. It is not correct to say that directing a party to file a civil suit in a matter brought before a court does not amount to a decision so as to debar the same party from bringing another litigation before that very court or authority. It is one thing to say that such a decision being not on merits would not operate as res judicata, it will be another that a second application can still be filed and will be maintainable.

22. In Workmen of Cochin Port Trust v. Board of Trustees of the Cochin Port Trust (AIR 1978 S.C. 1283), the Supreme Court had an occasion to consider this aspect of the matter while dealing with the maintainability of a second writ petition. It observed (at p. 1288):

"If the writ petition is dismissed by a speaking order, either at the threshold or after contest, say, only on the ground of laches or the availability of an alternative remedy, then another remedy open in law either by way of suit or any other proceeding obviously will not be barred on the principle of res judicata. Of course, a second writ on the same cause of action either filed in the same High Court or in another will not be maintainable because the dismissal of one petition will operate as a bar in the entertainment of another writ petition."

23. The above proposition of law applies on all fours to the facts of the present case. When an earlier application for the same matter had been decided, the second application under S. 16A(7) was not maintainable.

24. At this place, it may also be worthwhile mentioning that against the order dated 15-12-1980, respondent 3 had filed a writ petition in this Court which was dismissed on 12-3-1981. It is in respect of this very matter that another attempt has been made by respondent 3 to raise (the dispute) by filing an application under S. 16A(7). We have already held above that there is no difference between the two proceedings. The only difference is that of the officer deciding it which, to our mind, is immaterial.

25. Counsel for respondent 3, however, pointed out that on a review application being filed, the order dismissing the writ petition was modified and respondent 3 was permitted

to raise this question afresh Hence, the application filed before the Deputy Director of Education could not be rejected on that ground The argument is devoid of merit While rejecting the review application on 19-5-1981, the Court observed

"If the petitioners are aggrieved by the District Inspector of Schools, they should get their right declared by the civil courts No relief can be granted in this jurisdiction "

26. These observations made by the learned Judges dismissing the review application does not improve the position of respondent 3 By these observations, respondent 3 had only been permitted to file the civil suit if the same was maintainable These observations in no way can be taken to justify the filing of the application under S 16A(7) before the Deputy Director of Education In fact, the Deputy Director of Education also fell into a fallacy when he relied upon the said order while deciding the preliminary question on 23-6-1980 To our mind, there was no dispute which was left undecided and could be raised under S 16A(7) The dispute can only be decided by a civil court. Hence, the Deputy Director of Education had neither any jurisdiction to issue the notice nor was right in holding that a dispute existed between the parties

27. Learned counsel for respondent 3 cited before us some authorities for the proposition that against the show cause notice no Writ of prohibition could be issued Since in the instant case, the decision had been given on merits, these authorities do not apply As observed by Smith in his Book "Judicial Review of Administrative Action", Third Edition, at page 337, "The orders of certiorari and prohibition have so many characteristics in common that they can well be discussed together Prohibition will not lie unless something remains to be done that a court can prohibit, certiorari will not lie unless something has been done that a court can quash."

28. In the instant case, we are required to judge the validity of the order dated 23-6-1981. Since we find that the said order is erroneous and wrong on the face of it, we quash the same The necessary result would be that the Deputy Director of Education would have no jurisdiction to proceed with the matter

29. In the result, the writ petition succeeds and is allowed The order of the Deputy Director of Education dated 23-6-1981 is quashed, and the Deputy Director of Education is directed not to proceed with the dispute in question We make no order as to costs

Petition allowed

1981 ALL. L. J. 1330

V. K. MEHROTRA, J

Hira Teli, Appellant v Shripati Rai and others, Respondents

Second Appeal No 956 of 1974, D/- 20-8-1981 *

(A) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 117 and 128 — U. P. Z. A. and L. R. Rules, Rr. 115-L, Second Proviso and 115-M — Allotment of abadi site — Allottee must be residing in the circle of Gaon Sabha.

Except in cases which were covered by the first and the third provisos, namely, where the applicants were seeking to get the land for construction of a building for a charitable purpose or for setting up a cottage industry or where the Collector required the land for settling those who had lost their houses on account of floods, settlement had to be confined to applicants who were residents of the circle of the Gram Samaj (Para 13)

A perusal of various rules would indicate that allotment for purposes of construction of buildings was to be made by the Gram Samaj in the order of preference contained in Rule 115-L by the public auction held for that purpose except in cases where the necessity for auction had been obviated by the rule itself The first proviso envisaged that where the allotment was sought for construction of a building for a charitable purpose or for setting up of a cottage industry, the allotment must be made by the Land Management Committee subject to the confirmation by the Assistant Collector, in charge of the Sub-Division without recourse to the procedure of auction. Likewise, under the third proviso, where abadi site was required for settling those who had lost houses on account of floods, allotment was to be made according to the direction of the Collector. The opening part of Rule 115-M provides that subject to the provisions of Rule 115-L, the auction for abadi sites for

*Against judgment and decree of 2nd temporary Civil and S. J., Ghazipur, D/- 28-2-1974.

construction of houses shall be open to all persons residing in the circle of the Gram Samaj. It is obvious that the normal rule envisaged in the matter of allotment was to permit the residents of the circle of the Gram Samaj alone to obtain it by participating in an auction. The fact that in the case of a lone applicant, where no auction was contemplated, allotment could be made also in favour of a non-resident of the circle, does not seem to be intended by the rules. The reason is obvious. By a fortuitous chance of there being only a single applicant for allotment of a particular site, the necessity for an auction stood obviated. If there were more than a single applicant, recourse was to be had to an auction which was, in terms of Rule 115-M, to be confined to the residents of the circle alone. The rules have to be harmoniously construed or else, it may become difficult to make them workable in some situations. (Paras 11, 13)

The intention of the rule becomes manifest also from the fact that announcement about the auction, namely, its time, date and venue is to be made by beat of drums in the circle of the Gram Samaj as provided in Rule 115-L. (Para 14)

(B) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 117 and 128 — U. P. Z. A. and L. R. Rules, Rr. 115-N and 115-L — Allotment of abadi site to ineligible person — Asst. Collector alone can cancel allotment — Civil Court has no jurisdiction — Rights under such allotment subsist till they are cancelled. (Civil P C (1908), S. 9)

The allotment of an abadi site made in favour of a person who was not eligible for such allotment, in that he was not resident of the circle of Gaon Sabha could be cancelled on that ground by the Assistant Collector in charge of the Sub-Division and under sub-rule (3) of that Rule, the decision of the Assistant Collector shall be final. It was clearly intended by the rule-making authority that in matter of cancellation of allotment, the Assistant Collector in charge of the Sub-Division would be the final authority and would, thus, be able to give all the reliefs that could be obtained in a civil court in the matter. By necessary implication, the jurisdiction of the civil court was excluded. 1973 All L J 439 and 1977 All L J 310, Foll. (Para 16)

Further, unless an order of allotment made under Rule 115-L is cancelled in proceedings under Rule 115-N, it subsists and the right conferred by it has to be recognised. However, exclusive jurisdiction has been conferred upon the Assistant Collector in charge of the Sub-Division to adjudicate about the validity of the order of allotment and the jurisdiction of the civil court in the matter has, by necessary implication, been excluded. (Para 17)

Cases Referred : Chronological Paras

1977 All L J 310 AIR 1977 All 360 1977 All W C 259 (F B) 16
1973 All L J 439 AIR 1973 All 564 1973 All W R (H C) 306 16
1970 All L J 274 1970 All W R (H C) 112 16
AIR 1969 S C 78 (1969) 1 S C J 925 16

Sankatha Rao, for Appellant, R N Singh, for Respondent.

JUDGMENT :— This is a plaintiff's second appeal who has lost in both the courts below.

2. The case of the plaintiff was that the land in suit was allotted to him by the Land Management Committee on March, 19, 1971 and he was put in possession thereof. The plaintiff then surrounded the land by bamboos. The first four defendants, according to the plaintiff, uprooted these bamboos and illegally encroached upon the land covered by the Patta in his favour, by raising constructions like Nad, Charan, Chhappar. Since they were not prepared to vacate the encroachment the plaintiff was compelled to sue for recovery of possession after removal of the encroachments.

3. Gaon Sabha Bagendra, which is said to have allotted the land to the plaintiff was impleaded as the 5th defendant in the suit. It took the stand in a separate written statement that a 'patta' had validly been executed in favour of the plaintiff and that the first four defendants had illegally encroached upon the land.

4. The defence taken by the first four defendants was that no valid 'patta' had been executed in favour of the plaintiff nor could one be so executed for the plaintiff was not a resident of the circle of the Gaon Sabha. In fact, the land in suit was appurtenant to their house and stood settled with them under section 9 of U. P. Act No. I of 1951. Further they had obtained a 'patta' themselves from the Gaon Sabha on September 20, 1970.

5. The trial court framed several issues which arose on the pleadings of the parties The first of these issues was "whether the plaintiff was the owner of the land in suit on the basis of 'patta' dated March, 19, 1971 " The third and fourth issues were in regard to the claim of the first four defendants to the land in suit on the basis of its settlement with them under S 9 of U P Act No I of 1951 and of the 'patta' dated Sept 20, 1970 Parties led evidence in support of their respective cases

6. The trial Court, on appraisal of the evidence of the parties, came to the conclusion under issue No 1 that the allotment in favour of the plaintiff appeared to be doubtful particularly when the original of the resolution under which the land was said to have been allotted to him had not been produced It also concluded under issues Nos 3 and 4 that the disputed land was not appurtenant to the house of the first four defendants nor had it been settled with them by the Gaon Sabha through any 'patta' dated Sept 20, 1970. In view of its finding on issue No 1 the trial Court dismissed the suit The plaintiff appealed.

7. The lower appellate Court summoned the original resolution on an application made on behalf of the plaintiff in that regard It proceeded to consider the validity of the allotment in favour of the plaintiff in the first instance It noticed para 60 of the U P Gaon Sabha and Bhumi Prabandhak Samiti Manual which was a compilation of the relevant rules of the U P Zamindari Abolition and Land Reforms Rules, 1952 The lower appellate Court was of opinion that Rule 115-L of these rules did not contemplate that allotment of land vesting in it could be made by the Gaon Sabha in favour of a person who was not a resident of the circle of that Gaon Sabha. The lower appellate Court held that inasmuch as the plaintiff was not a resident of the circle of Gaon Sabha Bagendra, no allotment could be made in his favour. As such, the allotment dated March 19, 1971 did not confer any right upon the plaintiff in respect of the land in suit. The lower appellate Court then proceeded to hold that the plaintiff's claim could not succeed even on possessory title for he was not in possession over the land in suit at the relevant time The lower appellate Court upheld the decree of the trial Court.

8. Sri Sankatha Rai appearing for the plaintiff-appellant in this Court, has argued that the view of the lower appellate Court that no allotment of land could be made by the Gaon Sabha to a person, like the plaintiff, who was not a resident of the circle of the Gaon Sabha, was incorrect His submission is that the allotment made by the Gaon Sabha in favour of the plaintiff on March 19, 1971 was valid so that the plaintiff was entitled to recover possession of the land in suit after removal of the encroachments made by the first four defendants thereon This submission has been countered by Sri R N Singh, appearing for the first four defendants-respondents, by urging that the allotment of the property vesting in the Gaon Sabha could only be made in favour of persons residing in the circle of that Gaon Sabha except in specific cases envisaged by the relevant rules

9. Chapter VII of the U P Z A and L R Act (U P Act No. 1 of 1951) which deals with Gaon Sabhas, as it stood at the relevant time, provided in S 117(vii) that the State Government may, by notification in the Gazette, at any time after the publication of a notification under S. 4 of the Act, declare that on the specified date, abadi sites situate in the circle which had vested in it under the Act shall vest in the Gram Samaj established for the same circle S. 122-A occurring in the same Chapter charged the land Management Committee for and on behalf of the Gaon Sabha with the general superintendence, management, preservation and control of all the abadi sites which vested in the Gaon Sabha under S 117 Sub-sec (2)(a) of that provision specified that the functions and duties of the Land Management Committee would include the settling and management of the land, while sub-sec. (2)(e) provided that the maintenance and development of abadi sites and village communications was amongst the functions and duties of that Committee. Sub-sec. (1) of S. 128 enabled the State Government to make rules for purposes of carrying into effect the provisions of that Chapter.

10. The State Government framed Rules, which included Rules 115-L, 115-M, 115-N and 115-P They were in the following terms

"115-L Abadi sites situate in the abadi or in the waste land of the area vested in the Gaon Samaj shall be allotted for the purpose of construction of buildings in the following order of preference —

(a) a landless agricultural labourer or a landless servant of the village community such as Barhai, Dhobi, Lohar, Sweeper, etc

(b) a bhumidhar, sirdar, or adhivasi, who is holding less than 5 standard bighas

(c) others

Allotment shall be made on the result of public auction held for this purpose. The exact location of the site to be auctioned, the time, the date and venue of the auction shall be announced by beat of drum in the circle of the Gaon Samaj

Provided that –

(i) no auction shall be held where any of the applicants requires a site for the construction of a building for a charitable purpose. In case of such an applicant, the site shall be allotted to him without payment of premium If there are more than one such applicants, the Land Management Committee shall decide as to whom the site may be allotted The decision of the Land Management Committee in this respect shall be final subject to confirmation by the Assistant Collector incharge of the sub-division

(ii) the provision of cl (i) shall also apply in cases where an applicant requires a site for setting up cottage industry, provided that a certificate to this effect is obtained from the Assistant Collector in charge of the sub-division In case where there are two applicants for a site, one requiring it for charitable purpose and the other for setting up cottage industry, the Land Management Committee shall decide as to whom the site may be allotted The decision of the Land Management Committee in this respect shall be final subject to confirmation by the Assistant Collector, in charge of the sub-division

(iii) abadi sites in the area earmarked for abadi in the waste land shall not be put to auction unless there are more applicants than the sites available

Provided further that if there is only one applicant requiring a site for the construction of a house it shall be allotted to him on payment of such premium as may be fixed by the Land Management Committee in this behalf

Provided also that the provisions of this rule shall not apply in case where the abddi site is required for settling those who have lost their houses on account of floods In such cases the land will be earmarked and allotted by the land Management Committee according to directions of the Collector.

115-M. Subject to the provisions of rule 115-L, the auction for abadi sites for construction of houses shall be open to all persons residing in the circle of the Gaon Samaj. The first bidding shall be confined among the persons of categories (b) and (c) mentioned in rule 115-L, and the highest bid shall be recorded. immediately thereafter, there shall be a second bidding among the persons of category (a) mentioned in rule 115-L The highest bid in the second bidding, provided it is not less than 25 per cent of the highest bid recorded in the first bidding, shall be taken as the final bid and accepted, failing which the highest bid recorded in the first bidding shall be taken as the final bid and accepted if the bidder belongs to category (b) mentioned in rule 115-L If the highest bid recorded in the first bidding is of the person belonging to category (c), the highest bidder among the persons of category (b) shall be given an option to pay the amount of the highest bid recorded in the first bidding If he agrees to pay the amount, his offer shall be accepted, and if not, the highest bid recorded in the first bidding shall be taken as final and accepted. The person whose bid is accepted, shall be required to pay one-fourth of the bid money immediately and the balance within a time to be fixed by the Land Management Committee. If the balance is not paid within the time so fixed, the advance money shall be liable to forfeiture in the discretion of the Land Management Committee

115-N (1) The Assistant Collector in charge of the sub-division shall, on the application of any person interested, filed within three months of the date of auction, and may, at any time on his own motion, cancel for reasons to be recorded in writing the allotment order on one or more of the following grounds

(i) the bid accepted was inadequate,

(ii) the auction was collusive or unfair,

(iii) the auction proceedings were not followed in accordance with the rules,

(iv) any other ground.

(2) No order under sub-rule (1) shall be passed unless the allottee has been given an opportunity to show cause against the proposed action.

(3) The decision of the Assistant Collector in charge of the sub-division shall be final

115-O . . . . .

115-P. The person to whom an abadi site is allotted shall be required to build a house, either Kachcha or pucca, and begin to reside in it or use it for the purpose for which it was built within two years from the date of

allotment If he fails to do so, his rights shall be extinguished and the site may be re-auctioned "

11. A careful perusal of these rules would indicate that allotment for purposes of construction of buildings was to be made by the Gram Samaj in the order of preference contained in Rule 115-L by public auction held for that purpose except in cases where the necessity for auction had been obviated by the rule itself The first proviso envisaged that where the allotment was sought for construction of a building for a charitable purpose or for setting up of a cottage industry, the allotment must be made by the Land Management Committee subject to the confirmation by the Assistant Collector, in charge of the Sub-Division without recourse to the procedure of auction Likewise, under the third proviso, where abadi site was required for settling those who had lost houses on account of floods, allotment was to be made according to the direction of the Collector There is no difficulty so far

12. The argument on behalf of the plaintiff-appellant is that cases covered by the second proviso in Rule 115-L which contemplated allotment of the site for construction of a house by the Committee where only one applicant was before it for such allotment, also fell in the same category as cases covered by the first and the third provisos As such, like in the case of the first and the third provisos, wherein it could not be envisaged that the applicant had necessarily to be a resident of the circle of the Gaon Sabha which was to make the allotment, an allotment to a lone applicant could also be made even though he was not a resident of the circle of the Gaon Sabha

13. The opening part of Rule 115-M provides that subject to the provisions of Rule 115-L, the auction for abadi sites for construction of houses shall be open to all persons residing in the circle of the Gram Samaj It is obvious that the normal rule envisaged in the matter of allotment was to permit the residents of the circle of the Gram Samaj alone to obtain it by participating in an auction. The fact that in the case of a lone applicant, where no auction was contemplated, allotment could be made also in favour of a non-resident of the circle, does not seem to be intended by the rules The reason is obvious By a fortuitous chance of there being only a single applicant for allotment of a particular site, the necessity for an auction stood obviated. If there were more than a single applicant, recourse was to be had to an auction which was, in terms of Rule 115-M, to be confined to the residents of the circle alone. The rules have to be harmoniously construed or else, it may become difficult to make them workable in some situations. For example, where there were more applicants than one, all residing outside the circle of the Gaon Sabha, how would the allotment be made. Due to the number of applicants being in excess of one it will be necessary to make the allotment through an auction But, in term of Rule 115M, they would not be eligible to participate in an auction so held It is reasonable, therefore, to hold that except in cases which were covered by the first and the third provisos, namely, where the applicants were seeking to get the land for construction of a building for a charitable purpose or for setting up a cottage industry or where the Collector required the land for settling those who had lost their houses on account of floods, settlement had to be confined to applicants who were residents of the circle of the Gram Samaj

14. The aforesaid intention of the rule becomes manifest also from the fact that announcement about the auction, namely, its time, date and venue is to be made by beat of drums in the circle of the Gram Samaj as provided in Rule 115-L. There is no error in the view taken by the lower appellate Court in this regard

15. The question that now needs attention is whether it was open to the civil Court to go into the validity of the allotment made in favour of the plaintiff on March 19, 1971 The submission of the learned counsel for the appellant is that the jurisdiction to determine the validity or otherwise of the allotment was exclusively that of the Assistant Collector in charge of the Sub-Division under Rule 115-N and that by necessary implication the jurisdiction of the civil Court to do so stood excluded. It has been urged that apart from the first three reasons for cancellation of an order of allotment by the Assistant Collector, R 115-N(1) contemplated cancellation of that allotment on any other ground as well. Further, that the decision of the Assistant Collector was made final by sub-rule (3) of that rule.

16. In Sub-Divisional Officer, Mathura v Shivvali (AIR 1973 All 564) . (1973 All L J 439), a Division Bench of this Court took the view that cl. (iv) of Rule 115-N(1) was not

confined in its nature to the grounds mentioned in the preceding clauses and that the rule of ejusdem generis could not be pressed into service to confine it in that manner It covered grounds other than those mentioned in the preceding three clauses In view of this decision, it must be held that the reason that allotment had been made to a person who was not eligible for such allotment, would be covered by cl (iv) and the Assistant Collector would be competent to cancel an order of allotment on that ground The order of allotment would not become void merely because it had been made in contravention of the rules of eligibility Until it is cancelled, the right conferred by it upon the allottee had to be recognised The position of an order of allotment made under Rule 115-L will be akin to the one made in terms of S 198(3) of the Act under Rr 173 to 175 of the Rules In respect of an allotment of land made under S 198, the decision of this court has been that unless it is cancelled by the appropriate authority it would have to be recognised and the right conferred upon the allottee given effect to (See Rasala v Deputy Director of Consolidation 1970 All L J 274) In Dhulabhai v State of Madhya Pradesh (AIR 1969 S C 78) it was held by a Constitution Bench that where the statute gives finality to the orders of the special tribunals, the civil Court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil Court would normally do in a suit It is clear from a perusal of Rule 115-N, as also interpreted by the Division Bench in Sub-Divisional Officer, Mathura v Shivvali (supra) that the allotment made in favour of a person who was not eligible for such allotment could be cancelled on that ground by the Assistant Collector in charge of the Sub-Division and under sub-r (3) of that Rule, the decision of the Assistant Collector shall be final. It was clearly intended by the rule-making authority that in the matter of cancellation of allotment, the Assistant Collector in charge of the Sub-Division would be the final authority and would, thus, be able to give all the reliefs that could be obtained in a civil Court in the matter By necessary implication, the jurisdiction of the civil Court was excluded. A Full Bench of this Court had occasion to consider the question whether it was open to Consolidation Authorities to ignore a lease given by Land Management Committee which had not been cancelled in accordance with the provisions of S 198 of U. P Act No. I of 1951. That was in the case of Simlesh Kumar v Gaon Sabha, Uskar Ghazipur, (1977 All L J 310) : (AIR 1977 All 360 Para 6) Satish Chandra, J (as he then was) observed in para 24 of the Report as follows :-

"The provisions of the Zamindari Abolition Act lay down rules for admission of persons to land vesting in the Land Management Committee, and the grounds and the period of limitation within which such grants can be challenged It created a special authority in the shape of the Collector to adjudicate such disputes It then provides for a finality All this shows that in this matter the Act creates a self-contained Code creating rights and indicating the manner of settlement of disputes. No other authority has jurisdiction to re-adjudicate matters covered thereby The Consolidation Authorities have to recognise and respect the action of Land Management Committee or order of the Collector or Board of Revenue, if any They cannot go behind them."

A Banerji, J observed as follows (in para 30 of the Report (Para 12 of AIR))

" The basic question, therefore, is whether the Consolidation Authorities could cancel the lease or set aside the allotment made by the Land Management Committee. In Dhula Bhai's case the Supreme Court has laid down that where the statute gave finality to the orders of the special tribunals there was an exclusion of the jurisdiction of the civil Court This principle would also be applicable to Courts or Tribunals which had taken the place of civil Court. In my opinion, the principle of law laid down in Dhula Bhai's case would exclude the jurisdiction of the Consolidation Authorities from considering the validity or otherwise of the lease granted by the Land Management Committee."

K C Agrawal, J the third member of the Bench, also observed (in para 13 of the Report (Para 29 of AIR)) as under

". . Accordingly, so long as the lease is not cancelled or the allotment made is not set aside, the person obtaining the land from the Land Management Committee would be entitled to hold it for his or her benefit. A transaction which is voidable is valid until repudiated I am not prepared to accept, as was urged on behalf of the respondent No 2, that the lease having not been executed in accordance with the Act in the instant case, was void" and later (in para 14 (Para 30 of AIR)) that

" ... In case of a lease or allotment of a land made contrary to the provisions of S. 198

of the Act, it appears to us that as such a transaction would be voidable, the Consolidation Authorities would have no right to inquire into and adjudicate the validity of the same "

17. On parity of reasoning, it must be held that unless an order of allotment made under Rule 115-L is cancelled in proceedings under Rule 115-N, it subsists and the right conferred by it has to be recognised However, exclusive jurisdiction has been conferred upon the Assistant Collector in charge of the Sub-Division to adjudicate about the validity of the order of allotment and the jurisdiction of the civil Court in the matter has, by necessary implication, been excluded

18. The submission of Sri R N Singh, based upon the observation of the Supreme Court in Dhulabhai's case, may now be noticed. The submission is that as observed by the Supreme Court in that case a provision giving finality to the decision of the Special Tribunal would not exclude the jurisdiction of the civil Court in those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial proceedings Allotment of land by the Gaon Sabha to a person who was not eligible for such allotment would, according to Sri Singh, amount to a non-compliance with the provisions of the statutory Rule so that the jurisdiction of the civil Court would not be excluded in such a case The submission overlooks the basic distinction between a case where the order impugned is not one under the Act and a case where it is in contravention of some provision thereof What was laid down by the Supreme Court in the aforesaid decision was that in a case where, by breach of some mandatory provisions of the Act, the impugned order ceased to be one under the Act, the jurisdiction of the civil Court will not be barred when it was called upon to pronounce upon its validity That is not the situation in a case like the present where the grievance is that the allotment had been made in favour of a person who was not eligible for such allotment. Determination of this question has been left to be made by the Assistant Collector in charge of the Sub-Division by Rule 115-N. It is akin to the one which was up for consideration before the Full Bench in Similesh Kumar's case.

19. It is not in dispute that the order of allotment in favour of the plaintiff made on March 19, 1971 has not been cancelled by the appropriate authority, namely, the Assistant Collector in charge of the Sub-Division The rights which the plaintiff acquired in the land in dispute under this allotment order had to be recognised The lower appellate Court was in error in taking the view that the order was invalid for it had been made in favour of a person who was not a resident of the circle of the Gaon Sabha concerned. The plaintiff was entitled to a decree for possession over the suit land an account of the order of allotment in his favour dated March 19, 1971 The Courts below were in error in refusing that relief to him Their decree cannot be upheld

20. The appeal is allowed The plaintiff's suit is decreed for the relief of possession over the land in dispute The first four defendant-respondents are directed to remove the encroachment made by them upon it within a period of four months failing which the plaintiff will be entitled to get it removed through Court at the cost of those defendant-respondents In the circumstances of the instant case, however, I direct the parties to bear their own costs

Appeal allowed

1981 ALL. L. J. 1336

K M DAYAL, J

Smt Bedo, Appellant v Nagina and others, Respondents

Second Appeal No 2662 of 1973, D/- 6-8-1981 *

Civil P. C. (5 of 1908), O. 41, Rr. 23, 25 — Remittal of some issues for findings to trial court — Issues tried but not decided — Appellate court accepting findings on remaining issues — Decree is not reversed — Case is covered by R. 25 and not R. 23 of Order 41.

Where a decision of the trial court was accepted by the appellate court but the case was remitted to the trial court for findings on certain issues which were tried by recording evidence and hearing arguments but were not decided, the case was held to be covered by R 25 and not by R. 23 of Order 41 and the

*Against judgment and decree of D P. Mittal, 2nd Temporary Civil & Sessions J., Muzaffarnagar, D/- 25-7-1973

remittal was held to be within the jurisdiction of the lower appellate court AIR 1959 S C 837 and AIR 1966 Andh Pra 295, Ref

(Para 10)

The Appellate Court having agreed with the findings of the trial court, even assuming that it had wrongly so agreed, it could not be said that the court had reversed the decree of the trial court and therefore should have remanded the case under O 41, R 23

(Para 11)

As the appellant had full opportunity to challenge in the lower appellate court, the findings of the trial court on the issues which were remitted, such remittal cannot be said to cause prejudice to the appellant

(Para 12)

Cases Referred : Chronological Paras

AIR 1966 Andh Pra 295 (1966) 1 Andh W R 22 8

AIR 1959 S C 837 1959 S C J 1030 8

G. N Verma, S C Agrawal, for Appellant, G L Pandey, Jagdish Swarup and V B L Srivastava, for Respondents.

JUDGMENT :— The present Second Appeal has been filed by the plaintiff

2. The suit of the plaintiff was dismissed by the trial court basing its judgment on findings on only some of the issues An appeal was filed Before the lower appellate court an argument was raised by the plaintiff-appellant that certain issues had not been decided which were crucial in the case and which ought to have been decided The lower appellate court after hearing the arguments of the parties on that question, passed an order on 24th February, 1972 remitting issues Nos 4 to 7 to the trial court for its finding under Order 41 Rule 25 C P. C The finding of the trial court was received and thereafter the entire appeal was heard including the arguments of the plaintiff-appellant against the findings recorded by the trial court under Order 41 Rule 25 C P. C. The appeal was dismissed

3. The brief facts of the case are that original owner of disputed Sir/Khudkasht land was one Jahana son of Faqira He died on 8-6-30 According to the plaint allegation at the time of death of Jahana the plaintiff was in the womb of her mother Smt. Risali who had been impleaded in the suit as defendant No. 3 The plaintiff was born in 1931 to Smt. Risali At the time of death of Jahana, Risali was very young Jahana executed a will on 4-6-30 providing that Smt Ramdei the mother and Smt Risali, the wife, defendant No. 3, would get life estate in the assets left by Jahana in equal shares It was further provided that in case Risali gave birth to a son, the estate of Jahana would vest in him and in case she gave birth to a daughter, the mother and wife were entitled to a life estate over the property and after their death it was to revert to the daughter She was born in January, 1931 and was daughter of Jahana It was further alleged in the plaint that afterwards the mother Smt Ramdei got Smt Rishali married with Nagina by way of Karao and thereafter Smt. Risali became wife of Nagina, defendant No 1 and he begot several children from Risali Consolidation operations took place in the village under the U P Consolidation of Holdings Act, 1954 and Smt Risali and Ramdei were allotted different chaks Smt Ramdei in order to deprive the plaintiff completely and to help her own nephews executed a gift deed which was registered on 22nd May, 1965 in favour of Nagina and Birjhan, defendants Nos 1 and 2 It was claimed that according to the will dated 4-6-30 the plaintiff was entitled to the land left by her father and the gift deed dated 22nd May, 1965 was liable to be cancelled. It was further alleged that Ramdei expired about two and half months before filing of the suit and she had no share or interest left. The relief regarding cancellation of gift deed dated 22nd May, 1965 and for possession over half portion of the disputed land was claimed

4. The suit was contested by the defendants The will was denied and it was further alleged that the plaintiff Smt. Bedo was not the daughter of Jahana and Risali but she was daughter of one Jail Singh It was further contended that the consolidation operations had taken place and chaks of Risali and Ramdei were prepared separately Gift deed dated 22nd May, 1965 was alleged to have been made validly It was further alleged that the suit was barred by section 49 of the U P. Consolidation of Holdings Act and Jahana did not execute any will in favour of any one on 4th June, 1930. It was also alleged that Risali never was remarried with Nagina nor any children were born to Risali at any time

5. As many as 16 issues were framed by the trial court. The trial court decided issues Nos 1 to 3 and 7 to 16 Some of the issues

were not pressed by the defendent and some of the issues were decided in the light of decision on other issues Issues Nos 4 to 7 were regarding the plaintiff being daughter of Jahana, the marriage of Risah with Nagina by way of Karao, execution of the will dated 4-6-30 by Jahana and competence of Jahana to execute the will These points were not decided by the trial court holding that the property that was left by Jahana as Sir/Khudkasht vested in State and subsequently Smt Ramdei and Risah became its absolute owners and after the date of vesting the will of Jahana even if it was valid, could not limit or control the rights of Smt Risah and Ramdei The trial court, in its view, held that it was not necessary to decide the issues Nos 4 to 7 mentioned above The matter came up in appeal before the lower appellate court. Before the lower appellate court, the plaintiff-appellant's argument seems to have been that issues Nos 4 to 7 have not been decided and a decision on those issues was necessary By order dated 24-2-72 the lower appellate court remitted issues Nos 4 to 7 as the trial court had "omitted to decide some material questions of fact involved in the case" In pursuance of the order of the lower appellate court a finding was returned by the trial court after hearing both the parties on the issues referred to above In the opinion of the court below it was necessary for decision on merits

6. After hearing the parties on the questions involved in the appeal including those arising out of issues remitted and findings recorded by the trial court, the lower appellate court dismissed the appeal The plaintiff-appellant has filed the present Second Appeal

7. Sri G N Verma, Advocate for the appellant did not challenge the findings recorded by the lower appellate court on the question of parentage of the plaintiff, the genuineness of the will, remarriage of Risah, which were apparently the questions of fact and ordinarily he would not be entitled to reopen the said questions in the present Second Appeal His argument, however, was that the case was decided by the trial court mainly on the basis of issue No 9 It was a decision based on a preliminary issue as contemplated by Order 41 Rule 23 C P C, and the court below had no jurisdiction to remit the issues Nos 4 to 7 for decision to the trial court under Order 41 Rule 25 C P C According to him, the operation of Rule 25 of Order 41 was excluded because the decision of the trial court was merely on a preliminary point and the only course open to the lower appellate court was to set aside the judgment and decree of the trial court and remand the case to it for fresh decision The Learned counsel relied upon the word "try" occurring in Rule 25 of Order 41 and argued that the lower appellate court could remit an issue only if the trial court had omitted to try the same In the instant case the trial court had recorded the evidence of the parties on issues Nos 4 to 7 but merely omitted to give the finding and, therefore, the trial court had duly tried the issues He argued that in such a case the lower appellate court should have reversed the decree of the trial court and remanded the case with a direction to decide the issues Nos. 4 to 7 as well

8. In support of the contention that 'trial' did not include finding or decision the learned counsel relied upon a case Om Prabha Jain v Gian Chand, reported in AIR 1959 S C 837 That was a case under the Representation of People Act In that case it was observed that after the conclusion of the trial the findings were to be recorded He also cited the case of Sultan Saleh Bin Omer v Vijayachand Sirimal (AIR 1966 Andh Pra 295). According to him the trial commenced as soon as the plaint was filed in the court and ended on the last date of hearing i e with the argument Learned Advocate relied upon the following observations in para 17 of the aforesaid case

"It is in the option of the parties to argue their case after the evidence in the suit is closed and it is for them to decide whether they will exercise their privilege or not In other words, once the trial of the suit is taken up and the examination of the witnesses has commenced, the hearing of the suit is said to begin, and, that hearing comes to an end only with delivery of the judgment, or when the suit is posted for judgment where it is reserved In cases, therefore, where the suit has not been posted for judgment, but is posted for hearing arguments of one side or the other, it should be remembered that the hearing of the suit is not concluded, though the recording of evidence might have been finalised by both the parties. In such cases, either party is not precluded from making a request for examination of additional witnesses, or marking documents, merely on the ground that the trial is closed and the matter is posted for arguments. whether the request should be granted or not, is however,

a matter to be decided on the merits, bearing in mind the fact that it is belated "

Sri G N Verma further relied upon the meaning of word "Trial" in Wharton's Law Lexicon (Fourteenth Edition) Page 1011 —

"Trial" — the hearing of a cause, civil or criminal before a judge who has jurisdiction over it, according to the laws of the land

"Trial is to find out by due examination the truth of the point in issue or questions between the parties, whereupon judgment may be given "

Sri G. N Verma relied upon the meaning of word "trial", in Shorter Oxford English Dictionary Volume II (Page 2242) According to him in the said dictionary the meaning under 'law' was "the examination and determination of a cause by a judicial tribunal " He cited Dictionary of the English Language Vol II page 2194, Col 2 Under the 9th meaning, that is the legal meaning of 'trial', the following is mentioned

"(Law) The formal examination of the matter in issue in a cause before a competent tribunal for the purpose of determining such issue, the mode of determining a question of fact in a court of law A trial may be of an issue of law when it is before a Judge alone, or of fact when it is usually before a Judge and Jury In a general sense trial includes all proceedings from the time when issue is joined, or usually when the parties are called to try their case in court to the time of its final determination, in criminal law the term trial is, however, generally restricted to proceedings subsequent to swearing in the jury "

8A He argued that after the evidence and arguments, there was no trial and the delivery of judgment would not be a part of trial According to him as the trial court had not given its own finding on issues Nos 4 to 7, it simply failed to decide the same but did not fail to try the same

9. Sri Jagdish Swarup appearing for the respondent relied upon the meaning of the word "try" given in the Black's Law Dictionary, Revised Fourth Edition, page 1685 According to it "try" means "to examine judicially, to examine and investigate a controversy by the legal method called 'trial' for the purpose of determining the issue it involves." Word 'trial' has also been relied upon in that dictionary and the meaning of word 'trial' is given as under

"Trial — A judicial examination, in accordance with law of the land, of a cause, either civil or criminal, of the issues between the parties whether of law or of fact, before a court that has jurisdiction over it It includes all proceedings from time when issue is joined, or more usually, when parties are called to try their case in court, to time of its final determination "

10. In view of above citations there appears to be some force in the argument of Sri G N Verma that trial may not include the decision In our case, however, the controversy is slightly different In this case as it appears the issues had been tried by recording evidence and hearing arguments of the parties by the trial court While giving the judgment it did not consider it necessary to give a decision on those issues (issues Nos 4 to 7) as the matter could be concluded by decision of other issues That did not mean that the trial court omitted to try the issues Thus the case was apparently covered by Rule 25 of Order 41 C P C Under these circumstances, the order of the lower appellate court remitting the issues for findings could not be said to be beyond the scope of Rule 25 of Order 41

11. There is yet another aspect of the matter According to Sri G N Verma, the only course open to the lower appellate court was to remand the case to the trial court The operation of the remand order depends upon the reversal of the decree under appeal Unless the lower appellate court reversed the decree of the trial court, the occasion for remand did not arise In the instant case it is clear that the lower appellate court agreed with the findings of the trial court Assuming that the court below wrongly agreed with the findings of the trial court, still it could not be said that the court below had reversed the decree and therefore should have remanded the case

12. The argument of the learned counsel for the appellant that the order of the lower appellate court remitting the issues for finding of the trial court was without jurisdiction, cannot be accepted. Learned counsel, however, argued that the issues remitted by the lower appellate court and the findings given by the trial court thereon prejudiced the plaintiff-appellant as the appellant was entitled to have a right of appeal against the findings recorded by the trial court and accepted by the lower appellate court. The argument is misconceived The findings that were recorded by the trial court were again examined by the lower appellate court as is clear from the decision of the lower appellate

court The lower appellate court after examining the findings agreed with those findings for good reasons and it cannot be said that any prejudice was caused to the appellant The appellant had full opportunity to challenge the findings on issues Nos 4 to 7 before the lower appellate court That was a court of fact and was entitled to test the correctness of the findings recorded on issues Nos 4 to 7 by the trial court It also did so I consequently reject this argument of the learned counsel as well

13. In the result, the present appeal fails and is dismissed However, there will be no order as to costs

Appeal dismissed

1981 ALL. L. J. 1340

= AIR 1981 Supreme Court 2176

(From Allahabad)

P N. BHAGWATI AND BAHARUL ISLAM, JJ

Civil Appeal No 352 of 1981, D/- 15-1-1981

M/s. Noorulla Ghazanfarulla, Appellant v The Municipal Board of Aligarh and others, Respondents

Constitution of India, Art. 136 — Special leave — Grant of — New plea — Appellant amending his writ petition before High Court so as to include challenge to constitutional validity of a provision — Controversy between parties as to canvassing of constitutional validity before High Court — Even though new plea is not allowed to be raised in special leave petition, as another writ petition could be filed by appellant to challenge constitutional validity, special leave was granted and matter was remitted back to High Court to decide all questions including question of constitutional validity.

(Para 2)

ORDER :— Special leave granted

2. It appears from the record that the appellants amended their Writ Petition before the High Court so as to include a challenge to the constitutional validity of the U P Municipal (Amendment) Act 48 of 1975 and the respondents also filed an affidavit in reply to the amendment But there is a controversy between the parties as to whether the constitutional validity of the Amendment Act was canvassed before the High Court The appellants contend that the constitutional validity of the Amendment Act was challenged by them but the High Court erroneously stated in the judgment under appeal that the validity of the Amendment Act was not challenged before it. The respondents submit that what the High Court has stated is correct and that in fact the constitutional validity of the Amendment Act was not canvassed on behalf of the appellants We do not propose to enter into this controversy and we will assume for the purpose of our judgment that the question regarding the constitutional validity of the Amendment Act was not argued before the High Court But, even so, we do not see any reason why we should not allow the appellants to raise this question at the hearing of the appeal before us It is true that ordinarily we do not permit a party to raise before us a new question which has not been argued before the High Court But here the question relates to the constitutional validity of a legislation and even if we do not permit the question as regards its constitutional validity to be raised, it would always be open to the appellant to file another petition challenging the constitutional validity of the Amendment Act We do not think that any useful purpose will be served by declining to allow the appellant to question the validity of the Amendment Act On the contrary, it will lead to the filing of another writ petition and unnecessarily prolong and delay the proceeding We are, therefore, of the view that the appellant should be allowed to raise the question in regard to the constitutional validity of the Amendment Act and since that question has not been discussed before the High Court, we would set aside the judgment of the High Court and send the matter back to the High Court, so that the High Court may decide all the questions arising before it as have not been so far decided, including the question of the constitutional validity of the Amendment Act.

3. We are not pronouncing upon the correctness of the judgment of the High Court on the points considered and decided by it and if the appellant ultimately fails before the High Court, it would be open to the appellant to canvass the correctness of the judgment of the High Court on those points in a petition for Special Leave which may be filed by them.

4. The appeal is allowed to this extent with no order as to costs Since this is a very old matter we would request the High Court to dispose it of within four months from today

Order accordingly

1981 ALL. L. J. 1341

= AIR 1982 Supreme Court 3

(From Allahabad)*

A P SEN AND A VARADARAJAN, JJ

Civil Appeal No 2754 of 1981, D/- 20-10-1981

Smt Jeewanti Pandey, Appellant v Kishan Chandra Pandey, Respondent

Hindu Marriage Act (25 of 1955), Sections 12, 19 cl. (ii) -- 'Residence' -- Meaning of -- Parties to marriage belonging to village within jurisdiction of District Judge, Almora married in Delhi and residing there -- Petition for nullity of marriage under Section 12 filed in court of District Judge, Almora -- District Judge would have no jurisdiction to try the petition. Civil Revision No. 1904 of 1978, D/- 6-8-1979, (All.) Reversed. (Words and Phrases -- 'Residence').

The context of cl (ii) of Section 19 that the word "resides" must mean the actual place of residence and not a legal or constructive residence. It certainly does not connote the place of origin The word "resides" is a flexible one and has many shades of meaning, but it must take its colour and content from the context in which it appears and cannot be read in isolation (Para 13)

Where the parties to marriage who originally belonged to a village within the territorial jurisdiction of District Judge, Almora got married in New Delhi and the wife resided with her uncle in Delhi ever since the marriage and the husband also was a resident of Delhi being employed there the petition for nullity of marriage under Section 12 filed by the husband in the court of the District Judge, Almora on the ground that the parties were residents of a village within the territorial jurisdiction of that Court would not be maintainable as that District Judge, would have no jurisdiction to try the petition. Civil Revn No 1904 of 1978, D/- 6-8-1979 : (All) Reversed (Para 13)

In order to give jurisdiction on the ground of "residence", something more than a temporary stay is required It must be more or less of a permanent character, and of such a nature that the Court in which the respondent is sued, is his natural forum. The word "reside" is by no means free from all ambiguity and is capable of a variety of meanings according to the circumstances to which it is made applicable and the context in which it is found It is capable of being understood in its ordinary sense of having one's own dwelling permanently, as well as in its extended sense In its ordinary sense "residence" is more or less of a permanent character The expression "resides" means to make an abode for a considerable time, to dwell permanently or for a length of time, to have a settled abode for a time It is the place where a person has a fixed home or abode Where there is such fixed home or such abode at one place the person cannot be said to reside at any other place where he had gone on a casual or temporary visit, e.g for health or business or for a change. If a person lives with his wife and children in an established home, his legal and actual place of residence is the same. If a person has no established home and is compelled to live in hotels, boarding houses or houses of others, his actual and physical habitation is the place where he actually or personally resides

(Para 12)

M. K Garg, for Appellant; K. K Mahrotra, for Respondent.

SEN, J.:— The short point involved in this appeal by special leave from a judgment of the Allahabad High Court, is whether the Court of the District Judge, Almora had jurisdiction to entertain the petition for nullity of marriage filed by the respondent under Section 12 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act')

2. To bring out the point, it is necessary to state a few facts It appears that the parties originally belonged to village Bagyan, District Pithoragarh, in the State of Uttar Pradesh. The appellant's case is that they fell in love and she became enceinte as the respondent had access to her during the period of courtship. Her case is that she wanted to marry the respondent, but her father was opposed to the alliance as her elder brother

*Civil Revn. No. 1904 of 1978, D/- 6-8-1979 (All).

and sister were unmarried She was therefore brought in an advanced stage of pregnancy to Delhi and through the intervention of her uncle Basant Kumar, the marriage was solemnised on Jan 24, 1976 according to Arya Samaj rites at the Arya Samaj Mandir, Hanuman Road, New Delhi Three days after the marriage i e on January 27, 1976, the respondent left the residence of Basant Kumar on the pretext that he had to fetch his belongings from the residence of his uncle Dharm Nand Pant who also lives at Delhi and never returned On February 6, 1976, he served a notice on the appellant alleging that the marriage was a nullity as she got pregnant through someone else, that fraud was practised on him by her uncle Basant Kumar and that he had been coerced to marry her against his will On February 17, 1976, she sent a reply denying the allegations made therein On March 2, 1976, she filed a petition for restitution of conjugal rights under Section 9 of the Act in the Court of Subordinate Judge, Class I, Delhi.

3. It may here be stated that although the appellant is a resident of Delhi as she lives with her uncle Basant Kumar at Lajwanti Garden, and the respondent was also a resident of Delhi being employed, at all material times as Radio-Technician in the Ministry of Home Affairs, Rail Bhawan, New Delhi, he started the present proceedings not at Delhi but at Almora

4. On March 18, 1976 the respondent filed a petition for nullity of marriage under Section 12 of the Act in the Court of the District Judge, Almora alleging that the parties were residents of village Bagyan, District Pithoragarh, i e within the territorial jurisdiction of the Court of District Judge, Almora On March 23, 1976 i e just after five days of the filing of the petition under Section 12 of the Act the appellant delivered a dead child at Delhi

5. On Feb. 25, 1977 the Subordinate Judge, Class I, Delhi decreed the appellant's suit for restitution of conjugal rights under Section 9 of the Act In decreeing her claim for restitution of conjugal rights, the learned Subordinate Judge observed

"That to sum up, the evidence adduced by petitioner proves that the petitioner and respondent were known to each other and had developed sexual intimacy It is further proved that the respondent married the petitioner at Delhi on 24-1-1976 of his own sweet free will according to Hindu rites The petitioner delivered a dead child on 23-3-1976 would show that on the date of marriage, the petitioner was running in 7th month of pregnancy Such advanced stage of pregnancy could not be hidden from the vision of any person The plea of respondent that he did not know on 24-1-1976 that the petitioner was pregnant cannot be believed The respondent thus knew at the time of marriage that the petitioner was pregnant The very fact that he married her of his own free will would justify the conclusion corroborated by other evidence and circumstances discussed above that the petitioner had conceived from the respondent and the respondent thus married her of his own free will"

The judgment of the learned Subordinate Judge decreeing the appellant's claim for restitution of conjugal rights under Section 9 of the Act was not appealed from and has, therefore, become final

6. Upon these facts, it is quite evident that the Court of the District Judge, Almora had no jurisdiction to try the petition for nullity of marriage filed by the respondent under Section 12 of the Act The appellant by her written statement filed on August 23, 1976 challenged the jurisdiction of the District Judge, Almora to try the suit The learned District Judge, accordingly framed a preliminary issue as to jurisdiction. By his order dated April 8, 1978 he negatived the objection raised by the appellant holding that since the parties were originally resident of village Bagyan, District Pithoragarh that is a place within the territorial jurisdiction of the Court of the District Judge, Almora, he was competent to entertain and try the suit

7. The appellant being aggrieved by the order of the learned District Judge preferred an appeal before the High Court The High Court by its judgment dated Aug 6, 1979 upheld the finding of the learned District Judge observing :

"The allegations made in the written statement do unmistakably show that the respondent was ordinarily residing at village Bagyan which was within the limits of the territorial jurisdiction of the Court of District Judge, Almora Even if she happened to be in Delhi on the date when the petition was presented, she must have gone to Delhi only on a temporary visit as she had no place of residence at Delhi and the respondent could not be said to have been residing at Delhi when the petition was presented in the District Court."

8. In arriving at that conclusion, the High Court was obviously influenced by the fact that the parties never had any permanent residence While it is true that mere casual or temporary visits do not constitute 'residence' within the meaning of cl (ii) of Section 19 of the Act, it cannot be said that the parties came to Delhi on a temporary sojourn for a day or two The appellant's case is that she had left her parental home at village Bagyan as her father did not consent to the marriage If that be so, the irresistible conclusion is that she came to reside with the respondent at Delhi It was frankly conceded before us that the finding of the High Court that she should be so regarded as having her residence at village Bagyan in the district of Pithoragarh is based on no evidence It is agreed on all hands that ever since the marriage the appellant has been residing with her uncle Basant Kumar at Lajwanti Garden, New Delhi.

9. Section 19 of the Act, insofar as material, reads as follows

"19 Every petition under this Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction —

(i) the marriage was solemnised, or

(ii) the respondent, at the time of the presentation of the petition, resides, or

(iii) the parties to the marriage last resided together. . "

10. It is common ground that the marriage was solemnised on January 24, 1976 at New Delhi The fact that the parties last resided together at the residence of the appellant's uncle Basant Kumar at Lajwanti Garden, New Delhi is not in dispute It is, therefore, clear that the conditions laid down in cls (i) and (iii) of Section 19 of the Act are not present to invest the Court of the District Judge, Almora to entertain the petition for annulment of marriage filed by the respondent under S. 12 of the Act.

11. The question that arises is whether the learned District Judge was invested with jurisdiction by reason of cl. (ii) of Section 19 of the Act, i.e whether at the time of presentation of the petition, the appellant was a resident of village Bagyan within the territorial jurisdiction of the Court of District Judge.

12. In order to give jurisdiction on the ground of 'residence', something more than a temporary stay is required It must be more or less of a permanent character, and of such a nature that the court in which the respondent is sued, is his natural forum The word 'reside' is by no means free from all ambiguity and is capable of a variety of meanings according to the circumstances to which it is made applicable and the context in which it is found It is capable of being understood in its ordinary sense of having one's own dwelling permanently, as well as in its extended sense In its ordinary sense 'residence' is more or less of a permanent character The expression 'resides' means to make an abode for a considerable time, to dwell permanently or for a length of time; to have a settled abode for a time It is the place where a person has a fixed home or abode. In Webster's Dictionary, 'to reside' has been defined as meaning 'to dwell permanently or for any length of time', and words like 'dwelling place' or 'abode' are held to be synonymous Where there is such fixed home or such abode at one place the person cannot be said to reside at any other place where he had gone on a casual or temporary visit e g. for health or business or for a change If a person lives with his wife and children, in an established home, his legal and actual place of residence is the same If a person has no established home and is compelled to live in hotels, boarding houses or houses of others, his actual and physical habitation is the place where he actually or personally resides

13. It is plain in the context of cl (ii) of Section 19 of the Act, that the word 'resides' must mean the actual place of residence and not a legal or constructive residence, it certainly does not connote the place of origin The word 'resides' is a flexible one and has many shades of meaning, but it must take its colour and content from the context in which it appears and cannot be read in isolation. It follows that it was the actual residence of the appellant at the commencement of the proceedings, that had to be considered for determining whether the District Judge, Almora, had jurisdiction or not That being so, the High Court was clearly in error in upholding the finding of the learned District Judge that he had jurisdiction to entertain and try the petition for annulment of marriage filed by the respondent under Section 12 of the Act.

14. In the result, the judgment of the High Court is set aside and the District Judge, Almora, is directed to return to the respondent the petition filed by him for

nullity of marriage under Section 12 of the Hindu Marriage Act, 1955 for presentation to the proper court, i.e. the Court of the District Judge, Delhi There shall be no order as to costs

Order accordingly

1981 ALL. L. J. 1344

= AIR 1982 Supreme Court 18

(From Allahabad)

D A DESAI AND BAHARUL ISLAM. JJ

Civil Appeal No 1410 of 1981 (Arising out of S L P (Civil) No 3066/79). D/- 14-4-1981

Wadhya Mal, Appellant v Prem Chand Jain and another, Respondents

Limitation Act (36 of 1963), S. 5 — Condonation of delay — Award by Motor Accidents Claims Tribunal — Appeals against filed by claimant and insurer pending — Appeal filed by owner of vehicle after expiry of limitation — Circumstances showing that there was some ex parte proceedings and that owner was misled as to when he should have preferred appeal — Held that there was some justification for delay and that when other two appeals on same subject matter are already pending, the appeal by owner should also be adjudicated on merits — Delay, therefore, condoned. Decision of Allahabad High Court, Reversed. (Motor Vehicles Act (1939), S. 110-D)

(Para 5)

DESAI, J.:— Special leave to appeal granted

2. We heard learned counsel Mr O P Verma for the appellant, learned counsel Mr J P Goyal for respondent No 1 and learned counsel Mr. J L. Nain for respondent No 2 The only point involved in this appeal at this stage is that the present appellant who had preferred an appeal against an award made by Motor Accidents Claims Tribunal was dismissed by the High Court on the short ground that it was barrd by limitation, after rejecting the application for condoning the delay in preferring the appeal

3. The Award was made by II Additional Motor Accidents Claims Tribunal, Meerut on 31-3-1977 Appellant was the owner of the truck involved in the accident in which respondent No 1 was injured Respondent No 1 preferred 1st Appeal No 266 of 1977 against the aforementioned award Respondent No 2, insurer, preferred 1st Appeal No 248 of 1977 against the same award We are informed that both these appeals are pending in the High Court

4. The present appellant preferred an appeal against the same award The appeal of the present appellant has been dismissed on the ground that it is barred by limitation This conclusion was recorded after the application of the appellant for condoning delay was rejected

5. In view of the fact that the award dated 31-3-1977 is under challenge in two appeals, it is just and proper that the appeal of the present appellant may also be entertained and may be disposed of on merits along with aforementioned two appeals May be, there was some delay in preferring the appeal by the present appellant, but if one goes through the zig-zag course of the proceedings, it would appear that there was at least some justification for the appellant being misled as to when he should have preferred his appeal. To briefly trace the course of this proceeding, it may be pointed out that the claimants filed an appeal of which notice was served on the appellant on 12-11-1977 There was some ex parte proceedings and the application was made to set aside the same By an application dated 4-3-1978, a prayer was made for setting aside the ex parte award This application appears to have been rejected, and an appeal against the order was held not to be maintainable Thereafter the appellant filed an appeal against the award which was obviously time-barred and his application for condoning delay was rejected on the ground that his moving from pillar to post would not be a sufficient ground for condoning the delay We need not take a very strict view of the matter and we consider it appropriate to give an opportunity to the appellant to get his appeal adjudicated on merits on the only ground that the award which he seeks to challenge is under appeal by Respondent No. 1 and Respondent No. 2. Guided by these special facts of the case, we allow this appeal, set aside the order of the High Court rejecting the appeal of the appellant on the ground that it was barred by limitation We condone the delay in preferring the appeal and direct that the appeal be admitted to file and heard and disposed of along with appeals preferred by Respondent No 1 and Respondent No 2 pending in the High Court. Appeal allowed to that extent with no order as to costs.

Appeal allowed

KY KY F192 SI DA T

1981 ALL. L. J. 1345

DEOKI NANDAN, J

Mahanth Zorawar Singh Shastri, Appellant
v Manohar Das and others, Respondents

Second Appeal No 1154 of 1970, D/- 14-10-1981 *

(A) Civil P C (5 of 1908), S. 47 — Bar under — Easementary right — Compromise decree passed in 1923 — Prohibitory injunction, restraining defendant from raising new construction granted under decree — Defendant raising construction in breach of such injunction in 1948 — Suit for its removal by plaintiff in 1958 — Cannot be said to be barred under S. 47. (Easements Act [5 of 1882], S. 47). Case law discussed.
(Paras 9, 10)

(B) Easements Act (5 of 1882), Ss. 47, 15 — Right of easement acquired by prescription or by other lawful means — Non-exercise of such right within two years next before institution of suit — Suit not barred by limitation. (Limitation Act (1963) S. 23)
(Para 12)

(C) Evidence Act (1 of 1872), S. 115 — Acquiescence — Easementary right of plaintiff declared by decree of court — Defendant raising new construction and obstructing plaintiff's right — Failure by plaintiff to raise objection at the time of construction — Lapse of ten years — Subsequent suit for demolition of such construction — Barred by acquiescence and laches.
(Para 13)

Cases Referred :	Chronological	Paras
AIR 1969 Andh Pra 92		9
AIR 1958 All 326		9
AIR 1954 Nag 245	1954 Nag L J 272	9
AIR 1938 All 416	1938 All L J 558	1938 All L R 628 9

G. P. Bhargava and A. N. Bhargava, for Appellant, Sankatha Rai, for Respondents

JUDGMENT :— This is a plaintiff's Second appeal in a suit for a declaration that the plaintiff is entitled to the right of passage through the door and the southern wall of his house of which the old number was 15/10 and the present number 34/12 of Mohalla Bhairon Bazar adjoining Chau-Khamba in the city of Varanasi, and of enjoying light, air and sunshine through the said door and ventilators in the same southern wall of his house. A mandatory injunction for the restoration of the said amenities by demolition and removal of the constructions and the room, which had been erected by the defendants on the eastern end of the lane on the south of the plaintiff's house, and which was said to be 12 feet long and 6 feet wide and 2 feet high from the ground level, and the iron bars, wooden frame and wirewash was also claimed. The plaintiff claimed to have acquired these rights by prescription and alleged that the aforesaid obstructions in the enjoyment of the said rights by the plaintiff were raised on the 15th Apr 1958 which was said to be the date of the accrual of the cause of action and that the plaintiff came to know of the same when he returned to Varanasi in May, 1958

2. Apart from denying the plaintiff's right even to the house No 34/12 and the easementary rights claimed by the plaintiff in respect thereto, the defendants asserted that no new constructions had been made by them during the thirty six years preceding the date of the written statement which was 24-7-1959 and that the position of their house has been the same

3. The defendants alleged that there was no lane on the south of house No 34/12 and, at any rate, the dispute between the parties had been resolved by a compromise in Suit 865 of 1923 and the present suit was barred by S 47 of the Civil P C as also by res judicata

4. A large number of issues were framed by the trial court and, on a consideration of them, it dismissed the suit with costs. On appeal the points raised before the lower appellate court were five, namely (1) Whether the finding of the lower court that the impugned constructions were made in 1948 is erroneous? (2) Whether the finding of the lower court that the suit was barred on the principle of estoppel and acquiescence is erroneous? (3) Whether the finding of the lower court that the plaintiff had failed to prove the prescriptive right of passage light, air etc is erroneous? (4) Whether the finding that the suit was not barred by S 47 C P C was erroneous? (5) Whether the discretionary reliefs sought should be granted to the plaintiff?

5. The lower appellate court took up the first three points together and, on an appraisal

*Against decree of S. S. Bose, 2nd Addl. Dist. J., Varanasi, D/- 14-3-1970

of the evidence, found that the trial court was right in holding that the constructions had come into being by the year 1948, but was in error in observing that the suit was barred by non-exercise of the right of easement within two years next before the suit According to the lower appellate court, once a prescriptive right of easement is recognized by a decree of court, it does not get extinguished by non-user for two years, but can get extinguished only by continuous non-user for twenty years The lower appellate court relied upon S 47 of the Easements Act and the compromise decree dated 1st Oct , 1923 between the parties in the earlier Suit 865 of 1923 Further, according to the lower appellate court, the trial court was also in error in holding that the suit was barred by the principles of estoppel and acquiescence On the further point, the lower appellate court read the compromise decree dated the 1st Oct , 1923 inthe said Suit 865 of 1923 and held that the decree clearly gave the defendants a right to make new constructions so as not to interfere with the enjoyment of light and air by the plaintiff According to the lower appellate court, the decree thus contained a prohibition by necessary implication and the defendants could not make any constructions which might interfere with the plaintiff's enjoyment of light and air Further, apart from the mandatory injunction for removal of the constructions which obstructed the door and the light and air of the plaintiff, the decree also contained a prohibitory injunction to prevent the raising of any construction which might interfere with the plaintiff's enjoyment of light and air The lower appellate court held that the present suit was barred by S 47 of the C P C inasmuch as questions relating to the execution, discharge and satisfaction of the consent decree dated 1-10-1923 in Suit 865 of 1923 were raised in the present suit. On this point also, the lower appellate court reversed the finding of the trial court. On the fifth point, the lower appellate court held that the plaintiff was not entitled to any relief, and in the result it dismissed the appeal

6. The first question, which, therefore, arises in this appeal, is whether the present suit could be said to be barred by S 47 of the Civil P C The decree dated 1-10-1923 in Suit 965 of 1923, as quoted in the judgment of the lower appellate court, is in the following terms :

" Yeh degree wa hukum hua ki

" Dawa mudda mutabiq bayanat pharikain degree hoven Nakal bayanat pharikain — muddaleh apani usa imarat ki hata lewe jisase ki mudda ke makan ki darwaza aur roshani wa hawa ko rokati hai Muddadleh apane makan ke samane baramada wa nai imarat ko isa tarik para banawe jisase ki muddai ke makan men roshani hawa ki amadaraft men rukawat na ho Muddaleh ko muddai izazat deta hai ki wah teen khirkiyan salakh dar elawa ek khiraki maujoodah ke apane makan ke usari manzil par shumal ke janib bana lewen Kharcha jisme pharikain rahen "

7. The first item of decree in the earlier suit was that the defendants do remove that building which obstructed the door of, and the light and air to, the plaintiff's house The next item of decree was that in constructing the verandah in front of their house and making other new constructions, the defendants should not obstruct the passage of light and air to the plaintiff's house Lastly the plaintiff permitted the defendants to open three windows with iron bars in addition to the one existing window on the third storey of their house towards the north

8. The two courts below have found that the constructions complained of in the present suit had already come into existence in the year 1948. In so far as this finding is concerned, it is a concurrent finding of fact and has been arrived at on an appraisal of the evidence by the two courts below It is not possible to say that it suffers from any error of law

9. If the constructions sought to be demolished, for removal of the obstruction to the light and air by the present suit, were the same which the defendants undertook to remove by the first clause of the decree dated 1st Oct 1923, then in that case there could be no doubt that the present suit for that relief would be barred by sec. 47 of the Civil P C. But the finding that the constructions which are the subject matter of dispute in the present suit had come into existence by the year 1948, implies that these were new constructions raised after the decree dated 1-10-1923. By the second clause of that decree the defendants undertook to construct the front verandah and the new building in such a manner as would not obstruct the passage of light and air to the plaintiff's house This implied a prohibitory injunction The constructions complained of could be assumed to have been raised in breach of the said prohibitory injunction, for otherwise, the question about the bar of S. 47 of the Civil P C could not be raised at all. Now, according to a Division Bench of this Court

in Angad v. Madho Ram (AIR 1938 All 416) where a judgment-debtor disobeys a prohibitory injunction, the remedy of the decree-holder is not in the execution department but is by a separate suit This was followed in Chiranji Lal v Behari (AIR 1958 All 326) The Andhra Pradesh High Court has taken the same view in Venkata Subbayya v S Veerayya (AIR 1969 Andh Pra 92) and a similar view was taken by the Nagpur High Court in Ajabrao v Atmaram (AIR 1954 Nag 245)

10. It is, therefore, not possible to endorse the view of the lower appellate court that the present suit was barred by S 47 of the Civil P C

11. The further questions which, therefore, arise are whether the finding of the trial court that the suit was barred by estoppel and acquiescence was correct and whether it was necessary in law for the plaintiff to have exercised the easementary rights within two years next before the institution of the suit

12. I shall dispose of the latter point first Once an easement is acquired whether by prescription or by other lawful means, it could be extinguished by a continuous failure to exercise the right of easement for twenty years It may, in this context, be noticed that issue 6, which raises this question, also raised the question whether the suit is barred by time Since the easement in question was an easement of light and air, there could be no question of any bar of limitation because of S. 23 of the Limitation Act, 1908, which laid down the rule that in the case of a continuing breach of contract or a continuing wrong independent contract, a fresh period of limitation begins to run at every moment of time during which the breach or the wrong, as the case may be, continues. Such a right of easement is thus, as held by the lower appellate court, lost only by twenty years non-user as laid down by S. 47 of the Easements Act.

13. This brings me to the question of estoppel and acquiescence. On this point, I find it difficult to agree with the lower appellate court There was the decree dated the Ist Oct 1923. The defendants raised the constructions in suit in spite of that decree The constructions in suit deprived the plaintiff of the enjoyment of his right to light and air and of passage through the ventilators and the door and he continued to be so deprived of those rights for at least ten or eleven years before he came to court It is impossible to say that the plaintiff was not aware of the infringement of his rights And the case set up by the plaintiff that the constructions in suit were raised on 15th April, 1958 has been found to be false. It is impossible to believe the facile assertion made by the plaintiff that he came to know of the constructions complained of for the first time in May, 1958, when he came to Varanasi The facts that the plaintiff allowed these constructions to be raised without any objection from his side when they were in the process of being raised, and allowed them to remain for a space of ten long years even after that and filed a suit falsely alleging that the constructions in suit were made in April, 1958 and he came to know of that for the first time in May, 1958, are, in my opinion, sufficient for holding that the plaintiff's claim for demolition of the constructions complained of was barred by acquiescence and laches If the obstruction of the plaintiff's right of passage through the door and of the right of light and air through the ventilators from more than ten years did not cause any irreparable injury to the plaintiff, such as to necessitate the filing of a suit for their removal, it would be a proper exercise of the court's discretion in the matter to refuse the grant of the relief of demolition of the pucca constructions The loss caused to the defendants by the demolition of these constructions would in all probability be out of all proportion to the inconvenience suffered by the plaintiff by the existence of these constructions I would, therefore, maintain the dismissal of the suit, though for reasons different from those adopted by the lower appellate court

14. In the result, the appeal fails and is dismissed with costs

Appeal dismissed

1981 ALL. L. J. 1347

M. P MEHROTRA, J

Jeet Narain and others, Petitioners v State of U P and others, Respondents

Civil Misc Writ Petn No 2839 of 1977, D/- 16-9-1981

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961) S. 14 — U. P. Imposition of Ceiling on Land Holdings Rules (1961), R. 8 Proviso — Ceiling cases against heirs — Land sold by deceased included —

KY/LY/F116/81/AGM/MVJ

State claiming purchasers to be ostensible owners — Notice must be given — Purchasers filing objections — Objections must be decided on merit.

In ceiling cases against the heirs of a deceased land owner, land already sold by the owner prior to his death was included in the holdings of the heirs with a claim that the purchasers of the said land were ostensible tenure-holders. The purchasers thereupon filed objections claiming to be tenure-holders The objections were rejected on ground that they were time-barred in view of S 14

Held, that irrespective of whether the objections were barred by limitation or not, in view of Proviso to R 8 when the State has claimed the purchasers to be ostensible holders of the land, a notice under R 8 Proviso must be issued to them If the purchasers put in appearance before the concerned authority, then it is not necessary to issue the notice under R 8 Proviso to them again but their objections should be heared and decided on merits 1979 All L J 1174 (FB), Relied on (Paras 4, 5, 6)

Cases Referred : Chronological Paras

1979 All L J 1174 1979 All W C 585 AIR 1980 NOC 6 (FB) 6

Kameshwar Nath Tripathi, for Petitioners, Standing Counsel, for Respondents

ORDER :— This petition arises out of the proceedings under the U P Imposition of Ceiling of Land Holdings Act

2. The facts, in brief are these The petitioners claimed that they purchased some land from one Smt. Suraj Pal Kunwar, widow of Babu Prachan Vir Singh by a registered sale deed dated 9-11-1971 They claimed that they obtained possession on the basis of the sale deed They have further claimed that their names stood recorded in the revenue records on 8-6-1973 when the U. P. Imposition of Ceiling on Land Holdings (Amendment) Act 1972, (U. P Act No. 18 of 1973), came into force. It is further stated in the petition that the said Smt. Surajpal Kunwar died in March 1972, and after her death three heirs succeeded to her estate The three heirs are Onkar Singh, Raujai Singh and Inderdeo Singh Inderdeo Singh is opposite party 4 in the present petition It seems that separate notices u/s. 10 (2) of the Act were issued to each of the said three persons and three ceiling cases in respect of the said three persons came into existence. It has been alleged in the petition that the land, which was purchased by the petitioners, was included in the said ceiling cases against the said three persons and this was done presumably on the basis that the aforesaid sale deed dated 9-11-1971 executed by the predecessor-in-interest of the said three persons was ignored. The petitioners contend that in the ceiling case against the opposite party 4 Inderdeo Singh, they filed an objection claiming that on account of the aforesaid purchase, they were the real tenure-holders of the land which had been purchased by them from the aforesaid lady and that the same could not be included in the holdings of the three heirs of the said lady. It is stated that the prescribed authority by his order dated 29-9-1975 rejected the objections of the petitioners A true copy of the said order is Annexure 4 to the petition The prescribed authority rejected the objections on the ground that the objections had been filed beyond the limitation mentioned in S 14 (3) of the Act as it then stood on 29th Sep 1975 when the aforesaid order (Annexure 4) was passed. Thereafter, the petitioners filed an appeal against the said order but the same was declared to stand abated by the appellate court by its judgment dated 8-3-1977, a true copy whereof is Ann. 5 to the petition. The said abatement was held to have been brought about in view of the transitory provision contained in S 31, U P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1976, (U. P Act No 20 of 1976)

3. Feeling aggrieved, the petitioners have now come up in the instant writ petition and in support thereof, I have heard Sri Kamleshwar Nath Tripathi, Learned counsel for the petitioners and in opposition, the Learned Standing counsel has made his submission

4. It is not necessary to advert to the controversy as to whether the objection filed by the petitioners was or was not time barred u/s. 14 (3) of the Act as it stood before its amendment by the U. P. Act No. 20 of 1976 with retrospective effect from 10-10-1975. It should be seen that irrespective of that aspect of the matter, the first proviso to R 8 of the Rules framed under the Ceiling Act, was clearly breached in this case The said proviso clearly lays down :

"That where the statement in C. L. H Form 3 also includes land ostensibly held in the name of any other person, the prescribed authority shall cause to be served upon such other person a notice in C L. H Form 4

together with a copy of the statement in C L H Form 3 calling upon him to show cause within a period of 15 days from the date of service of the notice why the aforesaid statement be not taken as correct "

5. It has not been disputed that on 8-6-1973 the petitioners had their names recorded on the basis of the aforesaid sale deed in their favour and therefore, it was a case where the State was contending that the land was ostensibly held by the purchasers but that the real tenure-holders were the three heirs of the aforesaid lady Smt Surajpal Kunwar On the basis of the said contention the land sold in favour of the petitioners was included in the statement which was prepared in C L H Form 3 in the cases of the said three heirs of the said lady Therefore, it was obligatory that a notice should have been given to the petitioners to enable them to contest the claim of the State that the land was merely ostensibly held by the petitioners Admittedly, no such notice was given as required by the said proviso to Rule 8

6. I have held in several decisions that where the persons, who are claimed by the State to hold the land ostensibly, themselves put in appearance before the prescribed authority then it is not necessary that a notice under the said proviso to R 8 should be again issued to them, because the purpose of the proviso is to enable such persons to contest the claim of the State that they are merely ostensible tenure-holders and not real ones However, both the prescribed authority and the appellate court denied the petitioners' right to have their objections decided on merits and rejected the claim of the petitioners to have their objections considered on merit and decided the objections by considering only S 14 of the Act and changes which were brought about in the said section by the Amending Act None of the said authorities took into consideration the said first proviso to R 8 of the Rules framed under the Ceiling Law It should be seen that in view of the Full Bench Decision in Shantanu Kumar v State of U P 1979 All W C 585) , (1979 All L J 1174), it has been clearly laid down that the said proviso to R 8 lays down a mandatory provision of law and if there is no compliance with the same, then the proceedings would not be good in law

7. In this view of the matter, I allow the petition and quash the order of the prescribed authority dated 29-9-1975 (Annex 4) and the judgment of the appellate court dated 8-3-1977 (Ann 5) The case is remanded to the prescribed authority with a direction that the claim of the petitioners to be the tenure-holder of certain land which has been included in the holding of the opposite party 4 Inderdeo in the C L H Form 3, which has been prepared in the case of the said tenure-holders, shall be considered on merits after giving the parties concerned an opportunity of leading evidence in support of their respective stands and after considering such evidence and material on record, the surplus land of Inderdeo Singh shall be redetermined after such adjudication In the circumstances, there will be no orders as to costs

Petition allowed

1981 ALL. L. J. 1349

DEOKI NANDAN, J

Munner Hazzam, Appellant v Gyas Uddin and others, Respondents

Second Appeal No 366 of 1968, D/- 3-9-1981 *

Evidence Act (1872), S. 35 — Relevancy of entry in public record made in performance of duty — Record of Commissioner in earlier suit — Relevant in subsequent suit, AIR 1927 Oudh 323, AIR 1914 All 59, Foll.; AIR 1934 Lah 890, AIR 1936 Oudh 192, Dissented from, AIR 1928 Cal 63, AIR 1976 All 121, Disting.

(Para 2)

Cases Referred :	Chronological	Paras
AIR 1976 All 121	1975 All W C 632	2
AIR 1936 Oudh 192	1935 Oudh W N 1388	2
AIR 1934 Lah 890	37 Pun L R 519	2
AIR 1928 Cal 63		3
AIR 1927 Oudh 323		2
AIR 1914 All 59	12 All L J 179 ILR 36 All 161	2

Uma Kant Misra, for Appellant, Ratan Singh, for Respondents

JUDGMENT :— Having heard Mr Birendra Dixit, the learned counsel for the applicant on this review application, I find that it cannot be said that my judgment dated 21st Jan. 1981 in the Second Appeal, suffers from any such error as to afford a ground for review

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*Against judgment of Deoki Nandan J reported in 1981 (7) All L R 293 1981 U. P. L. T NOC 109

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2. The only point raised was that the finding recorded by me that the Commissioner's report in the earlier suit, of which a certificate copy had been filed in the suit giving rise to the present second appeal, was relevant evidence under S 35 of the Evidence Act I need not repeat the reasons given by me for taking the view which I did Certain cases were cited before me The first case, State v Smt Ram Sri, (AIR 1976 All 121), is clearly distinguishable and does not advance the applicant's case any further The next case cited by the learned counsel was that of Ibrahim Beg v Mst Azman, (AIR 1936 Oudh 192) That case does help the applicant in so far as it was held there that a Commissioner appointed by a Court with special directions to make a particular inquiry into the particular facts of a case is not a person performing a duty specially enjoined by the law of his Country in which such book, register or record is kept Further an earlier oudh decision in Jagdat v Sheopal, (AIR 1927 Oudh 323), was distinguished in that case on the ground that the kanungo had been appointed as a Commissioner in the earlier case It was observed that the report in the earlier case was thus made by a public servant, namely, a Kanungo in the discharge of his official duty, he having been called upon by a Magistrate to make an enquiry of a certain complaint filed in the Magistrate's Court With respect I am unable to see any difference between a Kanungo or an Amin or as to that even an Advocate or a private individual appointed as a Commissioner by a Court and acting as such in due discharge of the duties entrusted to him by a Court Under S 21 of the I. P. C., a public servant is defined to include every officer of a Court of justice including a liquidator, receiver or Commissioner whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorised by a Court of Justice to perform any of such duties With respect I would prefer to rely on the earlier decision of the Oudh Chief Court in Jagdat v. Sheopal, (AIR 1927 Oudh 323). Reliance was next placed on a punjab decision of the Lahore High Court in Ghanaya v. Mehtab, (AIR 1934 Lah 890) The head note of that case shows that the decision of the Oudh Chief Court in Jagdat v Sheopal (AIR 1927 Oudh 323) and of a Division Bench of this Court in Baldeo Das v Gobind Das, (AIR 1914 All 59), were dissented from by the Lahore High Court in that case With respect I am bound by the Bench decision of this Court

3. Lastly, the decision of the Calcutta High Court in Sarat Chandra Rakhit v Sarala Bala Ghosh, (AIR 1928 Cal 63), was cited That case is no authority for the proposition that the record of a Commissioner in an earlier suit is not relevant in the subsequent suit under S 35 of the Evidence Act The judgment in that case shows that the report and the map were not taken into evidence as contemplated by the Civil P C, but they were taken in under the Evidence Act on being proved by the person who made them, that is a pleader commissioner who was examined in the case and he deposed that the map and the report were made by him and they were themselves marked as exhibits It was further observed in that case that objection to the admissibility of the report and the map of the Commissioner was not taken at the earlier stage of the trial and the objection was overruled In case the report of a Commissioner appointed in a case is confirmed, it becomes admissible as evidence in that case, and a part of the record of the case. I have observed in the judgment that in case the Commissioner's report was not confirmed in the earlier suit, it would be of no evidentiary value; "and even if it was confirmed in the earlier suit, it might have been open to the parties who contested the report to call for the Commissioner for cross-examination in order to test its correctness or to show that it was incorrect by some other evidence but it cannot be brushed aside out of hand simply because it was a report made in an earlier suit and the party who relied upon it did not produce the Commissioner to prove that report in the present suit As to the inspection note of the presiding officer, the report could be used to judge the reliability of evidence of witnesses in the present case

4. I may add that, being certified copy of a document on the record of the earlier suit it proved itself, it was not necessary to call the Commissioner as a witness to prove it This application for review is accordingly dismissed

Application dismissed.

1981 ALL. L. J. 1351

DEOKI NANDAN, J

Union of India, Appellant v Jamuna, Respondent

Second Appeal No 1985 of 1970, D/- 19-8-1981 *

Constitution of India, Art. 311 — Termination of service of temporary Railway servant by service of notice on ground of service being no longer required — Termination actually based on police report regarding misconduct of employee — Held termination of service in this manner and without opportunity of hearing was illegal and violative of Art. 311. (Paras 6, 7)

R P Goel, for Appellant

JUDGMENT :— This is a Second Appeal by the Union of India on behalf of the North Eastern Railway Administration The Plaintiff-respondent was appointed as a Hamal on Rs 30/- per month as salary in the Scale of Rs 30-½-35 plus usual D A, and joined his post on the 2nd Jan, 1956 The appointment was purely temporary and liable to termination on thirty days notice by the Railway Administration. By a notice dt 31st May, 1966, that is more than ten years after the plaintiff's said appointment, his services were terminated on the ground that they were no longer required, with fourteen days' notice The order of the termination of the plaintiff's services was issued in pursuance of a direction of the Chief Personnel Officer of the Railway Administration to the Assistant Personnel Officer, North Eastern Railway, Sonepur, where the plaintiff seems to have been working at that time The said direction is contained in a letter dt 2nd Jan, 1966, which appears to have been a reply to a letter dt 4th Sept., 1965, from the Assistant Personnel Officer, Sonepur, whereby he forwarded certain remarks of the Police on an inquiry memo dt, 7th Oct, 1961, sent by the District Traffic Superintendent, North Eastern Railway, Sonepur to the District Magistrate, Saran (Chupra) The remarks of the Police at the back of this memorandum (Ex A-11) are that there was nothing against the plaintiff in the police records, but his reputation in the locality was bad and that he was concerned with many unreported cases of theft of Railway property that is coal, iron and steel etc., in league with certain criminals

2. It is obvious that this adverse report against the plaintiff, which concerned not his antecedents before he became a Railway Servant, but his conduct as a Railway Servant was the cause of the action taken by the Railway Administration in terminating the plaintiff's service

3. The trial Court having decreed the suit, two points were raised before the lower appellate Court (1) that the plaintiff's services were temporary, and (2) that the order terminating his services did not attract the provisions of Art 311 of the Constitution

4. The trial Court had, on the basis of the material placed before it, found that the plaintiff had to be deemed to have become a permanent servant of the Railway Administration and that his services could not be terminated without complying with the provisions of Art 311 of the Constn The lower appellate Court agreed with this finding and did not give any finding on the second question raised before it, as to whether the notice terminating the plaintiff's services was bad for not complying with the provisions of Art 311 of the Constn even if he was a temporary employee

5. The learned counsel for the Railway Administration urged before me that the finding of the two Courts below that the plaintiff was a permanent employee of the Railway Administration was based on no evidence It is true that, according to the reasons given by the lower appellate Court for arriving at the finding that the plaintiff was a permanent employee, it was impelled by two circumstances (1) the fact that the plaintiff had been allowed to contribute to the provident fund, and (2) that, according to the circular issued by the Railway Administration, he should have been confirmed in his post after completion of two or, at any rate, three years' service without requiring verification of his antecedents The fact remains that from the records produced by the Railway Administration, and I have no reason to think that they have suppressed any part of the record, the plaintiff does not appear to have been confirmed in service May be that according to the instructions issued by the Railway Administration the immediate superiors of the plaintiff or the

*Against judgment and decree passed by R. C. Awasthi, 4th Temporary Civil and S J., Gorakhpur, D/- 10-7-1970

officer's concerned should have taken steps to confirm the plaintiff in his employment, and, if they had followed those instructions, the plaintiff would have been confirmed in his employment, but this could not mean that the plaintiff had become a confirmed employee, simply because the concerned authorities did not take any steps to confirm him in his employment. It is no explanation that the plaintiff being a poor fourth class employee of the Railway Administration, he was no supposed to keep papers regarding the confirmation of his service. I would, therefore, hold, in disagreement with the finding of the lower appellate Court, that there is nothing on the record to show that the plaintiff ever became a confirmed employee of the Railway Administration. May be, on the basis of the circular issued, he was entitled to be confirmed, but the fact remains that he did not take the necessary steps in the direction.

6. This, however, is not the end of the matter, for, as observed above, it is apparent from the documents filed by the Railway Administration itself that his services were terminated on the basis of the police report. It may be that the Railway Administration is entitled in law to have suppressed that police report and to have passed an order terminating the plaintiff's services after giving him fourteen days' notice in terms of the appointment letter given to him without giving any reason and without casting any stigma on the plaintiff. But the law in this regard cannot be applied in a mechanical fashion. The object of Art. 311 of the Constn. is to maintain the morale of the public services, and at the same time to see to it that the public interest does not suffer by not taking proper action against erring employee. It is obvious that the police report was the basis of the action taken against the plaintiff. Having looked into that report, it is obvious that the report related to the plaintiff's conduct as a Railway servant. Now, if that was the basis of the action taken against the palintuff, it was in the public interest to have formulated a specific charge against him and to have taken action to punish him in accordance with the service rules. This kind of a termination of service, by service of notice, withholding the real reason, and on the ground of service being no longer required, which reason is, on the face of it, false, defeats the object and purpose of Art. 311 of the Constn. It only shows that the Railway Administration shirked its responsibility of taking action against the plaintiff and punishing him in accordance with the service rules, and at the same time deprived him of the opportunity of showing cause to which he was entitled under the rules.

7. I would, therefore, dismiss the appeal and maintain the decree declaring that the order terminating the plaintiff's services was illegal and unconstitutional for violating Art. 311 of the Constn., but I wish to make it clear that this would not prevent the Railway Administration from proceeding to punish the plaintiff in accordance with the service rules if they so want to do. Since the plaintiff was unrepresented in this Court, there will be no order as to costs.

Appeal dismissed.

1981 ALL L. J. 1352

M. P. MEHROTRA, J.

Suleman, Petitioner v. State of U. P. and others, Respondents.

Civil Misc. Writ Petn. No. 7909 of 1980. D/- 16-10-1981.

Constitution of India, Art. 226 — New plea — Contentions that the notice issued under S. 10(2) of U. P. Imposition of Ceiling on Land Holdings Act was void and without jurisdiction and that the order passed in earlier ceiling proceedings were binding in subsequent ceiling proceedings, not pressed before appellate authority — Held, controversy raised was not a pure controversy of law but was mixed question of law and fact and hence could not be allowed in writ proceedings. (Para 6)

Cases Referred : Chronological Paras

1979 All C J 168 22
AIR 1975 S C 1297 (1975) 1 S C C 858 26
AIR 1970 S C 1029 1970 Cri L J 991 72 Pun L R 1000 8, 13
AIR 1970 Guj 178 1970 Cri L J 1348 17
AIR 1966 Pat 458 15
AIR 1965 S C 282 : (1965) 1 S C A 378 8, 11
AIR 1964 S C 477 (1964) 5 S C R 64 26
AIR 1964 S C 1625 : 1964 (2) Cri L J 590 (1964) 1 S C W R 328 18, 21
1964 All L J 1139 : 1964 All W R (H C) 311 8, 9
AIR 1964 Andh Pra 53 (1963) 2 Andh W R 307 18, 20
AIR 1963 S C 146 1962 All L J 1075 : (1963) 1 S C A 585 6

KY/LY/F58/81/LGC

AIR 1960 Andh Pra 253 1960 Cri L J 561
(1959) 2 Andh W R 249 18, 19
AIR 1959 Ker 12 1958 Ker L T 388 16
AIR 1957 Ker 103 1957 Ker L T 799 18
AIR 1948 All 309 1948 All L J 87 1948 All W R (H C) 53 19
AIR 1940 Nag 217 1940 Nag L J 150 19
AIR 1940 Rang 191 1940 Rang L R 481 19
1936 Mad W N 111 19
AIR 1932 Oudh 137 135 Ind Cas 387 19

K C Sinha, for Petitioner, Standing Counsel, for Respondents

ORDER :— This petition arises out of the proceedings under the U P Imposition of Ceiling on Land Holdings Act

2. The facts, in brief, are these A notice under S 10(2) of the Act was issued to the petitioner Suleman and the same was registered as Case No 191 of 1978 (this is the number given in the Annexure 8 to the petition, however, in para 11 of the petition it is stated that the number was 199 of 1978) The petitioner filed his objections to the said notice and, inter alia, took certain preliminary objections to the issuance of the said notice under S 10(2) of the Act Two preliminary issues were framed by the Prescribed Authority and they were numbered as Nos 1 and 3

3. Both the preliminary issues were decided by the Prescribed Authority by his order dated 12-9-1978, a true copy of which is Annexure 8 to the petition Thereafter, an appeal was filed by the petitioner against the said order of the Prescribed Authority and the same was dismissed by the appellate court as not maintainable The appellate court's judgment is dated 9-12-1978 and a true copy of the same is Annexure 9 to the petition Thereafter, the proceedings continued before the Prescribed Authority and the order under S. 12 of the Act was passed by the said authority on 6-3-1980, a true copy of which is Annexure 10 to the petition Thereafter, two cross-appeals were filed against the said order dated 6-3-1980 one was filed by the State and the other by the petitioner. Both the appeals were disposed of by one common judgment dated 14-8-1980, a true copy of which is Annexure 14 to the petition. The State's appeal was allowed and the petitioner's appeal was also partly allowed. While allowing the State's appeal, the appellate court held that two sons of the petitioner Gaydor Ali and Latif Ali were also minors. The petitioner's appeal, as stated above was partly allowed and the Prescribed Authority was directed to determine whether plots Nos 714, 322 and 322/1821 were irrigated or not in accordance with the provisions of S 4-A of the Act All the other contentions of the petitioner, which he had raised in his appeal, were rejected

4. Feeling aggrieved, the petitioner has now come up in the instant writ petition and in support thereof, I have heard Sri G N Verma, learned counsel for the petitioner In opposition, the learned Standing Counsel has made his submissions

5. The learned counsel for the petitioner contended before me that issues Nos 1, 2 and 3 were wrongly decided by the Prescribed Authority and the notice under S 10(2) of the Act, which was issued in 1978 to the petitioner, was void and without jurisdiction He further contended that the orders passed in the earlier ceiling proceedings were binding in the subsequent ceiling proceedings It should be seen that these contentions were never pressed before the appellate court as is clear from the impugned judgment of the lower appellate court dated 14-8-1980 (Annexure 14) In the said judgment, it has been clearly observed

"No other point has been pressed in the two appeals The appeals are fit to be decided accordingly"

6. In para 26 of the petition it has been stated —

"That respondent 2 has failed to consider that the finding recorded by respondent 3 with regard to issues Nos 1 and 3 was illegal The proceedings giving rise to this petition were barred by the principle of res judicata and were not maintainable otherwise too"

It will thus be seen that there is no allegation in the petition that before the appellate court, the aforesaid contention was pressed and canvassed It is true that in the memorandum of petitioner's appeal (Annexure 12 to the petition) ground 4 of the grounds of the appeal did seek to raise the said controversy However, what is material is that the ground contained in the grounds of appeal is pressed and not merely its existence in the memorandum of appeal vide, Sukhpal Singh v Kalyan Singh (AIR 1963 S C 146), wherein it was laid down as follows (at p 148) —

"The memorandum of appeal does contain the grounds of objection to the decree appealed from, without any argument or

narrative as laid down in sub-r (2) of R 1, O XII Such grounds cannot take the place of the points for determination contemplated by R 31 Not unoften certain grounds of objection raised in the memorandum of appeal are not argued or pressed at the hearing and in that case such grounds cannot be taken to be the points for determination and are rightly not discussed in the judgment at all It is for the appellant to raise the points against the judgment appealed from He has to submit reasons against its correctness He cannot just raise objections in his memorandum of appeal and leave it to the appellate Court to give its decision on those points after going through the record and determining the correctness thereof It is not for the appellate Court itself to find out what the points for determination can be and then proceed to give a decision on those points"

It should be seen that the controversy raised is not a pure controversy of law but is a mixed question of fact and law and when this controversy was not pressed before the appellate court below, I do not think that the petitioner should be allowed to raise it within the narrow ambit of a petition under Art 226 of the Constitution Accordingly the first contention raised by the learned counsel for the petitioner is rejected

7. The learned counsel next contended that his three sons were major on the relevant date i e 8-6-1973 and the lower appellate court erred in holding to the contrary The appellate court examined the controversy in great detail and held that the evidence led on behalf of the petitioner both documentary and oral, lacked credibility and that much of such evidence had been manufactured for the purposes of the ceiling proceedings In particular, the extract of the Kutumb Register was criticised on this ground The expert evidence produced on behalf of the petitioner was also rejected on the ground that the medical practitioner concerned had not carried out the necessary tests which should have been carried out for determining the age of the persons concerned The appellate court placed reliance on the statement of Ram Swarup, Head Master of Primary School, in which the three sons had studied He had produced the extracts of the School Register which recorded the dates of birth of the three sons of the petitioner and which established that on the relevant date i e 8-6-1973 the said three sons were minors. The learned counsel for the petitioner contended that under section 35 of the Indian Evidence Act the appellate court could not place reliance on the extract of the School Register and that the statement of Ram Swarup should not have been relied upon as he had no personal knowledge and made his statement on the basis of the entries in the said register Learned counsel further contended that the sale deed dated 24-1-1972 in favour of Gayoor Ali should have been considered by the appellate court which clearly established that the said Gayoor Ali was major on 8-6-1973. It was further submitted that the oral evidence led by the petitioner was reliable and should have been believed

8. Reliance was placed on the following cases

1 Katwaru Yadav v Ram Surat Harijan (1964 All L J 1139), 2 Brij Mohan Singh v Priya Brat Narain Sinha (AIR 1965 S C 282), 3 Ram Murti v State of Haryana (AIR 1970 S C 1029)

9. In Katwaru Yadav's case (supra) Gangeshwar Prasad, J observed that

"In order that an entry in a public record may be receivable in evidence it is imperative that it should have been made by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country in which such record is kept That is the obvious requirement of S. 35, Evidence Act, under which the entry is relevant If, therefore, the entry has not been made by a public servant one of the essential ingredients constituting relevancy is lacking in it and the mere fact of its existence in a public record would not impart to it the character of evidence It is certainly true that if an entry is found in a public record it may be presumed to have been made by the public servant entrusted with the preparation of the record but if it is admitted or clearly proved that the entry is not in the handwriting of the public servant so entrusted, it will have to be established either by evidence or by circumstances that despite the entry not being in his handwriting it was really 'made' by him inasmuch as it was at his instance and on his direction that the entry came to find place in the record"

10. In my view, the said decision has no applicability to the facts of the instant case The ground, on which the learned counsel for the petitioner contended that the extracts of the register in question were inadmissible, was that it was not proved in whose handwriting the said register had been

maintained It is correct that Ram Swarup P W 3 who had produced the register in the witness-box, clearly admitted that he was not aware of the teacher, who had prepared the same and when the same was prepared However, this statement cannot be interpreted as an admission that the register had not been prepared in the regular course The said statement of the witness can only lead to the inference that if the register required proof before it could be read in evidence, then it was not proved in view of the said statement of the said witness This, however, is a different aspect of the matter and has nothing to do with the proposition which was laid down by Gangeshwar Prasad, J in the aforesaid case

11. In Brij Mohan Singh v Priya Brat Narain, (AIR 1965 S C 282 at p 286) (supra), it was laid down that

"An entry of birth made in an official record maintained by an illiterate Chowkidar, by somebody else at his request does not come within S 35, Evidence Act".

12. Again the said proposition has nothing to do with the facts of the instant case. It is not suggested that entry in the School Register was made by some one other than the person who was entrusted with the task of maintaining the register As I have emphasised above, the learned counsel has contended that the extract of the register could not be relied upon because the witness Ram Swarup had admitted that he had not maintained the register and could not prove the handwriting in which the same had been maintained

13. In Ram Murti v State of Haryana, (AIR 1970 S C 1029 at p 1031) (supra), it was observed :

"That Court also took into consideration an unproved and unexhibited school certificate which appears to have been obtained by the investigating Officer from the Dev Samaj School According to this certificate the date of Satnam Kaur's birth is stated by the trial Court to be Aug 5, 1948 We had a look at this document. It is dated Apr. 9, 1965 and purports to certify the date of Satnam Kaur's birth according to the School register to be Nov 5, 1948 and is signed by some one describing herself as Head Mistress, Dev Samaj Girls' High School We fail to understand how the Trial Court felt justified in taking his document into consideration and holding the date of birth as entered in this document to be Aug. 5, 1948 We, however, need not say anything more about the merits of this document because the counsel for the State in this Court has rightly declined to place any reliance on it"

14. In my view, the facts of the said case were different. A certificate had been issued which purported to certify the date of birth of a student on the basis of the School Register It was not a case where any extract of the School Register itself was produced or the original register itself was placed before the Court as was done in the instant case

15. It may be stated that a few more cases bearing on this aspect of the controversy were cited at the Bar They are as follows —

Tata Iron & Steel Co Ltd v Abnul Wahab, (AIR 1966 Pat 458) where the probative value of a school Admission Register was in question It was observed (at p 459) —

"Mr. Chatern has raised some doubt about the admissibility of the entry (Ext. 2) under S 35, Evidence Act, but it is not necessary for me to decide this question at this stage Assuming that this is admissible, all that can be deduced from it is that on the basis of someone's statement, it was recorded in the register that the plaintiff was born on 5th Dec 1900 No one has been examined to prove that he was actually born on that date, nor has any one been examined to prove that he made the statement before the School Authorities at the time of the admission, and that statement made by him was correct. It is, therefore, impossible to say that there is evidence in this case to prove the fact in issue i e the fact alleged by the plaintiff that he was born on 5th Dec , 1900"

16. In Gopalan v Kannan, (AIR 1959 Ker 12), the head note is as follows —

"Entries in Admission Registers kept in private schools cannot be considered as entries made by a public servant in the discharge of his official duties Nor can it be said that these registers are kept in the performance of a duty specially enjoined by the law of the country within the meaning of S 35, Evidence Act The rules in pursuance of which these registers are kept do not show that they have been framed in the exercise of any statutory power by the Government of Madras In these circumstances, the rules cannot be said to be statutory Rules and thus law within the meaning of S 35"

17. In Ghanchi Vora Samauddin Isabhai v State, (AIR 1970 Guj 178), the question

again was regarding the probative value of an entry regarding the date of birth as given in a school leaving certificate The controversy was examined with reference to the Bombay Primary Education Rules, 1949

18. In Vishnu Maheshwaran Nampoothiri v Kuruvilla Kuruvilla Kochitty Kuruvila, (AIR 1957 Ker 103), a learned Judge of the Kerala High Court laid down as follows (at p 104) —

"The Education Code enjoins upon the Headmaster of each school to prepare and maintain an admission register of the pupils admitted to that particular school, of the several particulars to be entered in such a register, the date of birth of the pupil as stated by the parent or guardian is an important item Thus there can be no doubt that the admission register is a public record maintained by the Head of the Institution who is in duty bound to maintain such a register containing certain particulars relating to each pupil as required by the Education Code In making such entries in the admission register, the head of the institution who is a public servant is merely discharging his official duty The date of birth as entered in such an official record is a relevant fact as contemplated by S 35 Evidence Act, and the same can be proved by production of that record The entry thus made in such an official record by a public servant in the discharge of his official duty, has to be presumed to be correct in the absence of other reliable evidence to the contrary"

On the other hand, the learned Standing Counsel placed reliance on the following cases 1 Re Sriram Reddi Simhachalam, (AIR 1960 Andh Pra 253), 2 Ajjarapu Subbarao v Pulla Venkata Rama Rao, (AIR 1964 Andh Pra 53), 3 Mohd Ikram Husain v State of U P, (AIR 1964 S C 1625)

19. In Re Sriram Reddi Simhachalam (supra), it was laid down that a register of admissions and withdrawals maintained by a school in the prescribed form i e the form prescribed under the Madras Educational Rules is an official register, and the clerk who maintains such a register is a public servant The register being an official register, the entries therein are relevant under S 35, Evidence Act. Seshagiri Rao v Emperor (1936 Mad W N 111) and Hoak Saing v Ma E Hla (AIR 1940 Rang 191), were distinguished on the ground that in the said cases private schools were involved Reliance was placed on Abhera Singh v Gaya Singh, (AIR 1932 Oudh 137), Agajan Khan v Keshorao, (AIR 1940 Nag 217) and Municipal Board, Aligarh v Mumtaz Khan, (AIR 1948 All 309)

20. In Ajjarapu Subharao v Pulla Venkata Rama Rao, (AIR 1964 Andh Pra 53) (supra) the Division Bench affirmed the correctness of the preceding decision of the same Court

21. In Mohd. Ikram Husain v State of U P, (AIR 1964 S C 1625 at p 1631) (supra) the dispute was about the age of a girl It was observed —

"In the present case Kaniz Fatima was stated to be under age of 18 There were two certified copies from School Registers which showed that on June 20, 1960 she was under 17 years of age There were also the affidavit of the father stating the date of her birth and the statement of Kaniz Fatima to the police with regard to her own age These amounted to evidence under the Evidence Act and the entries in the School Registers were made ante litem motam"

22. The learned counsel for the petitioner sought to distinguish this case by making a distinction between primary schools and High Schools The latter are governed by the Intermediate Education Act unlike the former In my view, this distinction is really not material in the instant case It is not clear from the record as to in what form the registers were maintained and whether such forms have been prescribed under the Education Code The relevant record is not before me in the instant petition and, therefore, it is not possible to express any opinion on this controversy However, in my view no interference is called for in the instant petition in respect of the decision of the appellate court on the said controversy It should be seen that the burden of proof was upon the petitioner who had special means regarding the dates of birth of his children He led evidence, documentary and oral, and the same was disbelieved The appellate court has given cogent reasons to establish that the extract of the Kutumbh Register was absolutely unreliable It was observed by the said Court

"However the entries of this register per se appeared to be forged and concocted and cannot be relied on"

In a situation of this kind, it was open to the appellate court to have rejected the claim of the petitioner that his three sons were major on 8-6-73 irrespective of the evidence led on behalf of the State I do not think that the

sale deed dated 24-1-1972 throws any light on the question of the date of birth of Gayur Ali In the said sale deed nothing has been said about the majority or minority of the vendee It should further be seen that the date of sale deed is 24-1-1972 i e after 24-1-1971 which date has been given a special significance in the ceiling law on account of the fact that on the said date the election manifesto of the Indian National Congress was released on the eve of the mid term Parliamentary poll of 1971 (See the decision of K N Goel, J, in Anurag Kumar v 4th Addl District Judge, (Civil Misc Writ Petn No 2361 of 1977 connected with Writ Petn No 2359 of 1977 and 2360 of 1977 decided on 19-12-1978*)

23. In the light of the aforesaid discussion, I do not think that the contention of the learned counsel for the petitioner regarding the three daughters of the petitioner can be accepted In my view, the appellate court's finding recorded in the following extract from the judgment of the said court, is unexceptionable —

"The next contention of the learned counsel for the appellant Suleman is that in his family there are also three minor daughters and the learned prescribed authority has erred in not accepting the same This contention of the appellant also appears to be false. There is also oral evidence regarding it In the Kutumb Register filed by the appellant himself, the names of the daughters did not find place, which show that there are no daughters in the family of the appellant No document regarding them has been produced The appellant has also not produced any entries of the birth register regarding their birth In the circumstances, I find that the contention of the appellant that he had three minor daughters is also false"

24. Lastly, it was contended that the plots Nos 908 and 910 were Abadi and should not have been included in the petitioner's holding. In regard to this controversy, the appellate court observed —

"In this regard also there is also only oral evidence of the appellant He has neither produced any Khasra entry to show that these plots are not being ploughed nor has got a commission issued to show the existence of Abadi at the spot. The learned counsel for the appellant has relied on a previous notice issued to the appellant which is paper No 74 in which plot 908 has been shown to be abadi Fresh notice under S. 10 (2) was issued to the appellant in supersession of the earlier notice because the earlier notice was defective Therefore, the contents of this notice cannot be relied on by the appellant I, therefore, find that the appellant is also not able to prove that there is abadi in plots Nos 908 and 910"

25. In my view, it is not possible to interfere with the said finding in this writ petition

26. I should like to emphasise here that the jurisdiction which I am exercising in a writ petition under Art 226 of the Constitution is dissimilar to the one which is exercised by this Court on its appellate side (See AIR 1964 S C 477, Syed Yakoob v K S Radha Kishanan and AIR 1975 S C 1297, Babhutmal Raichand Oswal v Laxmibai R Tarkel)

27. In the result the writ petition fails and is dismissed but there will be no order as to costs

Petition dismissed

1981 ALL. L. J. 1357

A N VERMA, J

Meshbahus Samad, Appellant v Smt Tamizan and others, Respondents

First Appeal No 49 of 1979, D/- 1-10-1981 *

(A) Transfer of Property Act (4 of 1882), S. 58 (c) Proviso — Mortgage by conditional sale — Condition for reconveyance not embodied in sale deed but in separate document — Transaction not a mortgage by conditional sale. (Para 7)

(B) Transfer of Property Act (4 of 1882), Ss. 58, 12 — Mortgage — Deed of reconveyance containing clause that on failure to perform certain condition reconveyance stands cancelled — Clause not penal in nature — Court cannot relieve mortgagor from effect of breach thereof — Section 74 of Contract Act cannot be invoked. (Contract Act (1872), S. 74) AIR 1963 S C 1182 Rel. on; AIR 1963 S C 1405 Disting. (Paras 10, 11)

*Against decree of Uma Shanker, 1st Addl Dist J, Kanpur, D/- 28-8-1978

*Reported in 1979 All C J 168

LY/LY/F630/81/AMG

Cases Referred : Chronological Paras

AIR 1963 S C 1182 1962 S C D 701 4, 8, 11, 12, 13

AIR 1963 S C 1405 (1964) 1 S C A 174 12, 13

AIR 1950 F C 38 1950 S C J 1 11

(1831) 39 E R 195 1 Russ & M 506 9

L J O S Ch 232, Davis v Thomas 11

Santosh Kumar, for Appellant, S P Mehrotra, for Respondents.

JUDGMENT :— This is a plaintiff's first appeal It arises out of suit for specific performance of a contract for reconveyance of two houses, details whereof are specified in the plaint The court below has dismissed the suit

2. The suit was filed with the allegations that the plaintiffs were in need of money They wanted to raise the money upon the security of their houses They approached the defendants for this purpose, who agreed to advance a loan of Rs 20,000/- to the plaintiffs with an interest of 1 25% per mensem which works out to Rs 250/- per month The defendants wanted security for the repayment of this loan It was consequently agreed between the parties that the following documents shall be executed by the plaintiff in favour of the defendant one, a sale deed transferring the houses in suit in favour of defendants for a consideration of Rs 20,000/- and, the other a deed of reconveyance whereunder the defendants would undertake to reconvey the property to the plaintiffs for a sum of Rs 20,000/- plus the amount of rent which shall have become due from the plaintiffs under the third document, namely, a rent note, whereunder, the plaintiffs would be liable to pay Rs 250/- per month to the defendants as rent for the two houses The plaintiff was, however, to continue in occupation of the houses. Pursuant to this arrangement, these three documents were simultaneously executed on 1-2-1965. The three documents together constituted, in truth and substance, a mortgage by conditional sale irrespective of what might have been recited in those documents. Within less than four years, the plaintiff called upon the defendant by means of written notices to execute the deed of reconveyance in favour of the plaintiffs in terms of the agreement referred to above The defendant however, refused to execute the deed of reconveyance The plaintiff offered to pay to the defendant the entire sums of money which he had to pay for the reconveyance of the property, but the defendant without any justification refused to reconvey the property, and, therefore, the suit

3. The defence of the defendants respondents was that the transaction between the parties was an out and out sale and not a mortgage by conditional sale In the agreement for reconveyance, however, there was a term that if the plaintiff happened to fall in arrears of rent for more than six months the deed of reconveyance would be deemed to have been cancelled The plaintiffs were in arrears of rent for more than six months They had, therefore, forfeited the right to claim reconveyance of the property. It was denied that the three transactions were intended to constitute a mortgage by conditional sale

4. On the pleadings of the parties, the trial Court framed various issues On the issue whether the three transactions constituted a mortgage by conditional sale, the court below held that they did not amount to mortgage by a conditional sale both upon the plain terms of these documents as well as in view of the proviso to S 58(c), Transfer of Property Act The court below rejected the plaintiff's oral evidence which was adduced to show that the real intention behind execution of these three documents was not to transfer the property outright in favour of the defendants but was to secure the repayment of the loan by mortgaging the houses in question on the ground that such evidence could not be admitted in view of the prohibition contained in Ss 91 and 92, Evidence Act The court below has also rejected the plea of the plaintiffs to the effect that clause in the agreement for reconveyance whereby the plaintiffs were to be precluded from claiming reconveyance if they fell in arrears of rent for more than six months, was penal in nature, and that the court should, therefore, relieve the plaintiffs from the effect of the breach of such clause. The learned Judge trying the suit followed a decision of the Supreme Court in the case of K Simrathmull v. Nanjalingiah Gowder, (AIR 1963 S C 1182), the facts of which were identical with the facts of the case in hand The net result was that the suit of the plaintiff-appellant was dismissed.

5. Aggrieved by the decision of the Court below, the plaintiff has filed this appeal.

6. Learned counsel first contended that the Court below committed an error of law in holding that the oral evidence of the plaintiffs

adduced to establish that the true intention behind the parties executing the three documents was not what appeared on the face of these documents, but something different therefrom, and was inadmissible because of the bar of Ss. 91 and 92, Evidence Act It was submitted that where the very existence of the contract evidenced by a document purporting to have been executed by the parties thereto is being questioned, the bar of S 91, Evidence Act, cannot possibly have any application

7. Having heared learned counsel for the parties, I do not consider it necessary to go into the aforesaid question as there is a shorter answer to the plea of the plaintiffs The clear case of the plaintiffs as pleaded was that the three transactions together constituted a mortgage by conditional sale Proviso to S 58(c), T P Act, lays down that where the mortgagor ostensibly holds the property mortgaged on various conditions enumerated therein, the transaction cannot be deemed to be a mortgage by conditional sale unless the condition for reconveyance is embodied in the document which effects or purports to effect the sale. In the present case, the condition for reconveyance is not embodied in the sale deed itself The condition occurs in a separate document Consequently, upon the plain terms of S 58(c) of the Act, the transaction in question could not be regarded as mortgage by conditional sale

8. Furthermore, the three documents are identical in terms and effect with the documents which were the subject matter of consideration in the case of K Sivrathmull v. Nanjalingiah Gowder (AIR 1963 S C 1182) (Supra) by the Supreme Court and on an interpretation of those documents their Lordships held that though the sale deed of reconveyance and the rent-note were part of the same transaction the transaction could not be regarded as a mortgage by conditional sale. Those documents were executed in circumstances substantially identical with those obtaining here The court below has followed this decision, in my view, rightly

9. Thus, in either of the matter, the conclusion, of the court below that the three transactions did not constitute a mortgage by conditional sale seems correct and is hereby affirmed

10. The next submission and this was the main submission of the learned counsel for the appellant was that the clause in the deed of reconveyance that in the event of the plaintiffs remaining in arrears of rent for more than six months, the deed of reconveyance shall stand cancelled, is penal in character, and the court should in equity ought to relieve the plaintiff from the effect of the breach thereof I cannot agree Before, I proceed to deal with the submission I may add that the learned counsel for the plaintiff did not dispute the fact that the plaintiffs were in fact in arrears of rent for more than six months

11. Now I find that the above submission also stands concluded by the decision of the Supreme Court in the case of K Simrathmull v Nanjalingiah Gowder, (AIR 1963 S C 1182), (supra) In that case, their Lordships of the Supreme Court were considering a similar argument advanced on behalf of the plaintiff of that case Their Lordships observed at page 1184 of the report as follows —

"It is true that equity relieves against penalties when the intention of the penalty is to secure payment of a sum of money of attainment of some other object, and when the event upon which the penalty is made payable and be adequately compensated by payment of interest or otherwise Thus relief is granted in equity against the penalty in a money bond, and also against penal sums made payable on breach of bonds, covenants and agreements for payment of money by instalments or for doing or omitting to do a particular act "But there is a well recognised exception to this rule which is enunciated in Halsubry's Laws of England III Edition Vol 14 page 622 Art 1147 Paragraph 1151 is as follows —

"Where under a contract, conveyance of will a beneficial right is to arise upon the performance by the beneficiary of some act in a stated manner, or at a stated time, the act must be performed accordingly in order to obtain the enjoyment of the right, and in the absence of fraud, accident or surprise, equity will not relieve against a breach of the terms." The Federal Court in Shanmugam Pillai v Annalakhshmi Ammal, AIR 1950 F C 38, held by a majority of three to two that where under an agreement an option to a vendor is reserved for purchasing the property sold by him the option is in the nature of a concession or privilege and may be exercised on strict fulfilment of the conditions on the fulfilment of which it is made exercisable If the original vendor fails to act punctually according to the terms of the contract, the right to repurchase will be lost and cannot be specifically enforced Refusal to enforce the

terms specifically for failure to abide by the conditions does not amount to enforcement of a penalty and the Court has no power to afford relief against the forfeiture arising as a result of breach of such a condition A majority of the Judges of the Court in that case followed the principle set out in Davis v Thomas (1831) 39 E R 195 We accept the view of the majority enunciated in Shanmugam Pillai's case AIR 1950 F C 38 "

The aforesaid observations put the controversy raised beyond the pale of doubt The Court cannot relieve the plaintiff from the effect of the breach The decision of the Supreme Court provides a complete answer to the submission of the learned counsel for the plaintiff appellant

12. Learned counsel, however, attempted to argue that in the aforesaid case, their Lordships of the Supreme Court did not consider the effect of S 74, Contract Act It was submitted that in a later decision of the Supreme Court in the case of Fateh Chand v Balkishan Dass (AIR 1963 S C 1405) their Lordships of the Supreme Court considered the effect of S 74, Contract Act and extended the principle enunciated above even to cases arising out of the breach of the contract for sale of an immovable property Learned Counsel submitted that this Court should follow the decision of the Supreme Court in the case of Fateh Chand v Balkishan Dass (Supra) rather than the decision in the case of K Simrathmull v Nanjalingiah Gowder (AIR 1963 S C 1182) (Supra)

13. Learned Counsel for the defendant respondent on the other hand submitted that the clause was not a penal clause It was not a stipulation by way of penalty On the contrary, the plaintiff had already transferred the property absolutely in favour of the defendant under a sale deed and under the deed of reconveyance, the defendants had merely conferred upon the plaintiffs an advantage or privilege which he was free to avail of provided he did not commit any breach of the condition The submission raised by the learned counsel for the defendant requires serious consideration and it cannot be rejected out of hand However, it does not seem necessary to go deeper into the question as in my opinion, the facts of the present case are indistinguishable from the facts of the case of K. Simrathmull v Nanjalingiah Gowder (AIR 1963 S C 1182), (Supra) I have examined the decision of the Supreme Court in the case of Fateh Chand v Balkishan Dass (Supra) and I find that the controversy involved there is different from the issue at hand Their Lordships of the Supreme Court in the case of Fateh Chand v Balkishan Dass (AIR 1963 S C 1405) (Supra), observed that S 74, Contract Act, is not necessarily limited only to cases where the aggrieved party is seeking to receive some amount on breach of contract, but that is available also in cases where upon breach of the contract, an amount received under the contract is sought to be forfeited This controversy is materially different from the problem with which I am concerned I would, therefore, follow the decision of their Lordships of the Supreme Court in the case of K Simrathmull v. Nanjalingiah Gowder (Supra) which is directly applicable to the facts of the present case.

14. The result of the aforesaid discussion, therefore, is that the conclusion of the court below that the plaintiffs cannot be relieved from the effect of the breach of the aforesaid clause in the deed of conveyance is correct and is fully supported by the decision of the Supreme Court

15. No other point was urged in support of this appeal

16. In the result, the appeal fails and is dismissed There will be no order as to costs

Appeal dismissed

END

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JOURNAL SECTION

1981 ALL. L J NOC 1

GOPI NATH, J

Smt Gurbir Kaur, Petitioner v State of U P and others, Respondents

Civil Misc Writ Petn No 3574 of 1978, D/- 25-2-1980

(A) U P. Imposition of Ceiling on Land Holdings Act (1 of 1961), Ss. 5 (3), 3 (7) and 3 (17) — Mode of interpreting S. 5 (3) indicated — Female tenure-holder — Expression "adult sons" in S. 5 (3) (a) and (b) includes adult step-son of female tenure-holder for allowing additional hectares of land to her

The Act is expropriatory encroaching upon the rights of the subject in respect of their property and has to be interpreted strictly against the State and liberally in favour of the subject accordingly the provisions of Section 5 (3) must be construed liberally in favour of the expropriated tenure-holders in respect of the rights secured to them and strictly against the State as regards the powers of expropriation The Act aims at taking away a tenure-holder's land and distributing it to those who are supposed to be landless The words "adult sons" in Section 5 (3) (a) and (b) and the expression "each of the members exceeding five" in Section 5 (3) (b) should be construed in a popular sense to enable the persons to receive the benefits conferred by the Act and so construed the expression "adult sons" in Section 5 (3) (a) and (b) would include adult step-son of a female tenure-holder Therefore the adult step-son of a female tenure-holder born of a predeceased wife of the late husband of the female tenure-holder must be held to be her son for the purpose of allowing additional hectares of land to her (AIR 1969 Born 505, AIR 1937 Born 266, AIR 1966 SC 1593, 1957 All LJ 33 (SC), 1943 All LJ 271 (PC), 1943 All LJ 501 (PC), 1968 All LJ 484, AIR 1961 SC 1334 and AIR 1963 SC 1192, Rel on

(B) U P Imposition of Ceiling on Land Holdings Act (1 of 1961), Ss 5 (3), 3 (7) and 3 (17) — Female tenure-holder — Her minor step-son cannot be held to be her son for clubbing land held by minor with her holding under S 5 (3).

The Act being expropriatory Section 5 (3) has to be construed liberally in favour of the expropriated tenure-holders in respect of rights secured to them and strictly against the State as regards the powers of expropriation Under Section 5 (3) clubbing of land held by members of a tenure-holder's family with his land depends on the artificial definition of family as given in Section 3 (7) A person whose land is sought to be clubbed must be a member of the tenure-holder's family The family of a tenure-holder under Section 3 (7) includes husband, wife and minor sons and daughters The popular notion of a family has been narrowed down and the minor sons and daughters seem to include only those children who have a body relationship with the tenure-holder and therefore would not include step children of the female tenure-holder Therefore, a minor step-son of a female tenure-holder born of a predeceased wife of the late husband of the female tenure-holder cannot be held to be her son for the purpose of clubbing the land held by him with the holding of the female tenure-holder under Section 5 (3)

J C Joshi, for Petitioner, Standing Counsel, for Respondents.

FX/IX/C879/80/GNB

1981 ALL. L J NOC 2

(LUCKNOW BENCH)

T S MISRA AND K S VERMA, JJ.

U. P Postal Primary Co-operative Bank Ltd., Lucknow, Petitioner v Ravi Mohan Nath and others, Respondents

Writ Petn No 1216 of 1973, D/- 11-2-1980

U. P Co-operative Societies Act (11 of 1966), Section 70 (3) — Proceeding before Arbitrator — Plea of lack of jurisdiction not raised before him — Cannot be raised for the first time in High Court — Rule 231 of Co-operative Societies Rules (1968), empowers the arbitrator to decide a question of jurisdiction. AIR 1975 SC 1895, Rel on.

GX/GX/D116/80/KND

1981 ALL L J. NOC 3

(LUCKNOW BENCH)

HARI SWARUP, J

Bishambhar Nath, Revisionist v Shanker Lal, Opposite Party

Civil Revn No. 396 of 1977, D/- 8-2-1980

(A) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Sections 30, 20 — Refusal by landlord to withdraw money deposited in Court — What amounts to refusal

Once the payment is made in Court after permission of the Court, it gets the judicial sanctity and a landlord cannot disregard the notice which is issued by the Court requiring him to take the money. The notice to a person gives him an opportunity to place before the Court his own case If the landlord does not appear in Court in spite of the notice issued by the Court and does not withdraw the money, it would be sufficient for concluding that he had refused to accept the money and the allegations in the tenant's application were correct The tender of money through Court tantamounts to tender by the tenant himself Section 30 (6) will then become operative and the amount will be deemed to be paid by the tenant on the day of deposit

(B) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Sections 30, 20 — Suit for eviction on ground of arrears of rent — Burden to prove invalidity of proceedings before Court.

If the Court accepts the deposit and the landlord fails to take the money and files a suit for eviction on the ground that the tenant had defaulted in paying the arrears of rent the burden will be on him to establish that the proceedings before the Court were vitiated in some manner So long as the Court proceedings are not shown to be vitiated under some law, they have a sanctity and it would be sufficient for the tenant to show that the money had been paid Landlord can in such circumstances succeed only by getting the proceedings in the Court set aside or by showing that they were vitiated in law

GX/LX/D138/80/MBR

1981 ALL. L J. NOC 4

A N. VERMA, J

Sushil Kumar Srivastava, Petitioner v. 1st Additional District Judge, and others, Respondents

Civil Misc Writ Petn No 7870 of 1978, D/- 1-2-1980

(A) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Sections 2-A; 21 (1) (a) and (5), 12 (1) (b) — House released under Section 21 — Landlord obtaining permission under Section 2-A to admit licencee — House cannot be said to have fallen vacant

Where a landlord is allowed to admit a licencee for a short term under Section 2-A under an order expressly passed in that behalf it cannot be said that the landlord has used the premises otherwise than for the purpose for which it was released under Section 21 (1) (a), by the mere fact of such a licence Once such a permission is granted to the landlord under Section 2-A, even after the release of the accommodation in his favour, it cannot be said that the premises have fallen vacant, by virtue of the provisions of Section 21 (5) by the only fact that the landlord has admitted a licencee

(B) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Section 2-A (5) — Period of licence — Also includes period of extension granted.

The period of license referred to in Section 2-A (5) must clearly include not only the initial period of three months but also the extension which the Dis-

trict Magistrate may grant under the second proviso to Section 2-A Hence, the period of licence referred to in S 2-A (5) is not limited only to three months

(C) U. P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act (13 of 1972), Section 2-A (5) — Landlord making application under Section 2-A (5) within reasonable time — Accommodation cannot be said to be vacant immediately after expiry of period of licence

The Legislature expressly provided a machinery for the eviction of a licencee permitted to occupy an accommodation under S 2-A, who is overstaying beyond the period of licence Between the expiry of the period of licence and making of an application by the landlord under S 2-A (5), some reasonable time must be conceded to the landlord In the present case, where the landlord moved the authority under S 2-A (5) within reasonable time from the expiry of the period of temporary occupation, it cannot be said that the accommodation must be deemed to be vacant immediately on the expiry of the period of licence

(D) Civil P C (5 of 1908), S 11 — Res judicata — Proceedings for allotment under U P. Act 13 of 1972 — In earlier proceeding District Judge observed that question of vacancy might be reconsidered if petitioner applied again for allotment — In subsequent proceeding landlord's plea that accommodation cannot be regarded as vacant — Held, question of res judicata did not arise. (U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 16).

R B. Mehrotra, for Petitioner, K B Mathur and Standing Counsel, for Respondents

DX/DX/B663/80/KND/SSG

1981 ALL. L. J. NOC 5

R S. SINGH, J

Sunder and others, Appellants v. Sita Ram, Respondent

Second Appeal No 86 of 1972, D/- 30-1-1980

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Sec 171 — Father selling ancestral bhumidhari and sirdari plots — Son seeking cancellation of sale and father dying pending suit — Claim must be granted — (U. P Consolidation of Holdings Act (5 of 1954), Section 9 (2)).

"Persons interested" in wider sense means those having some interest or other in the disputed land To challenge a document it is necessary for the plaintiff to show his having a legal right to enforce As such when a sale deed executed by the father in respect of ancestral bhumidhari and sirdari plots is challenged by the son seeking its cancellation, the son has no interest in the sirdari land during his father's lifetime, and therefore he cannot challenge that sale deed in respect of the sirdari plots during his father's lifetime

However when the father dies during the pendency of the suit, the son being a heir under Section 171 becomes sirdar of those plots Hence that sale deed casting a cloud on his title can be avoided by him Therefore he is entitled to the relief claimed by him and his suit cannot be resisted on the ground he had no title on the date of its filing AIR 1975 SC 1409, Followed

When in respect of some of the land in dispute the co-sirdar with the father had been duly issued the bhumidhari sanad in his name alone he has become bhumidar only to the extent of his share of those lands and not of the entire holding The father has continued to be sirdar even on the date of the deed as also till his death and thereafter his son became sirdar by inheritance Hence no right passed in favour of the purchaser under that sale deed That sale deed in respect of the sirdari land is void ab initio on that ground AIR 1973 All 288 and 1975 All LJ 62, Followed

When the bhumidhari plots covered by that sale deed were originally fixed rate tenancy, the son has got a right in them by birth Therefore the sale of the share of the son made without any authority is also void

Sidheshwari Prasad, for Appellants, Sankatha Rai, for Respondent

CX/FX/B503/80/JRM

1981 ALL. L. J. NOC 6

K C AGRAWAL, J

Rajendra Prasad, Petitioner v 9th Additional District Judge, Kanpur, Respondent.

Civil Misc. Writ Petn No 303 of 1979, D/- 23-1-1980

(A) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Section 12 (3) — Word 'acquires' — Meaning of — It includes acquiring a house by allotment also.

(B) U. P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Section 12 (3) (c) — Application of — Relevant date is date on which vacancy occurred

(C) U. P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Section 12 (3) (c) — Inspection of the place of dispute — Inspection made in absence of party but party having ample opportunity to produce evidence — Held inspection could be relied on

R K Asthana, for Petitioner, K L Grover, for Respondent

HX/EX/D980/80/DMS/RSK

1981 ALL L. J. NOC 7
(LUCKNOW BENCH)

T S MISRA AND K S VERMA, JJ

Assan Dass, Petitioner v The Prescribed Authority and another, Respondents

Writ Petn No 3076 of 1979, D/- 21-1-1980

U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Section 34 — Civil P C. (5 of 1908), O. 19, R. 1 Proviso (substituted by U. P. Act 57 of 1976) — Proceedings for eviction — Power of Prescribed Authority to summon deponents of affidavits for cross-examination.

A conjoint reading of R 1 of O 19 C P C and Section 34 makes it quite manifest that if the Prescribed Authority is satisfied that it is necessary for the ends of justice and to elicit truth that the deponent of the affidavit should be called upon to appear before it for the purpose of cross-examination, the Prescribed Authority has jurisdiction and power to ask such person to appear before it for that purpose 1978 All Rent Cas 405, Disting.

Surya Kant, for Petitioner

GX/HX/D141/80/AS

1981 ALL. L. J NOC 8
A. N VERMA, J.

Ganga Ram, Petitioner v The Prescribed Authority, Deoband and others, Respondents.

Civil Misc. Writ Petn No 4181 of 1978, D/- 2-1-1980.

(A) U P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Sections 18, 16 (4) — Order of release of accommodation by District Magistrate — Revision by occupant — Dismissal — Revision maintainable under Section 18 against any order passed under Section 16 (4) — District Judge failed to exercise jurisdiction vested in him by law.

When the revision of the occupant was undoubtedly directed against an order of release of accommodation passed under Section 16 (4) by the District Magistrate, the revision was maintainable under Section 18 The District Judge failed to exercise the jurisdiction vested in him by law, in dismissing the revision on the ground that the revision was directed against a mere notice

(B) Limitation Act (36 of 1963), Section 5 — Condonation of delay — Petitioner knowing passing of order but not its contents — Explanation offered by him is reasonable and amounts to sufficient cause for delay.

V K Gupta, for Petitioner, H. S Nigam and Standing Counsel, for Respondents

BX/CX/B53/80/KND

1981 ALL. L. J. NOC 9
(LUCKNOW BENCH)

T S MISRA AND K S. VERMA, JJ

Shamsher Singh, Petitioner v The Registrar, Co-operative Societies (Cane), U. P, Lucknow and others. Respondents.

Writ Petn No 126 of 1977, D/- 18-7-1980

U. P. Co-operative Societies Act (11 of 1966), Ss 39, 91, 92 — Scope and applicability of sections — Recovery of loan — Proceedings — Debtors plots, not subject to charge under S. 39 — Attachment of — Legality.

The Registrar cannot under S. 91 pass an order for the sale of any other property except the property on which the charge is created under S. 39 of the Act. Section 92 can be put into operation only if the order under S 91 is not carried out by sale of the charged property

Where there was nothing on the record to show that the order passed by the District Cane Officer (who was duly authorised to exercise the powers of the Registrar under the Act), for recovery of the loan by sale of the property of the debtor was not carried out, the proceedings could not be started under Section 92. Therefore, the attachment of the debtor's plots, which were not subject to charge under S. 39 was illegal and the said plots could not be legally put to auc-

tion Therefore, the auction notice was obviously bad in law

LX/LX/G542/80/AYP/SSG

1981 ALL. L. J. NOC 10

(BOARD OF REVENUE)

U B SINGH, MEMBER

Maiya Deen, Applicant v Anand Behari, Opposite Party.

Revision No 209 of 1976-77/Banda, D/- 4-12-1979

(A) Civil P C. (5 of 1908), S 96 — Merger of lower court's decree in that of superior court — Decree of first appellate court merging into decree of Board of Revenue — First appellate court amending decree after merger — Held first appellate court had no jurisdiction to amend decree as its decree had merged in the decree of superior court, namely, Board of Revenue. 1964 All LJ 817, Rel. on.

(B) Civil P. C. (5 of 1908), S. 151 read with O. 47, R. 1 — Inherent power of review — First appellate court amending decree after its merger in the decree of superior Court — Decree amended without jurisdiction and without notice to party seriously affected — Affected party applying for review to Court ordering such amendment and Court dismissing review application — Held dismissal of review application was erroneous as order for amendment was illegal and party affected was not notified. (1926) 24 All LJ 266, Rel. on.

R R Sheohare, for Applicant, Hari Shankar, for Opposite Party.

KX/LX/G298/80/HR/RSK

1981 ALL. L. J. NOC 11

1980 ALL L C 550

H N SETH AND R M SAHAI, JJ

State Bank of India, Petitioner v Zila Parishad, Gorakhpur and another, Respondents

Civil Misc Writ Petn No 306 of 1975, D/- 21-8-1980

Uttar Pradesh Kshetra Samiti and Zilla Parishad Adhiniyam (33 of 1961), Ss. 119, 121 — Circumstance and Property Tax — Assessee State Bank of India — Its branches in a district cannot be taxed separately.

The circumstance and property tax levied under Section 119 is a tax on status of an individual. For the purposes of circumstance and property tax his status as a whole will have to be determined, and it will depend upon the income which the person derives from all the businesses that he is carrying on within the jurisdiction of the Zilla Parishad

It is either a natural person, that is, a human being or juristic person which alone is capable of carrying on business so as to be subjected to circumstance and Property Tax under the Act A branch-office of the State Bank of India is neither a natural person nor is it a juristic person Accordingly it is not capable of carrying on business on its own When a branch-office is established it is the State Bank of India which is a juristic person which carries on business in the area through the staff posted or attached to the branch-office Any direction to the branch office to pay a tax is in substance a direction to the State Bank itself to pay the same Accordingly, even if the State Bank of India carries on business through various branches within the jurisdiction of Zila Parishad, the Zila Parishad has jurisdiction to impose a tax on the totality of the circumstance of the State Bank of India of course, subject to the maximum of the limit prescribed by the rules It cannot separately tax various branches of the State Bank of India which branches cannot be considered to be persons within meaning of S 121

S N Verma, for Petitioner, Standing Counsel, for Respondents

IX/IX/E847/80/KJK/LGC

1981 ALL. L. J. NOC 12

V K MEHROTRA, J

Raksha Ram Misra, Appellant v Chandra Bhushan Prasad and others, Respondents

Second Appeal No 2604 of 1972, D/- 16-9-1980

U. P. Consolidation of Holdings Act (5 of 1954), S 49 — Bar under — Petitioner failed to agitate the matter in respect of his share in joint and ancestral property during consolidation proceedings — Civil Court has no jurisdiction to go into such matter — Section 49 would come into effect.

Once the petitioner's father was recorded as sole bhumidhar over the plot of land during consolidation proceedings, any challenge to his being the sole bhumidhar could not be entertained by the civil court on account of the fact that although the petitioner could or ought to have taken objection to his father's name being entered as sole bhumidhar in the consolidation proceedings he failed to agitate the matter in respect of his share in joint and ancestral property during

the said proceeding The bar to the jurisdiction of the civil Court to go into such matter contained in S 49 would come into effect and therefore the claim of share by petitioner in the sir plots would be barred by S 49 1979 Rev Dec 50 (All). Distinguished. 1976 Rev Dec 162 (All), Foll

G P Mathur, for Appellant, B L Yadav, for Respondents

KX/LX/G207/80/VNP/SSG

1981 ALL. L. J. NOC 13

(LUCKNOW BENCH)

T S MISRA, J

Smt. Raj Kumari, Petitioner v State of U P and others, Respondents

Writ Petn No 2368 of 1975, D/- 16-10-1979

(A) U. P. Imposition of Ceiling on Land Holdings Act, 1960 (1 of 1961), S 3 (7) — "Judicially separated wife" — Connotation of.

The term "separated wife" connotes a wife who is separate from her husband A judicially separated wife, therefore, comes within but is somewhat more restricted than the general broad connotation of the term "separated wife", "Judicially separated" means separated judicially, 'Judicially separated wife' therefore, is a wife separated judicially The word 'Judicial' is used to describe acts, duties or functions which require or permit an exercise of judgment or discretion In its more technical sense the word 'Judicial' imports an act, duty, function or power pertaining to the judiciary or the administration of justice

Separation means a physical separation of the parties with the requisite intent which is sometimes referred to as an intent to sever the marital status or an intent not to resume marital relations If the husband and wife agree to live apart with the intention to bring cohabitation to an end, the wife will be called a separated wife However, she will not be called a Judicially separated wife inasmuch as the separation has not been brought about by an order of a court by reason of the general law

A lady irrespective of the fact that she had been living quite separately from her husband whether by her own choice or on the basis of some intervention by relations or other mediators cannot be called a judicially separated wife unless she has a decree for judicial separation granted by a competent court. A wife who has obtained a decree from a competent court permitting her to separate from her husband is a judicially separated wife The prescribed Authority is not a competent court to grant such a decree The fact that a lady has been deserted by her husband and is, therefore, forced to live separately from him may be a ground for a petition seeking a decree for judicial separation But so long as the decree is not passed, the separation may be a separation as a fact but will not be called a judicial separation The prescribed authority may, on appreciation of evidence, hold that a wife had been living separately from her husband but in absence of a decree for judicial separation it cannot hold that she is a judicially separated wife

(B) Constitution of India, Art. 14 — U. P. Imposition of Ceiling on Land Holdings Act, 1960 (U. P. Act, 1 of 1961), S. 3 (7) — Validity — Definition of 'family' whether discriminatory — Validity of definition cannot be challenged on ground of discrimination because Act is included in the Ninth Schedule of the Constitution — Even otherwise though definition of 'family' excludes only 'judicially separated wife,' it creates no hostile discrimination in relation to Muslim ladies.

The U. P Imposition of Ceiling on Land Holdings Act is a special enactment with a special purpose It has used the expression "judicially separated wife" and not the expression "separated wife" The legislature seems to have intentionally used the word "judicially" before the words "separated wife" because in other enactments relating to agrarian reform it has merely used the words "separated wife" A woman other than a Muslim woman who has been deserted by her husband cannot seek a decree for judicial separation before the expiry of the period stipulated under the Act Therefore, so long as that period does not expire all ladies whether they are Muslim or Hindu, Sikh, Parsi, Christian, Buddhist or Jain stand on the same footing. However, after the expiry of the statutory period a Muslim lady can seek dissolution of Marriage whereas any other lady can seek a decree for judicial separation If a Muslim lady obtains a decree for dissolution of marriage, her matrimonial relationship with the man concerned comes to an end and she ceases to be his wife She will, therefore, not be considered to be a member of the family of that person Similarly, a lady other than a Muslim lady who has obtained a decree for judicial separation will also not be considered to be a member of the family of that person (tenure-holder) even though matrimonial relationship between the

two has not come to an end vide definition of the term family in the Ceiling Act During the subsistence of the decree for judicial separation the lady is not obliged to perform her marital obligations She will be entitled to live and dine separately, in other words, to have separate bed and board The definition of the term "family" therefore, does not create any hostile discrimination

That apart, the entire U P Imposition of Ceiling on Land Holdings Act having been included in the Ninth Schedule of the Constitution, the validity of any provision thereof is not assailable The definition of the term "family" cannot, therefore, be attacked on the plea of hostile discrimination

Hence, even if the definition of the term "family" could be said to be violative of Article 14 of the Constitution, it is protected by reason of the inclusion of the U P Imposition of Ceiling on Land Holdings Act in the Ninth Schedule of the Constitution AIR 1951 SC 318, Ref. to

GX/LX/D529/80/HR/RSK

1981 ALL. L. J. NOC 14

DEOKI NANDAN, J

Smt Vindhyachal Devi, Appellant v Raj Kumar and others, Respondents

Second Appeals Nos 2161 and 3202 of 1972, D/- 26-3-1980

Easements Act (5 of 1882), Ss. 7, 28 and 32 — Specific Relief Act (47 of 1963), S. 40 (2), Proviso — B constructing Barja on upper floor of his house — Barja slightly projecting on Ahata of A's house — Suit by A for injunction for demolishing Barja — Since Barja was substantial construction and encroachment on A's Ahata was slight injury suffered by A on account of encroachment held could be adequately compensated by award of damages — Since A had not claimed damages in plaint he should be allowed to claim the same by amending plaint under Section 40 (2), Proviso

R S Misra and R P Misra, for Appellant

GX/HX/D184/80/GNB

BOOKS REVIEWED

INDIAN RAILWAYS ACT 4th Edition 1980, By P. Harirao Advocate, Madras, Edited by D S. Chopra, B. Sc, LL M. Advocate Bombay High Court. Published by : G. D. Kataria, for Orient Law House, Post Box No. 94, Opp High Court, Allahabad-211001. Pages 48 Plus 1144. Price in India Rs. 125/-. Price Abroad : 30$ (U. S) £ 20.

The Book under review is an exhaustive Commentary on Indian Railways Act, 1890 This is the 4th Edition of the Book and all the Amendments since 1949, i e. after the second Edition of the Book, has been inserted in it. Amendments regarding the Railway booking Procedure, Appointment of Claims Commissioners and their powers etc are discussed exhaustively Revised Case law up to Sept 1980 is also included under the relevant sections Railway Risk Notes which have been abolished since long time, replaced by the useful rulings bearing on them and the notes have been revised in the light of subsequent legislative changes and case law The outstanding features of the book are inclusion of the Current I R. C. A Goods and Coaching Tariff Rules, Railway Rules 1949, Railway Accidents Compensation Rules, in its main body Appendix A and Appendix B are also very useful as they contain many important rules and Forms of forwarding Notes Index also is exhaustive and very useful to the readers

Thus the edition will be very useful to the Lawyers, Railway Officers and to the Members of the Railway Tribunals It will be very useful to the Students as well as businessmen.

Mrs K J Karmarkar

SOME ASPECTS OF CRIMINAL PROCEEDINGS (Third Edition) by P C. Banerjee, Published by Monica Banerjee on behalf of Purna Publishing House, B-10/263, Central Avenue East, Kalyani, pp. 204, Price Rs 20/-.

The book under review is a hand book relating to procedural law as to Criminal Proceedings. Various stages like investigation of offences, Search and Seizure, Cognizance by Courts, trials, appeal and revision, bails etc are discussed lucidly and in easy to understand language The powers of investigating officers and the Courts and the rights of the person accused of offences are explained at appropriate places The effects of the changes brought about by the new

Cr P C of 1973 are suitably incorporated in this edition of the book Various aspects of the law relating to Criminal Procedure are arranged under appropriate topics with cross-references to statutory provisions Thus the book is very useful for ready reference and as a valuable aid to the students of criminal law Topical Index also adds to its utility The fact that the book has entered into third edition indicates its success

Mrs Kusum J Karmarkar

SARJOO PARASAD'S COMMENTARIES ON ESSENTIAL COMMODITIES ACT (10 OF 1955) AS AMENDED UP-TO-DATE WITH CENTRAL CONTROL ORDERS THEREUNDER: Revised by Justice H. L. Capoor, Justice D. D. Seth and Jagdishlal B A., LL B, 4th Edition 1980 Published by Law Publishers Allahabad, Pages LXII Plus 932 Price Rs. 130 00.

This is the 4th edition of this book, the earlier editions of which have already achieved considerable popularity In fact, this book can truly be described as an encyclopaedic work on the law relating to Essential Commodities in India It contains lucid commentaries with up-to-date case law and amendments, on the Essential Commodities Act, 1955 along with all the Central Control Orders including amendment orders thereto numbering 159 besides those incorporated in the supplement The revising authors have also included in this edition the text of the recently passed legislation viz The Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act (7 of 1980) which is said to have "strengthened the hands of the States to deal more effectively with the irregularities in regard to the handling of the essential Commodities from the stage of manufacture right up to their sale" At the same time the enactment safeguards the interests of honest dealers, consumers and the public at large In the fitness of things, therefore, this Act has been rightly included in this book

As stated by the revising authors, the Central Control Orders are the back-bone of the Essential Commodities Act Therefore these orders (covering about 600 pages) which constitute an important part of this book have been brought up-to-date and new orders issued since the publication of the previous edition have also been incorporated in this book

The Table of repealed orders made by the Central Government, the Table of Cases and an exhaustive Index have enhanced the usefulness of this book There can be no doubt that the present edition like its predecessors will receive the warm welcome and patronage at the hands of the legal profession, judiciary, police, Government departments and public in general

U. S D

A STUDY OF THE HINDU MARRIAGE ACT, 1955 (AS AMENDED UP TO DATE WITH STATE AND HIGH COURT RULES), 1980. By Dr. Tahir Mahmood, LL. M., Ph. D. Published by Law Book Company, Sardar Patel Marg, Allahabad Pages XVIII + 321. Price Rs. 45/-. U. K. £ 4, U. S. A. $ 11/-.

This is a part of the voluminous work of the author on the subject which is shortly going to be published. Since the subject dealt with in this volume was considered of great importance it was thought fit to bring it out in a separate volume

The book is designed to cater the needs of those who want to know the Hindu matrimonial law The students of law, legal practitioners, law teachers, Social Workers and others who want to know complete details of the present Hindu law of marriage and divorce would find herein what they must know of the subject.

The book gives the historical background of the Act and its subsequent developments Then it gives an exhaustive section-wise commentary on the entire Act At the end of the book are given three appendices. The first one gives marriage registration rules framed by the State Governments, the second one reproduces with annotations the rules framed under the Act by the various High Courts, and the third one contains such legislative enactments as are explanatory or supplementary to the Hindu Marriage Act The case law included is quite comprehensive

The book would be a valuable addition to the library of lawyers, students and institutions teaching law

1981 ALL L J NOC 15

DEOKI NANDAN, J

Sayeed Hasan, Appellant v Ahmad Husain and others, Respondents

Second Appeal No 1353 of 1971 D/- 25-2-1980

Specific Relief Act (47 of 1963), S. 15 — Right to claim specific performance — Property belonging to several plaintiffs sold to defendant subject to reconveyance — Despite first plaintiff's readiness to perform contract and other plaintiffs informing defendant of authorisation of first plaintiff to obtain reconveyance, defendant refusing to execute reconveyance — Plaintiff entitled to specific performance. (Ibid Section 16 (c)); (Contract Act (1872), S. 45), (T P Act (1882), S 130).

When property belonging to several plaintiffs is sold to defendant subject to reconveyance and the first plaintiff, authorised by other plaintiffs to obtain reconveyance, is ready and willing to perform the contract but the defendant though present in the Registry for execution and informed by the other plaintiffs about the authorisation of the first plaintiff refuses to execute the deed, the claim of the first plaintiff for reconveyance in his favour alone may not in equity be refused to him in his suit for specific performance filed after he had given a specific notice claiming the reconveyance in his favour for the benefit of the other plaintiffs as well and the other plaintiffs in the suit have not opposed such execution. The defendant's refusal for absence of a written assignment of the contract of reconveyance in favour of the first plaintiff is not wholly unjustified in view of S 130 of the T P Act But that does not mean the suit should be dismissed since all necessary parties are before the court. As the defendant is not at fault the plaintiff may be deprived of his costs.

Though the first plaintiff has not deposited the consideration money, in view of S 16 (c) Explanation Cl. (i) and of defendant's admission of having been requested by the plaintiff to reconvey, the first plaintiff cannot be said to have not been ready and willing to perform the contract

Thus the first plaintiff's claim for specific performance must be allowed but not his claim for mesne profits.

1981 All. L. J Jour/1 (2) I (2) (4 pp.)

H S Nigam, for Appellant, Ganga Singh and C D Vidyarthi, for Respondents

CX/FX/B475/80/JRM

1981 ALL L J NOC 16

DEOKI NANDAN, J

Smt Ram Kali, Appellant v Smt Jaswanti Debi and others, Respondents

Second Appeal No 160 of 1965, D/- 1-4-1980

(A) Limitation Act (9 of 1908), Sch I Art 47 — "Final order" means that passed under Section 145 (6) and not that made under Section 145 (4) (Limitation Act (1963), Sch I, Arts 64 and 65).

The final order referred to in Article 47 of Schedule I of the Limitation Act 1908 means that made under sub-section (6) of Section 145 Cr P C and not the preliminary one under sub-sec (4) Therefore the Civil suit brought within 6 years of the order made under sub-sec (6) of S 145 could not be held barred by limitation under the above Article

(B) Limitation Act (9 of 1908), Sch I, Art 47 — Ingredients

For Article 47 of Sch I of the Limitation Act 1908 to apply the Plaintiff must be a person bound by an order respecting possession of immovable property, passed under the Cr P C, and the suit must be a suit to recover the property comprised in such order Where a party to the proceeding under S 145 Cr P C continued to be in possession not under any order made in the proceeding but based on her antecedent claim or title to it, a suit to recover possession of the property would not attract limitation under the above Art 47

(C) Civil P. C. (5 of 1908), O. 22, R 3 — Appeal by deity as the first and its manager as the second appellant respecting property of the deity — Death of the second appellant would not abate the appeal.

B N Katju and Markendav Katju, for Appellant, S S Verma, for Respondents

GX/HX/D187/80/TVN

1981 ALL L J NOC 17

(LUCKNOW BENCH)

S C MATHUR, J

Hanuman Saran Singh, Appellant v Nankau Singh and others, Respondents

F. A. F O No 56 of 1975, D/- 7-4-1980

Lunacy Act (4 of 1912), S. 3 (5) — Word 'Lunatic' — Meaning of — A person of low intellect is an idiot and hence a lunatic

R A Upadhya and P P Singh and B K Srivastava, for Appellant, B L Shukla, for Respondent No 1.

HX/JX/D918/80/KSS/RSK

1981 ALL L J NOC 18

R S SINGH, J

Mohd Mustafa, Appellant v Mst Mahmuda Bibi and another, Respondents

Second Appeal No 2063 of 1969, D/- 10-4-1980

Transfer of Property Act (4 of 1882), S 44 — Dwelling house of an undivided family — Purchase of a co-owner's share by stranger — Only right of the purchaser is to claim partition — Purchaser not entitled to damages for denial of joint or common or part enjoyment or possession.

Though under Section 44 the transferee of a co-owner of an immovable property was entitled to (1) right to joint possession or (2) other common or part enjoyment of the property and (3) to enforce a partition of the same, the proviso denies the first two rights to the purchaser of a co-owner's share in a dwelling house of the undivided family of which the purchaser is not a member He can only claim partition and separate possession Therefore he will not be entitled to damages or mesne profits for the period he has not allowed to have joint possession or other common or other part enjoyment of the house Principles governing agricultural lands can have no application to house property which would be governed by S 44, T P Act

GX/HX/D181/80/TVN

1981 ALL L J NOC 19

M P MEHROTRA, J

State Petitioner v Om Prakash, Respondent

Civil Misc Writ Petn No 1008 of 1979, D/- 29-4-1980

(A) Civil P. C. (5 of 1908), S. 11 and O. 41, R. 22 — U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), Ss. 10 (2) and 13 — In response to notice under Section 10 (2) tenure holder A filing objections — Objections decided by Prescribed Authority — Separate appeals by A and Govt Appellate Court deciding A's appeal first — Decision in A's appeal does not operate as res judicata so as to bar Govt's appeal — Nor is Govt.'s appeal barred by O. 41, R. 22.

When there are two appeals arising out of one judgment of the trial court the normal practice is to hear and decide both together But if due to some reason this does not happen and one of the appeals is decided first, the decision therein cannot operate as res judicata so as to bar the other appeal nor can the other appeal be barred under Order 41, Rule 22 because the provision for filing cross-objections in Order 41, Rule 22 is in the nature of an alternative to the filing of cross appeal O. 41, R 22 is an enabling provision and it does not operate as an exclusion of the right of a party to file an appeal In response to the notice under S 10 (2) the tenure holder A filed his objections which were decided by the Prescribed Authority Against that decision both A and the Govt filed separate appeals under S 13 (1) The scope of the two appeals was separate because in A's appeal the points decided against A were being questioned while in Govt.'s appeal points decided in favour of A were being questioned Thus the two appeals operated in separate spheres. Therefore the decision in A's appeal which was decided first could not operate as res judicata so as to bar the Govt's appeal Nor could the Govt's appeal be barred under O 41 R 22

(B) Constitution of India, Art. 226 — U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 10 (2) — Objections filed by tenure holder A under Section 10 (2) — Both Prescribed Authority and appellate court finding that land in question was ancestral Sir and Khudkasht before date of vesting — And A's sons were in existence on date of vesting and therefore they had vested share in such land — Findings cannot be questioned within limited scope of petition under Art. 226

Rajesh Ji Verma and P K. Biswas, for Respondent

GX/HX/D189/80/GNB

HIGH COURT OF JUDICATURE AT ALLAHABAD

ADMINISTRATIVE (E) SECTION

Dated Allahabad, September 10, 1980

List of days to be observed as closed holidays in the High Court of Judicature at Allahabad including Lucknow Bench during the year 1981.

Name of holidays	Dates on which they fall	Days of the week	Number of days
	According to Gregorian calendar		
(1)	(2)	(3)	(4)
Bara Wafat	January 19, 1981	Monday	1
Republic day	January 26, 1981	Monday	1
Basant Panchmi	February 9, 1981	Monday	1
Shiv Ratri	March 4, 1981	Wednesday	1
Holi	March 20 to 23, 1981	Friday to Monday	4
Ram Naumi	April 12, 1981	Sunday	1
Summer Vacation	May 25 to July 3, 1981	Monday to Friday	40
Id-ul-Fitr	August 2, 1981	Sunday	1
Independence Day	August 15, 1981	Saturday	1
Raksha Bandhan	August 15, 1981	Saturday	1
Janmashtami	August 22, 1981	Saturday	1
Birthday of Mahatma Gandhi	October 2, 1981	Friday	1
Dashahara	October 5 to 9, 1981	Monday to Friday	5
Id-uz-Zuha	October 9, 1981	Friday	1
Deepawali	October 27 to 30, 1981	Tuesday to Friday	4
Moharram	November 8, 1981	Sunday	1
Winter Holidays	December 25 to 31, 1981	Friday to Thursday	7

NOTES : —

(1) The dates can be refixed according to the local visibility of moon

(2) Second Saturday of each month will be a holiday.

(3) Wednesday, January 14, 1981 on account of Makar Sankranti and Wednesday, February 4, 1981 on account of *Mauni Amavasya will be holidays for Allahabad only.

(4) Friday, July 31, 1981, will be holiday on account of Last Friday of Ramzan for Muslims only.

(5) Friday, April 3, 1981 will be holiday for Christians only on account of Good Friday.

(6) May 12, 1981 will be a holiday on account of Mahabir-Ji-ka Mela for the Lucknow Bench of the Court only

(7) There is a separate list of holidays for the courts subordinate to the High Court.

HIGH COURT OF JUDICATURE AT ALLAHABAD

ADMINISTRATIVE (E) SECTION

Dated Allahabad, 20th September, 1980

List of days to be observed as closed holidays in the Courts Subordinate to the High Court of Judicature at Allahabad during the Year 1981.

Name of Holidays	Dates on which they fall: According to Gregorian Calendar	Days of the Week	Number of Days
Bara Wafat	January 19, 1981	Monday	1
Republic Day	January 26, 1981	Monday	1
Shiva Ratri	March 4, 1981	Wednesday	1
Holi	March 20 and 21, 1981	Friday and Saturday	2
Good Friday	April 3, 1981	Friday	1
Ram Naumi	April 12, 1981	Sunday	1
Mahabir Jayanti	April 17, 1981	Friday	1
Budh Purnima	May 18, 1981	Monday	1
Civil Courts Vacation	June 1 to 30, 1981	Monday to Tuesday	30
* Id-ul-Fitr	August 2, 1981	Sunday	1
Independence Day	August 15, 1981	Saturday	1
Janmashtami	August 22, 1981	Saturday	1
Birthday of Mahatma Gandhi	October 2, 1981	Friday	1
Dashahara	October 7 & 8, 1981	Wednesday and Thursday	2
* Id-uz-Zuha	October 9, 1981	Friday	1
Deepavali	October 27, 1981	Tuesday	1
Moharram	November 8, 1981	Sunday	1
Kartik Purnima and Birthday of Guru Nanak	November 11, 1981	Wednesday	1
Winter Holidays	December 24 to 31, 1981	Thursday to Thursday	8

Notes —(1) * The date can be refixed according to local visibility of moon.

(2) Second Saturday of each month will be a holiday

(3) The local festivals shall be determined and declared by the District Magistrate in consultation with the District Judge and the Civil Courts shall be closed on account of such local festivals only if the Revenue Courts are closed on that day.

(4) For the Civil Courts in Naini Tal (except the Courts of Munsif, Kashipur and Additional Munsif, Naini Tal at Haldwani), Dehra Dun, Almora and Tehri Judgeships one month's vacation from January 1 to 30, 1981 (both days inclusive) will be substituted in place of one month's vacation

(5) There is a separate list of holidays for the High Court.

BOOKS REVIEWED

हिन्दू विधि, लेखक के. पी. शर्मा, एल. एल. एम., विधि व्याख्याता, राजस्थान विश्व विद्यालय, जयपुर, प्रकाशक; ईस्टर्न बुक कंपनी, ३४ लाल बाग, लखनऊ-२२६००१; पृष्ठ संख्या ५०+३४०, मूल्य रु. ३०.००.

Despite Hindi being the national language and substantial increase in its use in all spheres including Law Courts, Law Examinations, Government Offices etc etc, the legal profession is yet to see an useful comprehensive commentary on law in simple Hindi written in natural style covering all aspects of the relevant topics. The present work is an appreciable attempt by the author to achieve this object by making this valuable contribution. The arrangement of the book is not statute-wise but topic-wise. The list of topics in the beginning is vast and extensive. The use of English words along with the Hindi words in respect of the legal terminology has increased the quality of the book. The legal propositions have been usefully explained in simple language with full of illustrative up-to-date case law. The book though mainly written for students will be equally useful to the legal profession as well as to the vast litigating public.

S.S. C.

1981 ALL. L. J. NOC 20
(LUCKNOW BENCH)
S C MATHUR, J

Smt Satyawati Mehrotra and others, Appellants v M/s. Bhanamal Gulzari Lal (Pvt) Ltd, Respondent

Second Ex. Decree Appeal No 3 of 1977, D/- 1-5-1980.

(A) Civil P. C. (5 of 1908), O. 21, R. 2 and Section 47 — Application under R. 2 — Maintainability — Term "adjustment" in R. 2 — Import of — Wider — Embraces any act by which parties rearrange their relationship — Application under R. 2, if can be treated as one under Section 47.

The term "adjustment" in O 21, R 2 is of wider import It embraces any act by which the parties rearrange their relationship Under the said Rule, certification has to be made whether decree has been adjusted in its entirety or in part

A decree for ejectment and arrears of rent was obtained by S against his tenant B An application under O 21, R 2 was filed by B alleging that a compromise was effected between him and S whereunder a fresh contract of tenancy had been entered into at enhanced rate of rent and the decretal amount as well as advance rent at enhanced rate for four months was also paid to S by two cheques

Held, In view of the admitted fact that the entire decretal amount was paid by B, under first part of O. 21, R 2, S became liable to certify the said payment At least for the money part of the decree, B's application under O. 21, R. 2 is maintainable By the transaction alleged by B the relationship between parties was rearranged so as to revive relationship of landlord and tenant with the modification of enhanced rent to be paid Since implicit in the agreement relating to continued occupation or accommodation in question was the agreement not to execute the decree, the transaction alleged by B did amount to adjustment of decree for ejectment also. B's application under R 2 in respect of both the matters pleaded by him is maintainable. AIR 1973 All 40, Distinguished on facts

In view of the fact that an application under O 21, R. 2 relates to question of execution, discharge and satisfaction of decree, the question that is raised in such an application is one which is covered by S. 47. In fact through the application under O 21, R. 2, Court's jurisdiction prescribed under S 47 is invoked Therefore an application under R 2 has to be treated and decided as an application under Section 47 AIR 1963 On 160, Rel on.

(B) Civil P. C. (5 of 1908), S. 47 — Application under, by judgment debtor alleging satisfaction of decree — Maintainability — Pendency of application for execution of decree by Decree-holder, not a condition precedent.

(C) U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S 7 (1) (a) and (2) — Scope of S. 7 (1) (a) — Allotment — Jurisdiction to allot, when attracted.

Under S 7 (2) of the Act, the jurisdiction of District Magistrate to allot would be attracted only in three circumstances, viz (1) when the accommodation is vacant, (2) when the accommodation has fallen vacant and (3) when the accommodation is about to fall vacant Where before a decree for ejectment was put into execution, the parties adjusted the decree and under the adjustment, the landlord allowed the tenant to continue in occupation of the accommodation at a higher rate of rent, it could not be said that the said accommodation was about to fall vacant so as to attract jurisdiction to allot under S 7 (2) S 7 (1) (a) merely indicates the manner in which an accommodation may ultimately become vacant Mere termination of tenancy by a notice not followed by tenant vacating accommodation or ceasing to occupy it would not amount to vacation of accommodation as contemplated under S 7.

IX/JX/E440/80/VSS

1981 ALL. L. J. NOC 21
K. M DAYAL, J

Man Shanker and others, Appellants v Nanhey Lal and others, Respondents

Second Appeal No. 963 of 1972, D/- 2-5-1980

Torts — Negligence — Damage to Plaintiff's house due to leakage in water mains not caused by any negligence of the defendant — Defendant held not liable.

J S Gupta, for Appellants, Devendra Swarup, S A. Khan and I N Khan, for Respondents

HX/JX/E82/80/TVN

1981 ALL. L. J. NOC 22
A. N. VERMA, J.

Dr Jayanti Bajpai, Petitioner v. The District Judge, Kanpur and others, Respondents

Civil Misc Writ Petn No. 3008 of 1980, D/- 5-5-1980

Hindu Marriage Act (25 of 1955), S. 26 — Hindu Minority and Guardianship Act (1956), S. 6 — Minor below 5 years — Custody of under S. 26 — In absence of exceptional circumstances minor should be left in custody of mother in preference to father as per normal rule embodied in S. 6 — That minor was going to attain age of 5 within few months or mother was leading way of life opposed to traditions of father's family or mother did not have permanent place of residence is immaterial — As between mother and grandmother minor should be left in custody of mother

Janardan Sahai, for Petitioner, Standing Counsel, for Respondents

GX/HX/D191/80/GNB

1981 ALL. L. J. NOC 23
(LUCKNOW BENCH)
HARI SWARUP, J.

Preetam Singh, Petitioner v. State of U. P. and others, Respondents

Writ Petn. No. 895 of 1974, D/- 7-5-1980

(A) Constitution of India, Art. 226 — Laches — Order passed in 1967 challenged by petition under Art. 226 in 1974 — No explanation of delay — Petition suffers from laches.

(B) Forest Act (16 of 1927), Ss. 4 and 6 — Objections under S. 6 — Purchaser of land long after notification if can file — Subsequent purchase if provides ground for enlarging limitation — (Limitation Act (1963) S. 5)

Under S. 6 of the Forest Act, objections could be filed only by those persons who are having an interest in the land on the date of notification under S. 4

D who acquired interest in the notified land by purchase about six years after the date of notification filed objections under Section 6 along with a petition under S. 5 of the Limitation Act for condonation of delay.

Held. As D had no interest in the land on the date of notification or within the period of limitation to file objections under S. 6 the question of filing objections or of condoning delay on basis of his lack of knowledge did not arise. Subsequent purchase by itself can provide no ground for enlarging limitation. As condonation of delay cannot confer on a person a right to file objections to the notification if he had no interest in the property on date of notification, the subsequent purchase can provide no cause of action or even become a ground for condoning delay.

HX/JX/E405/80/VSS

1981 ALL. L. J. NOC 24
(LUCKNOW BENCH)
K. N. GOYAL, J.

Smt Mohammad Jehan Begum and another, Petitioners v. Shafiqur Rahman Khan and others, Respondents

Writ Petn No. 338 of 1980, D/- 30-6-1980

(A) Civil P. C. (5 of 1908), S. 47 — Objection as to inexecutability of decree for possession on account of uncertainty about a boundary — Executing Court has duty to construe decree — It can take into consideration pleadings and documents. AIR 1972 SC 1371 and 1970 All LJ 199, Rel. on.

(B) Constitution of India, Art. 226 — Writ petition against Order under S. 47 Civil P. C. — Subsequent order of executing court will not affect continued maintainabilty of writ petition, as executing court is bound to give effect to directions of High Court.

HX/JX/E412/80/VSS

1981 ALL. L. J. NOC 25
DEOKI NANDAN, J.

Anuruidh Kumar, Appellant v. Salek Chand and others, Respondents.

Second Appeal No. 1724 of 1974, D/- 30-6-1980.

Limitation Act (36 of 1963), Arts. 97 and 113 — Suit for pre-emption — Art. 97 and not residuary Art. 113 will apply whether whole or any part of property sold is capable of being taken into physical possession or only part of it admits of physcial possession — Limitation of one year would run from date on which purchaser enters into actual physical possession of whole or any part of property sold — Plaintiff's knowledge of execution of sale deed is irrelevant. AIR 1921 Sind 118

and (1906) 3 All LJ 191 and ILR (1901) 24 All 17 (PC), Ref.

Gyan Prakash, for Appellant

HX/JX/E85/80/GNB

1981 ALL. L. J NOC 26

DEOKI NANDAN, J

M Shamsuddin, Appellant v Fakhar Uddin and others, Respondents.

Second Appeal No 730 of 1969, D/- 19-2-1980

Limitation Act (9 of 1908), Ss. 14, 2 (7) — Due diligence or in good faith — What is not — Illustration.

Where after the money decree against the plaintiff in earlier suit by defendant was confirmed in first appeal, the plaintiff came to know of the existence of material evidence as to fraud by defendant in obtaining the said decree, but the plaintiff, without obtaining proper legal advice, filed a review application not under O 47 but under S 151, and that too, not before the judge but before the Munsarim and consequently the review application as well as the revision therefrom was dismissed as not maintainable, in suit by the plaintiff filed after six years for setting aside the said decree it could not be said that he acted with the due diligence or in good faith. AIR 1958 SC 767, Rel on

(Para 7)

S A Khan and Iqbal Hasan Khan, for Appellant, Ratnakar Bharti, for Respondents.

EX/FX/C278/80/KND

1981 ALL. L. J. NOC 27

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Mukut Singh, Appellant v Mukut Singh, Respondent.

Second Appeal No 89 of 1972-73/Shahjahanpur, D/- 6-1-1981

(A) U. P. Tenancy Act (17 of 1939), Section 87 — U. P. Land Records Manual Para 95 — Entry of FARAR in respect of tenant who shifted to adjoining village 25 years ago in Khatauni khata — No proceedings under provisions — No presumption as to abandonment of holding — Meaning of FARAR. (U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Section 186 (1)).

Where no entry of FARAR was shown to have been made in Khasra and rent was being paid and no proceedings under Section 86 of the U P Tenancy Act or under Section 186 (1) of the U P Z A and L R Act were taken up and there was no finding or order as to extinction of Sirdari right, the interest of the tenant who shifted to adjoining village for residential purposes 25 years ago cannot be said to be extinguished and the entry of Farar in the Khatauni khata would be incorrect 1948 Rev Dec 363 Rel on

Either before or after vesting, the purpose of "FARAR" entry was to move the Tehsildar for proceeding to determine if it was a case of abandonment. By the "FARAR' entry itself abandonment of the holding or any part of it cannot be presumed, nor can it be taken to be completed without the formal proceedings under Section 87 of U P Tenancy Act and Para 95 of the Land Records Manual

The plaintiff living at a distance of two miles was not equivalent to an absconder who was untraceable by anybody for the long period of 25 years, and the entry FARAR meant only that the address of plaintiff was not known, he having left the village

(B) U P. Consolidation of Holdings Act (5 of 1954), Section 49 — Bar under — In consolidation proceedings plaintiff held to be Sirdar — On that basis Trial Court holding plaintiff to be a tenant in possession in 1370-F — Defendant claiming adverse possession without specific evidence to prove it in each year from 1371-F onwards — Continuity of adverse possession not to be presumed — Person claiming continuous adverse possession has specifically to show his possession from year to year. 1977 Rev. Dec. 224, Rel. on

S N Pandey, for Appellant, Smt Indira Swaroop, for Respondents

BY/BY/A678/81/AAJ/MVJ

1981 ALL. L. J. NOC 28

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Naushey Ali Khan, Appellant v Jafar Khan, Respondent.

Second Appeal No 213 of 1971-72/Bareilly, D/- 20-12-1980

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Sec. 14 — Permissive possession of mortgagee — Lease by mortgagor subsequent to mortgage —

Mortgagee in possession of land and acquiring rights of Sirdar by process of law — Mortgagor cannot claim rights on basis of permissive possession of mortgagee.

Where the plots of land were mortgaged by the plaintiff in favour of the defendant on 19-4-1943 and subsequently a Patta was executed on 14-9-1943 in favour of the defendant, the effect of mortgage deed in respect of permissive possession could not be said to be continued beyond 14-9-1949 and when the defendant did not give up possession of land even after the expiry of Patta and became Sirdar of the land and had acquired those rights by process of law the plaintiff could not claim his rights on the basis of mere permissive possession of the defendant 1968 All LJ 101, (1979) 5 All LR 287 and 1969 All LJ 1095, Distinguished

J N Debey, for Appellant

BY/BY/A679/SAD/LGC

1981 ALL L J. NOC 29

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Smt Hulaso, Appellant v Natthoo, Respondent

Second Appeal No 170 of 1972-73/ Bareilly, D/- 16-12-1980

(A) U. P Zamindari Abolition and Land Reforms Act (1 of 1951), Sec. 331 (4) — Second appeal — Jurisdiction of Court — Decision of Additional Commissioner partly on surmises and partly on evidence — Finding perverse and vitiated — It being a question of law court has jurisdiction to go into that question.

Where the Additional Commissioner while deciding that the daughter of plaintiff's co-tenant was born of her husband and not of a muslim person, based his decision partly on surmises and suspicion and partly on evidence, in such a situation an issue of law arises and it is therefore necessary to go into the question raised in appeal and, jurisdiction of Court could not be denied Leaving out admissible and relevant documentary evidence also raises a question of law By selecting only certain parts of statements for consideration and leaving out other relevant portions the finding arrived at cannot be but perverse and vitiated, AIR 1955 SC 271, Rel on

(B) Evidence Act (1 of 1872), Ss. 79, 80 — Admissibility of copy of statement — Statement before Consolidation Officer — Date below signature formerly 13-10-1961 corrected as 3-10-1961 by crossing first numeral one — Correction not creating doubt — Copy of statement cannot be discarded. (U. P. Consolidation of Holdings Act (5 of 1954), Section 9 (2)).

The Additional Commissioner while deciding the age of the defendant who was plaintiff's co-tenant's daughter, alleged to be born of the muslim person with whom she was alleged to have illicit relationship, commits illegality in discarding the certified copy of statement of the plaintiff's co-tenant before the Consolidation Officer on the ground that the first numeral one of the date below the signature on copy of statement was crossed.

BY/BY/A680/81/SAD/MVJ

1981 ALL. L. J. NOC 30

(BOARD OF REVENUE)

D S. MISRA, MEMBER

Ram Krishna, Appellant v Smt Moola, Respondent

S A No 103 of 72-73/ Farrukhabad, D/- 13-10-80

U. P. Consolidation of Holdings Act (5 of 1954), S. 49 — Bar under — Suit under Section 229B of U. P. Zamindari Abolition and Land Reforms Act (1 of 1951) — 'A' seeking declaration to be a co-tenant with 'B' — No objection, as to correction or for continuance of his name in record of rights, raised at time of consolidation proceedings — 'A' cannot move Civil or revenue court for same relief and for declaration that 'A' is co-bhumidhar along with 'B'. 1979 Rev Dec 50 (All), Distinguished; 1978 Rev Dec 89 (BR), Explained.

R K Sriumn, for Appellant.

BY/BY/A683/81/AAJ/MVJ

1981 ALL. L. J. NOC 31

(BOARD OF REVENUE)

D S MISRA, MEMBER

Ram Charan and others, Petitioners v. Chandra Bhushan Etc., Respondents.

Reference No. 477 of 1978-74/Kanpur, D/- 25-9-1980.

(A) Limitation Act (36 of 1963), Sec. 5 — Application for condonation of delay and for substitution of legal representative of deceased — Judicial discretion of Court concerned — Not to be interfered in revision — (Civil P. C (1908), S. 115, O. 22, R. 9). 1977 Rev Dec 356 (SR) Foll

(B) Civil P. C. (5 of 1908), O. 22, R. 9 — Application for condonation of delay and substitution of legal representative of deceased, allowed — Setting aside of abatement is implied. AIR 1972 All 456, Followed.

AY/AY/A28/81/AAJ/SSG

1981 ALL. L. J. NOC 32
(BOARD OF REVENUE)
I B SINGH, MEMBER

Munshi Raja, Applicant v State, Opposite Party

Revn. No 872 of 1972-73/Fatehpur, D/- 30-6-1980

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 198 (as substituted by U. P. Act 35 of 1970), Ss 331, 333—Allotment of land to landless person — Cancellation of — Appellate Court remanding the case to S. D. O. after U. P. Act 35 of 1970 came into force — Order being without jurisdiction in view of the amended law, remand order was not proper — No irregularity committed in allotment to landless person — Order cancelling allotment must be set aside.

Hari Shanker, for Applicant, D N Srivastava, D G C. (R), for Opposite Party.

AY/AY/A30/81/KJK/SSG

1981 ALL L. J. NOC 33
(BOARD OF REVENUE)
I. B SINGH, MEMBER

Amar Singh, Applicant v Haripal Opposite Party

Reference No. 207 of 1974-75/Fatehpur, D/- 24-6-1980.

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 198 (3) — Application challenging action of Collector under — Limitation would be governed by Art. 137 of Limitation Act (1963), S. 5 of latter Act also will be applicable. (Limitation Act (1963) Art. 137, S. 5).

Where the appellant filed an application on 10-8-1971 for cancelling the allotment D/- 1-7-70 it could not be rejected as time-barred because limitation of three years under Art 137 of Limitation Act applies in such cases Even application under Sec 5 of Limitation Act could validly be made The Limitation provided for applications for action under old Section 198 (2) of the Act provided in Sch III of the U P Z A & L R Rules at Serial No 24 (1) cannot be made applicable 1972 Rev Dec 426 Held no good law

Section 5 of the Limitation Act is applicable to applications for action under Section 198 (3) of Act 1 of 1951 because Section 5 applies to appeals or any application other than an application under any of the provisions of O 21 of the C P C

M P Dixit, for Applicant, R N Srivastava, for Opposite Party

AY/AY/A29/81/AAJ/SSG

1981 ALL. L. J. NOC 34
(BOARD OF REVENUE)
I B SINGH, MEMBER

Lalji, Appellant v. Prag, Respondent.

Second Appeal No 151 (Z) of 1977-78/Jalaun, D/- 25-2-1980

(A) Civil P. C. (5 of 1908), O. 23, R 1 (4) (b) — Expression "such subject matter" — Meaning of — Cause of action and relief claimed in two suits must be same.

The phrase "such subject matter" used in O 23, R 1 (4) (b) does not mean the property or land but it means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him Where the cause of action and the relief claimed in the second suit are not same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of such subject matter AIR 1970 SC 887. Foll.

(B) Civil P. C. (5 of 1908), O. 23 R. 1; O. 7, R. 11 — Withdrawal of first suit with permission to file a fresh suit — Costs of it deposited on 26-12-77 — Fresh suit is deemed, instituted on 26-12-77 — No bar under O. 23, R. 1 is applicable.

Where the first suit was withdrawn with permission to file a fresh suit subject to payment of certain costs which was deposited on 26-12-1977 at appellate stage, the fresh suit will be deemed to have been instituted on 26-12-77 and the

previous proceedings in the suit prior to this date will be deemed to be part of the suit and the limitation also would start from that date, and in such a case bar of O. 23, R 1 would not apply

When it is ordered that the costs shall be paid before filing a fresh suit and the cost is not paid before, filing the fresh suit, the suit is not barred and costs can be paid or deposited either before the filing of the suit or if not so paid it can be paid or deposited any time during the pendency of the suit and the suit shall be deemed to have been instituted on the date of such payment or deposit, if allowed by the Court The Court may refuse to hear the suit on the ground that the condition has not been fulfilled, only in certain circumstances Even in such a case suit should not be dismissed but the proper course would be to reject the plaint under O 7, R 11 of C P C But if the costs is deposited with permission of the Court and if evidence has already been recorded it should be treated to be the part of the proceading, unless the suit is barred by limitation from the date of depositing the costs

S P Srivastava, for Appellant. Hari Shanker, for Respondent.

AY/AV/A33/61/AAJ/SSG

1981 ALL. L J NOC 35

DEOKI NANDAN, J

Brahmadeo Khan and others, Appellants v Shivadhari Khan and others, Respondents.

Second Appeal No 70 of 1971, D/- 28-11-1980

(A) U. P. Land Reforms (Supplementary) Act (31 of 1952), Section 6 (a) (i) — Adivasi right — Who can claim.

Where a suit under S 183 of U P. Tenancy Act was pending in the revenue court on 30-5-1952 Adivasi Right could not be claimed by the defendants on the basis of cultivatory possession in 1359F under the provisions of the U P Land Reforms (Supplementary) Act No 31 of 1952 in view of sub-cl (i) of cl (a) of Sec 6.

(B) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 17 and 6 — Scope.

Order that contemplates under Sec 17 the extinguishment of Sir rights of an intermediary who had let out his Sir Land on a Patta Dawami or Patta Istmarari and clause (d) (ii) of sub-sec (1) of Section 18 contemplates hereditary tenants possessing the right to transfer the holding by sale. Therefore a purchaser from hereditary tenants would become Bhumidhar of land on abolition of the Zamindari on 1-7-1952.

Kamini Mohan, G P. Bhargava and A N Bhargava, for Appellants, Sankath Rai, for Respondents.

AY/BY/A52/81/JDD

1981 ALL. L. J. NOC 36

B. N. SAPRU, J

Satnaram Singh and others, Appellants v Virendra Singh and others, Respondents

Second Appeal No 1825 of 1966, D/- 25-11-1980

(A) U. P Land Revenue Act (3 of 1901), Ss 110, 111 (3), 112 — Proceedings before Collector for partition of Mahal — Are proceedings before a Court. (Civil P. C. 1908), S. 2 (2)).

The proceedings for partition of Mahal under Chap VII of the Act are proceedings which determine the rights and titles of the parties, and order made by the Collector if he decides the objection under Sec 111 (3) are deemed to be decrees of Civil Court appealable to the regular civil courts of appeal. As such it cannot be said that Collector while deciding proceedings for partition of Mahal did not function as a court (1904) ILR 26 All 382, Disting

(B) U. P Land Revenue Act (3 of 1901), Sec. 110 — Suit for partition of village by plaintiff in 1931 — During pendency, co-sharer who filed objection to scheme of partition trespassing plaintiffs' land in 1948 — Abatement of partition proceedings on 1-7-1952 — Suit for possession against trespasser co-sharer in 1961 — Plaintiff entitled to benefit of S. 14, Limitation Act — Limitation for such suit starts from date of abatement — Suit not barred by limitation. (U. P. Zamindari Abolition and Land Reforms Rules (1952), Rr. 5, 6). (Limitation Act (1963), Sec. 14).

V K. S Chaudhry, for Appellants

LX/AY/G798/80/VCD/DVT

1981 ALL. L. J. NOC 37

R R RASTOGI J

Tek Chandra and others, Petitioners v State of U P and others, Respondents

Civil Misc Writ No 4663 of 1979, D/- 13-11-1980

(A) U. P Imposition of Ceiling on Land Holdings Act, 1960 (1 of 1961) Sections 10 (2), 12-A, 14 — Notice to tenure-holder under — Latter's right to indicate his choice — Can be exercised at any time before he was dispossessed

The tenure-holder could not have been denied his right to indicate his choice even after the orders regarding determination of surplus land had become final This right can be exercised till possession is taken from him by the Collector under Section 14 1977 All L J 375 and Civil Misc Writ Petn No 12553 of 1975, D/- 17-3-1978 (All), Rel on

Appeal by the tenure-holder against the order of the Prescribed Authority on his applications indicating his choice is maintainable

(B) U. P. Imposition of Ceiling on Land Holdings Act, 1960 (1 of 1961), Section 12-A — Transfers of plots by tenure-holder held not genuine — Choice of tenure-holder of the said plots as surplus cannot be regarded as mala fide and transferees cannot claim relief under the Proviso to Proviso (d) of Section 12-A.

N. S Chaudhary, for Petitioners

LX/AY/G605/80/KNA

1981 ALL. L. J. NOC 38

K. M DAYAL, J

Sohan Lal, Petitioner v Additional District Judge, Dehradun and others, Respondents

Civil Misc Writ Petition No 7099 of 1979, D/- 13-11-1980

U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Ss. 43 (2), 40, 39 — Suit for eviction — Premises within Cantonment Area — Tenancy terminated — Suit continued during period when both U. P. Acts 3 of 1947 and 13 of 1972 were not applicable to Cantonment Area — Held, eviction could be decreed. (U. P. (Temp.) Control of Rent and Eviction Act (3 of 1947), S. 3; T. P. Act (1882), S. 111).

A landlord filed a suit for eviction against tenant on ground of default in payment of rent in respect of premises situated in a Cantonment Area The tenancy was terminated before filing the suit The U P Act 3 of 1947 was made applicable to the Cantonment Area from 3-4-1972 but the said Act stood repealed on 15-7-1972 The new U P Act 13 of 1972 was made applicable to the Cantonment Area w e f 29-9-1973 The tenant did not take any step to deposit rent etc as required under the provisions of the U P Act 13 of 1972

Held in the circumstances that the case was covered neither by U P Act 3 of 1947 nor by Act 13 of 1972 and therefore decree for ejectment could be passed even if there was no default The tenant was not entitled to benefit under U P Act 13 of 1972

L M Pant, for Petitioner; Bharatji Agarwal, for Respondents

AY/AY/A181/81/VNP/SSG

1981 ALL. L. J. NOC 39

K M DAYAL, J

Ghana Nanda, Petitioner v 4th Additional District Judge, Bulandshahr and others, Respondents

C M Writ No 5001 of 1979, D/- 29-10-1980

U P. Regulation of Money Lending Rules (1976), Rr. 19 and 16 — Form 10 — Omission to mention a debt in Form 10 — Would not take away the right of money-lender to realise the debt.

Form No 10, under the Rules, is a statement under R. 19 and under R. 16. Rule 16 refers to the statement submitted by the money-lender to the Registrar in respect of the debts loaned by him That, however, does not mean that if a particular debt is not mentioned in the Form, may be for the reason that a litigation was already pending or otherwise, the debt will not be realisable or the money-lender will not be a money-lender in respect of such a debt

Devendra Swarup, for Petitioner, B. B Paul for Respondents.

LX/BY/G678/80/JDD

1981 ALL. L. J. NOC 40

R R RASTOGI, J

Man Mohan Singh Gill, Petitioner v State of U P and others, Respondents

Civil Misc Writ No 3392 of 1979, D/- 6-10-1980

U. P. Imposition of Ceiling and Land Holdings Act, 1960 (1 of 1961), S. 5 (6), Proviso — Good faith — Transfer by tenure-holder — Transfer deed found to be

for consideration and necessity — Absence of recital in the sale deed of the details and factum of necessity does not necessarily disprove good faith.

There is no presumption that a transfer should be considered as one made for avoiding the ceiling law 1978 All LJ 1143, Rel on

The presence or absence of such recital of the details and factum of necessity for the transfer in a sale deed, may be relevant to determine whether sale was bona fide or not within the meaning of the Act but the absence of such recital is not decisive of the matter.

The question is to be decided on an objective consideration of the facts obtaining in a particular case

Vinai Sahai, for Petitioner, Standing Counsel, for Respondents

LX/AY/G609/80/KNA

1981 ALL. L. J. NOC 41

N D OJHA AND B D AGARWAL, JJ

Ram Prakash Gupta, Petitioner v State of U P and others, Respondents

Civil Misc Writ Petn No 2045 of 1974, D/- 1-10-1980

(A) U. P. Rural Development (Requisitioning of Land) Act (17 of 1948), S. 3 — Requisition of land for construction of road — Improvement of economic condition of rural population alleged to be purpose of requisition — Requisition is valid — It is not necessary that the purpose for which land is requisitioned must be of a temporary character. AIR 1980 All 250 (FB), Rel. on.

(B) Govt. of India Act (1935), Sch. 7, List 3, Entry 9 — U. P. Rural Development (Requisitioning of Land) Act (17 of 1948), S. 3 — Requisition of land under U. P. Act — Only possession and not the title of owner is taken over for public purpose — Compensation for land is not illusory.

It is apparent that the provincial legislature in the exercise of the power conferred on it by Entry 9 of List 2 of the 7th Sch. of the Govt of India Act would have enacted in regard to taking possession of property even without acquiring the title in the said property Therefore the title in the land which is requisitioned, notwithstanding the requisition, continues to vest in the owner of the land and it is only the possession of the land which is taken over for a public purpose. Hence it could not be said that the compensation paid under the Act is illusory, as it is determined on the basis as is determined under the Land Acquisition Act for acquisition of land under that Act AIR 1953 Assam 84 and AIR 1954 SC 119, Rel on

Vijay Bhagguna, for Petitioner.

KX/KX/F913/80/AAJ/MVJ

1981 ALL. L. J. NOC 42

A N. VARMA, J

Ganga Singh, Petitioner v District Judge, Etah and others, Respondents

Civil Misc Writ Petn No. 6509 of 1979, D/- 18-9-1980

Civil P. C. (5 of 1908), O. 15, R. 5 (U. P. Amendment D/- 1-1-1977) — Suit for eviction — Payment of arrears of rent — First date of hearing subsequent to amendment — Arrears are to be paid on the first date of hearing and not from date of amendment.

The duty to deposit rent month by month throughout the continuance of the suit arises only after the first date of hearing Therefore, in a suit for eviction, if the first date of hearing was subsequent to the amendment of Order 15, R. 5, it could not be said that the arrears of rent would be paid from 1-1-1977, the date on which the U. P. Amendment came into force

N Lal, for Petitioner. S N. Agarwal, for Respondents.

KX/KX/F909/80/SAD/MVJ

1981 ALL. L. J. NOC 43

(LUCKNOW BENCH)

D N JHA, J

Kalim Khan and another, Appellants v Mohd Sabir Khan and others, Respondents

Second Appeal No. 143 of 1969, D/- 16-9-1980.

U. P. Consolidation of Holdings Act (5 of 1954), S. 3 (9) — Settlement Officer Consolidation — Definition of — Words "any person" in definition are wide enough to include "Additional Settlement Officer Consolidation" — Order passed by such officer — Not without jurisdiction.

Mohd Husain, Mohd Taki Khan and Saghir Ahmad, for Appellants: P. C. Srivastava, for Respondents

AY/AY/A218/81/VCD/DVT

1981 ALL. L. J. NOC 44
(LUCKNOW BENCH)
T S MISRA, J

Lalta Prasad and others, Petitioners v District Judge, Lucknow and others, Opposite Parties

Writ Petn No 2286 of 1978, D/- 14-8-1980

U P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 20 (2) — U P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules (1973), Rr 22 and 23 — Appeal — Additional evidence in appeal — Power of Court. (Civil P C (1908), Section 151 and O. 41, R 27).

The power of the appellate authority in hearing an appeal under the Rent Control Act is quite wide It can admit additional evidence for doing justice in the case Of course, while admitting additional evidence it has to see that no injustice is thereby caused to the opposite party Even under Rule 27 of O 41 of the Civil P. C the appellate court may allow additional evidence to be produced if it requires it to enable it to pronounce the judgment or for any other substantial cause The discretion is, of course, not to be exercised arbitrarily

The test as to admissibility, no doubt, should be as to whether the court would be able to pronounce the judgment on the materials before it without taking into consideration additional evidence sought to be adduced

L P Shukla, for Petitioners, S R Chhabra, for Respondents.

LX/AY/G690/80/AGT/MVJ

1981 ALL. L. J. NOC 45
(BOARD OF REVENUE)
R S VERMA, MEMBER

State of U P, Appellant v Smt Nagarey Wali, Respondent

Second Appeal No 292 of 1977-78/Lalitpur, D/- 7-1-1981

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 171 and 172 — Applicability of — Widow — Mother of last land-holder (son) remarrying — Death of son — Widow, though a mother of the last land-holder, not entitled to inherit land of her deceased son. 1978 RJ 189 (SC), Dist.

Devendra Nath Srivastava, District Govt. Counsel (Rev) I, Allahabad, for Appellant

BY/BY/A667/81/VSM/SSG

1981 ALL. L. J. NOC 46
S D AGRAWALA, J.

Nathoo, Petitioner v The 2nd Additional District Judge, Ghaziabad and others, Respondents

Civil Misc Writ Petn No 8555 of 1979 D/- 2-1-1981

U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 20 (4) — Word 'entire' — Meaning of — Deposit of less amount than required — Tenant not entitled to benefit of S 20 (4).

Where in a suit for ejectment a tenant deposited the amount of rent and damages for use and occupation of the building due from him which was short by Rs 40/- he would not be entitled for the benefit of S 20 (4) 1978 (U P) RCC 308 and 1976 Rent CJ 594, Rel on, 1976 All LJ 124, Distinguished

In S 20 (4) the word 'entire' is significant The only meaning which can be assigned to the word "entire" is that the amount has to be deposited in toto as required by the provision If the amount fell short of the said requirement, the tenant cannot be relieved of the liability for eviction on the ground mentioned in S. 20 (4)

B B Pant, for Petitioner, Santosh Kumar, A K Banerji and Standing Counsel, for Respondents

BY/BY/A707/81/AAJ/DVT

1981 ALL. L. J. NOC 47
DEOKI NANDAN, J

Abdul Ghafoor, Appellant v Smt Kasturi Bai and others, Respondents

Second Appeal No 938 of 1971, D/- 5-1-1981

Evidence Act (1 of 1872), S. 3 — Civil suit — Evidence — Appreciation of — Inference of facts to be drawn on preponderance of probabilities — Proof beyond reasonable doubt not required.

In a civil case inference of facts in issue have to be drawn on preponderance of probabilities on a balance of the evidence on the record The plaintiff does not have to prove his case beyond all reasonable doubt One cannot, after the parties have set out their respective cases, and led evidence on the issues of fact between them, examine only the evidence of the plaintiff and after rejecting each item on suspicions or doubts raised by reason of something which a perfect plaintiff may have possibly

done, come to the conclusion that the plaintiff has failed to prove his case It is the mind of a prudent man which the Judge is required to possess He should be neither naive or gullible not too suspicious The habit of mind acquired by doing too many criminal cases, of doubting everything said by the Prosecution and holding that the charge is not proved against the accused, as it is not proved to the hilt, beyond all reasonable doubt, should be kept at the back while dealing with civil cases

Kamshwar Prasad, for Appellant, Yatindra Singh for Respondents

BY/BY/A469/81/DVT

1981 ALL. L. J NOC 48

P N GOEL, J

State of U P, Appellant v Puttu, Respondent

Criminal Appeal No 2168 of 1976, D/- 20-11-1980

Criminal P. C (2 of 1974), Ss. 248 and 313 — Offence under S. 25 Arms Act — Magistrate examining one prosecution witness — No evidence that Prosecuting Officer was present and he closed evidence — Magistrate acquitting accused without examining him under S. 313 — Held, that the trial was conducted without observing the legal procedure and hence it was vitiated

Standing Counsel, for Appellant, Rajendra Kumar Goswami, for Respondent

AY/AY/A171/81/SAD/MVJ

1981 ALL. L. J. NOC 49

K M DAYAL, J

Ajit Kumar and others, Petitioners v. District Judge, Rampur and others, Respondents

Civil Misc. Writ No 8961 of 1979, D/- 30-10-1980

, Civil P. C. (5 of 1908), O. 32, R. 3 (3) (All.) — Appointment of guardian for minor defendant by court — Mother appointed as guardian without her consent — Validity.

Where notice was served to the mother of the minor defendants to be their guardian in the suit, who never consented to appear before the court, in the absence of her appearance her consent to be the guardian could not be inferred and the court could not appoint her as guardian.

Order 32, R 3 specifically, provides that no person shall be appointed as a guardian without his consent.

B D Madhyan, for Petitioners, Standing Counsel, Ramesh Sadani and A. B Saran, for Respondents

AY/AY/A178/81/SAD/LGC

1981 ALL. L. J. NOC 50

(BOARD OF REVENUE)

S C GOIL, MEMBER

Ram Nath, Appellant v. Anganoo, Respondent

Second Appeal No. 162 of 1969-70/ Azamgarh, D/- 19-7-1980

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 138 — Suit filed under Section decreed — Deletion of S 138 during pendency of appeal — Effect.

A suit filed under S. 138 for separate share was decreed. The decree was also upheld by the appellate Court Against it a second appeal was filed in 1969 During the pendency of this appeal S. 138 was deleted by Ordinance 1 of 1977. Defendant raised objection as to maintainability of the suit

Held, that a substantive right had already been created by the decisions of the Courts before deletion of S. 138. Since the orders were legally valid, rights created thereunder could not be denied on the ground that the procedural law had been subsequently changed. 1978 All LJ 1316 and 1954 All LJ 265 (FB), Explained.

AY/AY/A27/81/AAJ/MVJ

1981 ALL. L. J. NOC 51

A N. VARMA, J.

Malik Mohammad, Petitioner v. 5th Additional District Judge, Aligarh and others, Respondents.

Civil Misc Writ No. 8579 of 1979. D/- 10-10-1980.

U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Ss. 12, 20 (c), 25 — Alleged subletting before the date of the Act — Question of eviction — Law applicable.

Where subletting by the tenant before the date of the Act of 1972 is alleged as a ground for eviction, the question of eviction on that ground must be determined with reference to the provisions of law or legal principles which were applicable prior to the coming into force of U. P. Act 13 of 1972.

V K Gupta, for Petitioner; S. C. Asthana, for Respondents.

I.X/AY/G602/80/KNA

PLAINTS: (CONTAINING PRINCIPLES OF PLEADING WITH MODEL FORMS OF PLAINTS AND MAJOR PETITIONS) Second Edition 1980. By A. B Majumdar, M A, LL B Advocate Calcutta High Court. Published by B. C. De for Eastern Law House, Calcutta Pages 28 + 504 Price Rs 118/-, £ 10/-, $ 20/-.

The words "plaint" and "complaint" are synonymous They convey the feeling of aggrievedness of a party Presently the word "plaint" is used in the Civil Courts and "complaint" in the Criminal Courts

Order 6, R 1, of C P C defines pleading as a plaint or a written statement The written statement of facts and the grievance has got to be accurate and to the point giving no scope for ambiguity This forms the first step in pursuing a suit in the law Court

The drafting of a plaint is a very important matter in the processing of a case A junior lawyer or even a senior lawyer would be required to face difficulties in proper construction of a plaint which is the basis of further pleadings in a Court This book would be found of great help in this regard As many as 308 model plaints and 134 models of major petitions suitable for any occasion for filing a suit have been incorporated in this book, which would be of great assistance to the lawyers The author has also shown how a slight alteration of a form can well serve one his purpose different from the one for which the form is apparently written

This book covers the subject exhaustively and explains minutest intricacies about plaints The work is specially of great value to all practicing lawyers

L K K

SAHA'S CRIMINAL REFERENCE — (SECOND EDITION, 1979): By A. N. Saha, B. Sc., LL. B. Published by (Mrs.) R. De for Debooks of 9 Creek Row, Calcutta 700 013. Pp. 32 + 1089. Price Rs. 110/-.

The book under review is a Digest of Cases on Criminal Law. The case-law under various statutes is arranged alphabetically according to the respective statutes and sectionwise The author has discussed the constitutional principles of Criminal Liability, General Principles of Criminal Prosecution, Arms Act, 1959, Army Act, 1950; Copyright Act, 1957; The Foreigners Act, 1946; Prevention of Food Adulteration Act 1954; Prohibition Law and Suppression of Immoral Traffic in Women and Girls Act, 1956 At appropriate places the author has also given indication that the concerned cases required the review Glossary and Addenda are drawn up-to-date

Thus the book will be very useful to practising lawyers and all those who are concerned with the subject for ready and just reference

Mrs K J K

"B B. MITRA ON THE GUARDIANS AND WARDS ACT, 1890, (12TH EDITION 1980), Consulting Editor C. N. Laik. Former Chief Justice (Actg.) High Court, Calcutta, Editor S N Sen, Advocate, High Court, Calcutta Published by Eastern Law House Private Ltd., Calcutta." Pages 42 + 530, Price Rs. 80=00.

This is the 12th edition of the book which through its earlier editions has already established itself as a classic on the Guardians and Wards Act 1890 The opening chapter of the book on the 'Gradual Development of the Legal Concept on Guardianship' outlines the gradual development of the legal concept regarding children and their guardians since the Vedic age and brings out how the same influenced the development of the subject in foreign societies and thereafter, in later times how the law of minor and guardian as obtaining in foreign societies had influenced the Indian law on the subject This historical background goes a long way to facilitate a proper understanding of the subject

Paternal Control and Care over infants and ancillary matters having universal recognition, subordination of the same to the supremacy of the "Welfare principle", has been thoroughly discussed, illustrated in great detail with a large number of judicial decisions on this issue The law on this subject in India, being largely based on English principles and more, especially on the decisions of the Court of Chancery, English and Common Wealth judicial decisions have been profusely cited in dealing with all important points so that they may be of help to the readers

The principles enunciated under the Hindu Minority and Guardianship Act (32 of 1956) have been referred to in the commentary wherever necessary and its provisions have been suitably explained Similarly the gist of the main provisions

of the Central Children Act (60 of 1960) has been given at the end of Annexure A to the Book which inter alia contains the Rules framed by the various High Courts under S 50 of the Guardians & Wards Act, 1890 Full Text of the Hindu Majority Act, 1875, The Hindu Minority and Guardianship Act 1956 and also the West Bengal Children Act 1959 have also been given in this Annexure

This book also contains the Table of Cases and an exhaustive Index for facility of ready reference It is a book which every law liabrary must have on its shelf

U S. D

DOKANIA'S AFTER ASSESSMENT PROCEEDINGS IN TAXATION — (1st Edn 1980) By Satyanarayan Dokania, Advocate, Published by Rabindra Kumar Dokania on behalf of Arun Prakashan 134/1, Mahatma Gandhi Road, Calcutta-7 Pp. 41 + 606, Price Rs. 100/-.

The book under review deals with proceedings subsequent to assessment. It has been divided into appropriate parts and the proper arrangement of the topics has been made under proper details Author has discussed thoroughly the provisions under tax laws both direct and indirect and the rules made thereunder Procedure relating to Appeal, Revisions, Reference, Supreme Court appeal and Writs in Direct Taxes as well as Sales Tax Laws applicable in different States of India etc, have been explained exhaustively up-to-date case law also has been given wherever found necessary, table of cases and Foot-Notes appended in brief to the cases are very suggestive Thus the book is a most complete work It is in itself complete for ready reference purpose It is very useful volume covering wide range of subjects which tax-payers may come across in their field of daily work. The book is so simplified that even a layman can understand and seek solution to his problems

In short the book will be a treasure house of useful information for lawyers, students, tax authorities and public in general

Mrs K. J. K.

"ENGLISH LAW AND FRENCH LAW" (1st Edn. 1980) by Rene' David, Hon. Professor of the Universities of Paris, Grenoble and Aix-en-Provence, Hon. Master of the Bench, Middle Temple. Inn. Winner of Erasmus Prize 1976. Published in 1980 by Eastern Law House Pvt. Ltd., Calcutta & Stevens and Sons Ltd., London · Pages 14 plus 223.

The author, a distinguished French Jurist, wrote this book for the Tagore Law Lectures As pointed out by him in the Introduction to the book, despite the proximity of England to France and the Continent of Europe, the English Common Law and Equity have developed entirely separately from the Civil Law of the continent In fact, both the English and the Continental lawyers had in the past shown apathy towards the legal study and system of each other even though in other aspects of civilization and fields of knowledge intercourse between England and France existed for centuries.

The author has outlined to present state of law in England and France and pointed out the differences between the two legal systems In the 1st Chapter bearing the caption, A Law of Remedies and a Law of Rights, the author has expressed the view that in England law appears as a technical subject the study of which attracted men and women intending to engage into the legal profession whereas in France and Continental countries with Civil law tradition, law is treated as a social science and education in a law school is regarded as the best preparation for a number of professions in private and public spheres exceeding the domain of the legal profession. The differences to be noted between the English and French systems in the matter of codified law and case law have been brought out in a separate Chapter. Likewise separate Chapters have been devoted to the comparative study of Constitutional Law, Administrative Law, Law of Contract, Mercantile Law, Torts and Labour Law Thus the book presents a brilliant analysis of the State of Law in the various branches of the English and French law and points out the differences between the two systems primarily with a view to investigate whether one or the other may be better adapted to work out justice under the conditions prevailing in modern society.

U. S. D.

COMPANY MEETINGS AND RESOLUTIONS (3rd. Edn 1980) by Shri C. R Datta, M. A., LL. B (Cal.) A. T. I. T (Eng.) D I A. (Lond) Bar-at-Law Published by B C. De. For Eastern Law House Pvt Ltd., 54 Ganesh Chunder Avenue, Calcutta. Pages 21 + 495; Price Rs. 80=00

The topic of "Company Meetings and Resolutions" is one of the important topics of the Company Law The author has treated the subject with special attention to India's needs and circumstances The high technicalities of the subject have been convincingly explained so that the reader may get into inner recesses This edition also covers new topics like "club Meetings" "Board Meetings of Regional Banks" and meetings of the local bodies The book is highly useful not only to the legal profession and law students but will satisfactorily meet the present day secretarial and managerial needs

S S G

ARBITRATION (1st Edn. 1979) By S. K. Roy Chowdhury, M Sc., LL B, of the Middle Temple, Barrister-at-law, Judge, Calcutta High Court and H K. Saharay, M. A (Triple), M. Com., of Innex Temple, Barrister-at-law, Lecturer, Calcutta University Law College Published by Eastern Law House, Calcutta. 1978. Pages 82 + 644 + A-286 Price Rs 80/-; £ 8/-; $ 16/-.

This complicated subject has been simple and easy to understand by the two learned authors in their simple and characteristic style Hon Mr Roy Chowdhury is presently the Judge of the Calcutta High Court and Shri Saharay is practicing at the bar and is also teaching law at the University College of Law, Calcutta, and their vast experience at the bar and the college class-rooms has been poured in every page of this book. They have endeavoured to deal with different aspects of arbitration as comprehensively as possible so that it would be of great use to the Bar, Bench and the law Students

The book has six parts with an appendix containing High Court Rules, Rules and Regulations of arbitral proceedings followed in different chambers of commerce and Associations in India and abroad, forms and various matters having bearing on the subject. A comparative table of the Indian and English Arbitration Acts is also included The spread of the book is in six parts

Part-I — deals with general and topic-wise discussions on the Law of Arbitration

Part-II — deals with section-wise commentary on Arbitration Act, 1940

Part-III — deals with problems on arbitration with suggested solutions

Part-IV — deals with the basic rules of law drawn from English and Indian Cases on arbitration

Part-V — contains selected decisions of Privy Council, the Federal Court and the Supreme Court This part is divided into chapters with cases grouped under the various sections and Schedules of the Act

Part-VI — Contains selected English Cases on the subject in alphabetical order with head-notes, short facts of the cases and the principles of law laid down therein

Thus the authors have made their work most useful to all those concerned with arbitration.

L K K

INCOME-TAX RULINGS VOLUMES I & II, by K Chaturvedi, B. L., and S. M. Pithisaria; B Com, LL B. Assisted by M K Chaturvedi, M Com., LL M (Cal.), D I U N S (Geneva) Published by Vijay Yogi for Vijay Publishing Co. Calcutta Eastern Law House, Calcutta. 1979. Vol. I Pages CXxii + St. 150 + 936 + 56, Price Rs 128/-. Vol. II Pages CX + St. 95 + 1028 + 80. Price Rs 145/-.

The taxes are the price we pay for civilization Those who are entrusted with the task of realization of that price should familiarise themselves with the relevant provisions and become well-versed with the law on the subject. Any remissness on their part would result in less to the nation The same is true for the assessees and those who represent them.

The welfare works of the society are run by the administration by collecting taxes from the general public There is a natural instinct and desire either to avoid or minimise this burden in the minds of men and for that loop-holes in the rules are found and ingenious methods are adopted and therefore the administration has to meet those challenges by rearranging the rules.

There is quite a sizeable literature and huge case law is available on the knotty problems But it is not possible for one to read all that and pick up the relevant in support of his case There was a dire necessity of a book which was not only indicative text-book but a mirrorlike exposition to instantly locate and find the immediately wanted material at a split second reference, also indicating whether, at the relevant time it is, or is not, apposite

In these volumes the authors have collected rulings from almost all the leading Indian and foreign Cases, on particular points, placing them side by side, point-wise, subject-wise and section-wise, giving them apt and suitable headings of their own To help further the authors have at the start of each point, elaborated the provisions of law, indicating the amendments made therein from time to time The corresponding provisions of the 1922 Act and 1961 Act have been given separately with accurate foot-notes The amendments proposed in the Finance Bill 1979 have been extracted, as also explanatory notes thereto Rules relevant to the section dealt, are also extracted from Income-tax Rules, 1962

Volume I gives rulings on the provisions of Ss 1 to 27 and Vol II gives rulings to Ss 28 to 36 The Rulings are from cases not only from our own Supreme Court and High Courts, but also, by the Privy Council, House of Lords, Court of Appeal King's and Queen's Benches, Chancery Division, Court of Sessions etc of England Australia, U S A., Pakistan and other countries

This is not only a new venture but a wholly new type of presentation which will be found to fill up a long standing gap as a guide and an instant help book The work has been made very useful by many other additions to get accurate information and save valuable time of the busy lawyers and the Income-tax practitioners

L K K

DE SOUZA'S FORMS AND PRECEDENTS OF CONVEYANCING AND OTHER INSTRUMENTS AND MAJOR PETITIONS TO COURTS (ELEVENTH EDITION 1980) By B. Sen M A., B. L., Solicitor. Published by Eastern Law House Pvt. Ltd., Calcutta Pages 856. Price Rs. 115/-.

Conveyancing is an important aspect of the legal profession. There are not sufficient number of good books written by experienced lawyers and scholars on this subject Looking to the importance of the subject and the needs of the society, a very detailed and critical study of the law connected with the drafting of deeds and forms suitable for our people was an urgent need which this work will fulfil to some extent

Conveyancing is a special and technical subject and concerns with the practical application of land laws In India conveyancing is still, except in Presidency towns, in a most rudimentary state in grater part of the country There is a class of persons who call themselves "Deed Writers" who assume to themselves the part of conveyancing experts and draft crude drafts which very often create troubles both for the transferor and the transferee. The profession demands a detailed study of the law connected with drafting of deeds and forms suitable to the requirements in this country.

In this book the author has discussed the subject in sufficient details and it would provide a very useful guide to the practitioners with regard to matters relating to conveyancing. He has tried to make the book as comprehensive as possible and practically covered most of the matters relating to conveyancing.

Necessary forms to be used for various transactions are selected carefully The book is very valuable to a practicing lawyer and also to the general public. The students studying law would find the book of great help The get up and binding of the book is very fine

L. K. K.

B. B. MITRA ON THE LIMITATION ACT, 1963 (EIGHTEENTH EDITION, 1980). By A. C. Sen, M. A. LL. M. Published by B. C. De for Eastern Law House Pvt. Ltd., 54 Ganesh Chunder Avenue, Calcutta-700 013. Pp. 124 + 1146. Price Rs. 148/-.

The book under review is a commentary on Limitation Act, 1963. The author has written various commentaries on other branches of law, such as transfer of property, succession, criminal procedure etc, that the present book regarding limitation has been printed for the eighteenth time indicates clearly its vast

popularity and unquestioned utility to the members of the Bar and Bench and also to the students of law Author has spared no pains in presenting the various sections of the Limitation Act with exhaustive and lucid explanations The purport of every section is ably and clearly brought out by useful reference to the important cases and judgments thereof

Table of Cases falling under different articles of the Limitation Act is up-to-date for ready and accurate reference Each and every case mentioned therein indicates clearly the vast sphere of the Act in general

The subject index has been prepared by author by adopting totally a new method It has reach a high level of precision and preparedness on the part of author Thus the book is really a most complete work ever published on this subject covering all sides of limitation It should prove unfailing guide to the world of legal profession.

Mrs K J K

N. D. BASU'S LAW OF INJUNCTIONS, (FOURTH EDITION, 1980). By S K. BOSE Published by Eastern Law House Pvt Ltd 54, Ganesh Chunder Avenue, Calcutta 700 013 Price Rs 80. Pages lxxix + 988

With the growth of business and industry, the injunctive process has greatly increased as it is the only judicial instrumentality for the prevention of wrong Injunctive processes are not now confined to old types of action based on right to property or on disputes arising out of contracts, but they now embrace multifarious human activities.

The first edition of the book was published in 1934. This is the fourth edition by the author's son

The book under review is a complete treatise on the law relating to injunctions, stating and applying the principles controlling the granting of such relief in all cases and covering all the modern phases of the subject The author has dealt very elaborately with the controlling principles which guide the court in granting or refusing injunctive relief

The book is divided into 34 chapters. The first four chapters are introductory. The remaining chapters have been divided in accordance with the different classification of obligations arising out of trust, contracts and torts At the beginning of each chapter the general principles on which the injunctive relief to prevent the breach of that particular obligation is based, has been elaborately discussed, followed by substantive law regarding that particular obligation At the end are given illustrative cases as regards injunctive relief and other incidental matters The book is full of quotations from the judgments of judges in India and elsewhere, including England and America

In the fourth edition the case laws have been made up-to-date and a chapter incorporating the statutory provisions relating to the law of injunctions included There is an exhaustive Table of Cases arranged alphabetically and a Subject Index

The book will be found very useful both by the practising lawyers and the judges

S V M

THE MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT (1969), by Dr. N K Sengupta, M A. Ph. D, Published in (1980) by Eastern Law House, Pvt. Ltd., Calcutta. Pages 444 Price Rs 80/-, £ 10/-; $ 20/-.

This book is intended to give necessary guidance to the Practitioners in business, Law Management and Accountancy It was first published in 1977 and the second edition coming out in 1980 shows that it is useful and well received by those for whom it has been written. The Book covers a new and very complicated area. The M. R. T P. Act came into force on 1st June 1970 and is the latest economic legislation which will have great impact on the growth and progress of trade and industry in India

The three main objectives of the M R. T P Act have been vividly explained in this book i e (1) to control and regulate concentration of economic power to common detriment, (2) to control monopolies and restrictive trade practices and (3) to prohibit restrictive trade practices unless any of those can be justified as being in public interest

The Act triggered off a serious controversy from the very beginning The Author in his support of the Act has given reasonable and convincing explanations since he was well armed with up-to-date and accurate information on the subject as he was Director, Department of Company

Affairs, New Delhi when the Act was framed He has ably shown that the Act does not stifle the growth of trade or industry and has also shown how the Act is necessary for regulating concentration of economic power and monopolies

In this second edition the author has included cases decided by M R T P Commission and also few cases decided in appeal by the Supreme Court Thus a sizeable case law has been incorporated in this book

The Company Secretaries, Corporate Lawyers, Corporate Accountants and all those concerned with the Act will find this book most useful and of immense help in their day-to-day operation of the Act, and it will provide valuable guidance in this new and complicated subject

L K K

THE LAW OF MAINTENANCE (1st Edn., 1981). By P C Banerjee Published by Purna Publishing House, B-10/261 Central Avenue East, Kalyani, Nadia, West Bengal. Price Rs. 20. Pages 139.

In the past when there were joint families and divorces were rare, the question of maintenance concerned only a few With the emergance of nuclear families and divorces increasing, the right to maintenance acquired importance

Right to maintenance is available under the personal laws of different communities There have been many changes in the Code of Criminal Procedure of 1898 relating to maintenance Chapter IX of the Code of Criminal Procedure 1973 now extends provision for maintenance to near relatives who are unable to maintain themselves These now include parents, a divorced wife who has not remarried and to major children in specified cases

Mr P C Banerjee, author of a dozen books on different aspects of law, has, in the book under review, collected and presented the statutory provisions and the judicial decisions in their perspective on maintenance In the four chapters of the book he has dealt with eligibility, jurisdiction and procedure, proof and quantum and execution of the law of maintenance He has given, at the end of the book, extracts from the Code of Criminal Procedure, 1973.

The book will be useful to practising lawyers and judges when dealing with the suits on maintenance,

S. V. M.

THEORY AND PRACTICE OF VALUATION (1st Edition 1980):— By A. K. Mitra, B Sc., F. I. Y. Published by S. C. De, for Eastern Law House Private Ltd. 54, Ganesh Chunder Avenue, Calcutta 700 013. Pp. 23 plus 5184. Price Rs. 85.

The book under review is intended to serve as a guide to a man of property to enable him to plan his affairs to the best of his advantages acting within the legal limitations The various methods to evaluate real properties, undeveloped properties, properties in nature of investments have been discussed in full length by author Author has explained fully the dual interest of lessors and lessees in chapter 'Lease-hold interests' while in chapter 'Selection of measuring unit' author has discussed the most advantageous manner of disposition. The chapter containing judgments of High Courts and the Supreme Court have increased the utility of the book The mathematical Tables appended are also of great utility

The book will be of practical use to both the man of property and the valuers handling the various problems about valuation Thus in view of the practical importance the book is a must for all concerned. Mrs. K.J.K

COMMERCIAL REFERENCE (1st edition, 1980): By K. Vankoba Rao, M. L., Advocate, Published by Eastern Law House, Calcutta, 1980. Pages 143 plus 1506. Price Rs. 135, £. 10, $. 20.

This is probably the first handy book in a convenient form on commercial law In this book a busy lawyer can lay his finger on a judicial precedent with absolute accuracy and without loss of time and energy The Commercial Law is a constantly developing one and therefore it needs to be treated in a rational manner and in a language which can be easily understood This work fulfils both these requirements in a marvelous manner The doctrine of judicial precedents which is followed in India as in many other countries, has a very vast field and the task of finding a judicial precedent from the plethora of decided cases is not an easy one, but the hunting process for the required case has been simplified by the author, through judicious use of sections, sub-sections, headings, sub-headings etc. and the essence of law for each statute or of the common law. Thus making many ambiguous points perfectly clear. L.K.K.

"BANK GUARANTEE — VALIDITY OF THE LIMITATION CLAUSE."

By : K Chalapati Rao, Law Officer,
State Bank of India, Hyderabad.

The bankers, as part of their business execute guarantees favouring the third parties on behalf of their constituents These are called generally as 'bank guarantees' The guarantees so executed may be either a performance guarantee or a financial guarantee Performance guarantees are given for due performance of obligations under a contract by the one on whose behalf the guarantee is issued while the financial guarantees are issued in lieu of any deposit of money to be made by such person It is the usual practice with the banks to incorporate in all the guarantees issued by them, a clause stipulating the expiry of the date of the guarantee Further, at the end of the guarantee, they incorporate a clause called 'Limitation Clause' which reads in either of the two forms

(i) Unless a demand or claim under this guarantee is made on us in writing on or before the . (specified date), we shall be discharged from all the liabilities under this guarantee thereafter

(ii) Unless a suit or action to enforce the claim under this guarantee is made on us in writing on or before the (specified date), we shall be discharged from all liabilities under the guarantee thereafter

It is an established proposition of law that the payment under the bank guarantee is unconditional like payment under the letters of credit Lord Denning in Edward Owen Engineering Ltd v Barclay's Bank International Ltd, (1977) 3 WLR 764 observed

"A bank which gives a performance guarantee must honour that guarantee according to its terms It is not concerned in the least with the relations between the suppher and the customer, nor with the question whether the supplier has performed his contracted obligation or not, nor with the question whether the suppher is in default or not The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions The only exception is when there is a clear fraud, of which the bank has notice"

These observations have been quoted with approval by the Calcutta High Court in a recent case decided in Texmaco Ltd v State Bank of India, AIR 1979 Cal 44, wherein it was held thus

"The moment a demand is made without protest and contestation, the bank had obliged itself to pay irrespective of any dispute as to whether there had been performance in an orderly manner of the contractual obligation by the party"

These observations have been made to explain in reality the extent of liability under a bank guarantee and they have nothing to do with the limitation of action under such guarantee In State of Maharashtra v Dr M N Kaul, AIR 1967 SC 1634, the Supreme Court, dealing with the limitation clause in the guarantee, held that the cardinal rule is that the guarantor must not be made liable beyond the terms of the agreement The contention that is invariably raised to meet defence taken by the banks about the limitation is that the 'limitation clause' inserted in the guarantee deed is violative of the provisions of Section 28 of the Indian Contract Act They contend that it is not within the competence of the parties to consent or contract so as to alter either the statutory period of limitation or the statutory starting point of limitation The time, within which rights may be enforced, being fixed by the statute, it is not open to the parties, by agreement, to alter such time, or to waive and contract themselves out of the operation of the statute Limitation being a matter of public policy, consent or waiver is not allowed to defeat it

No doubt under Section 28 of the Contract Act, agreements which provide shorter period of limitation than the one prescribed by law are void, the reason being that such an agreement will absolutely restrict the parties from enforcing their rights after the expiration of the stipulated period, though it may be within the period of limitation. But these agreements must be distinguished from those which do not limit the time within which a party may enforce his rights, but which provide for a release or forfeiture of rights if no suit is brought or no claim is made within the stipulated period The Bombay High Court keeping this distinction in mind had upheld a clause in a Policy of Insurance which provides

"If a claim be made and rejected and an action or suit be not commenced within three months after such rejection .. all benefits under the Policy shall be forfeited"

on the ground that such a clause operates as a release or forfeiture of the rights of the assured if the condition be not complied with, and a suit cannot be maintained on such a Policy after the expiration of three months from the date of rejection of the plaintiff's claim (Baroda Spg & Wvg Co Ltd v Satyanarayan Marine & Fire Insurance Co, (1914) ILR 38 Bom 344) (AIR 1914 Bom 225 (2)) Similarly, a clause that the Company shall not be liable if no suit were brought within 12 months after the occurrence of the loss was upheld as not violative of Section 28 of the Contract Act (Ruby General Insurance Co v Bhara: Bank, AIR 1950 East Punj 352, Pearl Insurance Co v Atma Ram, AIR 1960 Punj 236 (FB)) Construing a similar clause in Government contract providing that the President of India shall be discharged from all liability under the contract unless an arbitration or suit is commenced within six months from the expiration of the period, Jammu and Kashmir High Court held in Prithvi Nath Malla v Union of India, AIR 1962 J & K 13 as follows

"The distinction may be fine one but it is nontheless a fundamental distinction The arrangement in the one case takes it for granted that the right as well as the liability exists, but the time for enforcing it is sought to be limited While in the other case the parties agree that the right as well as liability shall stand extinguished if a specified event occurs"

"What Section 28 forbids is not extinguishment of the rights or liabilities of a party to a contract on the happening of a specified event, but the limiting of time within which a party may enforce his rights It is obvious that the party will have no right to enforce, if the rights have already been extinguished under the contract In such a case there can be no question of the time for the enforcement of the rights being limited What happens is that the right itself ceases to exist"

This view was upheld by the Supreme Court in State of Maharashtra v Dr M N Kaul, AIR 1967 SC 1634 in no uncertain terms Their Lordships of the Supreme Court pointed out that an attempt should be made to enforce the guarantee within the period agreed to between the parties and it is impossible to ignore the time limit which is an integral part of the contract

The same principles that are applicable to the limitation clause in the Insurance Policies would equally apply to similar clauses in the 'bank guarantees' If a party in whose favour the guarantee is executed agrees for curtailment of the period and limits his rights to enforce within a particular time, he is bound by the same although under law he is entitled to a longer period of limitation

Recently, a Division Bench of the Kerala High Court had an occasion to consider the 'limitation clause' in a bank guarantee in Kerala Electrical & Allied Engineering Co Ltd v Canara Bank, AIR 1980 Ker 151 The facts of the case in short are

The third defendant, the proprietor of a unit, entered into a contract with the plaintiff company for purchase of 39 motors and offered a bank guarantee of the first defendant bank, duly signed by its Manager, the second defendant, for a sum of Rs 15,000 When part of the bills were not paid, the plaintiff had invoked the guarantee and later filed the suit for its recovery The main contention of the bank was that no claim could be made under the bank guarantee as the plaintiff lost his rights under the said guarantee as he did not institute the suit within a period of 6 months from the date of the expiry of the period of the guarantee The trial Court found that since the suit was filed after one year and 6 months from the date of the expiry of the bank guarantee, the plaintiff lost all rights under it and hence could not enforce the claim against the first and second defendants The trial Court, however, found the third defendant liable for the plaint claim and gave a decree against the third defendant and his assets It is the above judgment and decree of the trial Court that were challenged by the plaintiff in this appeal

Clause 6 of the bank guarantee dated the 16th January, 1970 read as under

"This guarantee will remain in force for a period of one year from the date hereof and unless a suit or action to enforce claim under the guarantee is filed against us within six months from the date of expiry of (the guarantee), all your rights under the said guarantee shall be forfeited and we shall be relieved and discharged from all liability thereunder"

The short point that arose for consideration was whether the condition in Clause 6 that a suit or action to enforce claims under the guarantee was to be filed within 6 months from the date of expiry of the guarantee was hit by Section 28 of the Indian Contract Act, 1872.

The learned Judges of the High Court upheld the validity of the Limitation Clause in the guarantee deed and on a review of the case law on the point held as under

"Section 28 of the Indian Contract Act, 1872 reads

"Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent

" Section 28 makes two kinds of agreements void What we are concerned in this case is the second of the two kinds, namely, an agreement which limits the time within which a party thereto may enforce his rights under or in respect of a contract by the usual legal proceedings in the ordinary tribunals It is the limiting of the time within which the rights are to be enforced that is made void. So, it goes without saying that rights to be enforced under the contract should continue to exist even beyond the shorter period agreed for enforcing those rights, to make such an agreement void under the section If, for example, beyond the shorter period agreed upon the rights under the contract cannot be kept alive, no limiting of the time to enforce the rights under the contract arises and hence the agreement putting a time limit to sue will not be hit by Section 28 So, a condition in a contract that the rights thereunder accruing to a party will be forfeited or released if he does not sue within a time limit specified therein will not offend Section 28 This is because, as per the contract itself, the rights accrued to the party cease to exist by the expiry of the limited period provided for in the contract In such a case, in effect, there is no limiting of the time to sue So, an agreement which provides for a simultaneous relinquishment of rights accrued and the remedy to sue for them will not be hit by Section 28 But at the same time, an agreement relinquishing the remedy only, by providing that if a suit is to be filed that should be filed within a time limit— the time limit being shorter than the period of limitation under the Limitation Act—will be hit by Section 28 This is because the rights accrued continue even beyond the time limit as the same are not extinguished In such a case, there is really a limiting of the time to sue prescribed by the Limitation Act In the instant case it is clear from Clause 6 of Ext A1 guarantee extracted earlier in this judgment that the liability of the bank will be alive only for a period of six months after the expiry of the period of duration of the guarantee It is also specified in Clause 6 that the plaintiff's rights under the guarantee will also be forfeited by the end of those six months There is an extinction of the right of the plaintiff under the contract and a discharge of the defendants from liability. So, the time limit imposed in Clause 6 cannot be hit by Section 28 of the Contract Act The findings of the Trial Court are perfectly legal and valid"

Accordingly, the appeal was dismissed

Therefore, it is open to any two parties to agree that the promisor would only be liable if he is informed of the indemnification within the stipulated period and there seems to be a great deal of sense in it Lapse of time may result in all kinds of claims which are not capable of determination with any amount of exactitude and when memories of men may become rather hazy A clause limiting the period to file the suit does not defeat any provision of law, it is not opposed to public policy and it neither contravenes Section 28 of the Contract Act, nor Article 86 of the Limitation Act

From the foregoing discussion, the legal position can be summarised by stating that a contract which does not limit the time within which the insured could enforce his rights and only limits the time during which the contract will remain alive, is not hit by Section 28 of the Contract Act In short, a condition in a contract that the rights thereunder accruing to a party will be forfeited or released if the party does not sue within the period of limitation specified therein, is valid and enforceable under law In short, an agreement providing for the relinquishment of rights and remedies is valid, while an agreement for the relinquishment of remedies only is violative of the provisions of Section 28 of the Contract Act

1981 ALL. L. J. NOC 52

T S MISRA, J

Ram Deo and others, Appellants v Bhagwati Din and another, Respondents

Second Appeal No 239 of 1974, D/- 30-1-1981

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Sections 6 (a) (i), 20 (a) (i), 249 (g) and 203— Ownership of trees on agricultural land — Plaintiffs acquiring rights as Sirdar on said land after vesting — Some trees thereon declared by Consolidation Authorities as belonging to the defendants who were erstwhile intermediaries — Held that ownership of those trees remained with the defendants even after vesting, and the decree of the appellate Court ordering defendants to remove their trees from plaintiffs' land was in order.

S N Sahai, for Appellants, Girish Chandra, for Respondents

BY/CY/A971/81/USD/MVJ

1981 ALL L J. NOC 53

DEOKI NANDAN, J

Smt Gagram Devi, Appellant v Mohan Lal, Respondent

Second Appeal No 965 of 1970, D/- 12-2-1981

Transfer of Property Act (4 of 1882), Section 9 — Partition of property — Requisites — Joint-owners must be definite and put into separate possession — Registered instrument for partition not absolutely required.

The requirements of law of partition are that the shares of the separating joint-owners must be definite and they should be put into separate possession of property in proportion to their shares It is well settled law that where no writing is required for transfer, it may be made orally and that partitions are made orally and given effect to is well known

Where the building situated on two separate plots of land was co-owned by the plaintiff and her husband; the plaintiff's husband after making oral partition transferred half share in the building to a stranger while other half portion belonging to the plaintiff was occupied by tenant, it was not necessary that the plaintiff should join her husband in the notice for filing a suit for ejectment of tenant The transferee was put into exclusive possession of the half portion of the property which on partition came to the share of plaintiff's husband while the tenant was in possession of the portion of the building belonging to the plaintiff on which the transferee had no concern As a result, the plaintiff alone was the landlord of the defendant over the remaining half portion which was recognised by the Municipal Board by giving two separate numbers to each of two portions and realising taxes separately Therefore, since both the requirements were fulfilled the tenant was liable to ejectment and the plaintiff entitled to recovery of damages and arrears of rent 1945 All LJ 452, 1978 All LJ 768, Rel on

L P Singh, for Appellant K M Dayal, for Respondent

CY/CY/B169/81/HSS/DVT

1981 ALL. L. J. NOC 54

A N VARMA, J

Jadunath Singh, Petitioner v Jaswant Singh and others, Respondents

Civil Misc Writ Petn No 4433 of 1980, D/- 7-1-1981

U. P. Consolidation of Holdings Act (5 of 1954), Section 48 — Order passed without serving notice of revision to affected party — Though order cannot be reviewed it can be recalled by Dy. Director of Consolidation.

B D Nadhyan and S M Dayal, for Petitioner, B N L Katiyar and Standing Counsel, for Respondents

BY/CY/A959/81/MRD/RSK

1981 ALL. L J. NOC 55

S D AGARWALA, J

Mahesh Dutt Awasthi, Petitioner v. Jrd Additional District Judge, Kanpur and others, Respondents

Civil Misc Writ Petn. No 9073 of 1979, D/- 16-1-1981

U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Section 20 — Suit for ejectment — One of the co-landlords not impleaded as party to the suit — No evidence on part of the other co-landlords that they were authorised by the other co-landlords to file a suit for ejectment — Held all the co-landlords having not joined the suit, suit was bad for nonjoinder of necessary parties. 1977 All LJ 251, 1978 (U.P.) Suppl. Rent CC 672: AIR 1978 NOC 3, Rel. on.

P N Saxena, M C Agarwal and S N Agarwal, for Petitioner; V. D. Singh and Standing Counsel, for Respondents.

BY/CY/A803/81/MRD/RSK

"THE METAPHYSICS OF THE BASIC STRUCTURE."

By Sunil Gupta, Allahabad

*INTRODUCTION:— The problem of constitutionalism has generally figured with reference to the limitations placed on the authority of legislatures constituted under a Constitution Speaking in the Indian context, it was decided in the famous case of Keshavananda Bharti (AIR 1973 SC 1461) that though the Parliament's power to amend the Constitution extended to every single provision of the Constitution, the Parliament could not so amend the Constitution as to damage or destroy its essential Philosophy or 'Basic Structure' This is called the doctrine of the Basic Structure In this paper I have dealt with the genesis and the relevance of the limiting doctrine of Basic Structure The paper is titled—

"THE METAPHYSICS OF THE BASIC STRUCTURE."

I have divided the paper into five parts, Part I is general, Part II deals with a short history of the law and theory of Basic Structure, Part III deals with an in-depth study of the concept of Basic Structure, Part IV deals with a few doubts voiced by certain critics of the Basic Structure position and Part V deals with an appraisal of the Basic Structure doctrine in the light of Socio-Economic Justice

PART I

INTRODUCTORY REMARKS

At the very outset, I wish to make a few preliminary remarks about the general treatment of the subject by me in the course of this paper First, I feel that for passing any value judgment on Basic Structure, it is vital to have a legal orientation regarding the functional and commonsense aspects of law

Secondly, while I have tried to avoid the political aspects of the subject, I have also deliberately steered away from the techno-legal defence of the doctrine I have dealt with the matter on a more general and rational basis

Thirdly, the fact that the Basic Structure is so elusive can by no means lead to a conclusion that it is non-existent

Fourthly, the Basic Structure being basic has to be abstract, and hence, indeterminable in advance

Fifthly, the Basic Structure is not a static concept Therefore, any attempt to capture it within the four corners of a formal, black and white formula would arrest its dimensions and prove self-defeating

Lastly, the best way to approach Basic Structure is a pragmatic method which brings the doctrine to life only when required for application to the facts and circumstances of 'concrete cases'

PART II

A SHORT HISTORY

In tracing the history of the Basic Structure I have treated the Supreme Court of India as our fundamental national institution, which has while interpreting the Constitution, given this doctrine to us One can say that in this sense the Supreme Court was, and has been, and shall always be, a political institution in the widest and most positive sense of the term — The socio-political aura of the cases which went before it, has in a big way determined its reasonings, on which the Judges rested their judgments and conclusions The doctrine of Basic Structure is a product of this process. It is not an invention or imposition on the Constitution It has always been there in the roots of our polity, at manifested in our Constitution As and when the situation and necessity arose the Supreme Court discovered it for us And this process has not come to an end It shall again become active when the situation will arise

The question of the Parliament's power to amend the Constitution has been intrinsically connected with the doctrine of the Basic Structure The issues which gave rise to the controversy often related to the fundamental rights of the people guaranteed under the Constitution. The controversy has generally been whether the Parliament has unlimited power to amend or abrogate these fundamental rights

There have been six cases before the Supreme Court relating to this controversy. In the first case of Shankari Prasad (AIR 1951 SC 458) decided in 1951, the Parliament was given unlimited power to amend any part of the Constitution, including the Fundamental Rights In 1951, everything that the Government was capable of doing seemed so innocuous and undisturbing in the presence of Pt Nehru's dynamic and trustworthy

*Introductory paper read out in Seminar on "Constitutionalism" organised by Human Rights Organisation, Allahabad on October 23, 1980

leadership The nation did not require a guiding principle or safeguard like the Basic Structure to keep the Parliamentary authoritarianism in check The trust and faith in his liberalism was itself the functioning basic structure

Then came the second case of Sajjan Singh (AIR 1965 SC 845) in 1965, one year after the death of Pandit Nehru With the death of Nehru came the end of a cult and a legend The trust founded on our emotional subscription to his leadership ended A situation of emptiness arrived In that feeble and pensive environment arose an occasion to discover a stronger, more permanent footing for our constitutional fundamentals In Sajjan Singh's case for the first time Justice Mudholkar felt the need of such fundamentals He referred to the existence of "The Basic Features of the Constitution", and expressed his serious doubts about the unlimited authority of the Parliament to amend the "Basic features of the Constitution"

The question arose again in Golak Nath's case (AIR 1967 SC 1643) But that case only decided that the Parliament could not totally wipe out the Fundamental Rights of the people The argument of Basic Structure was appreciated, but no decision was given on it This was in 1967 when rapid political changes were taking place after the death of Prime Minister Lal Bahadur Shastri and the election of Mrs Indira Gandhi to Prime Ministership However, the Golak Nath's case only resulted in a veneer of silence to be broken later on

The silence broke 7 years later in 1973 in the well-known case of Keshvananda Bharti in which the Basic Structure came to life and became law The main controversy related to the newly inserted Article 31C So far as the socio-economic ethos of the amendment was concerned, the Supreme Court allowed the socialist principles of State policy to overrule the citizen's fundamental rights The realisation of the poverty, hunger and disease all around in the post-war period, the excitement of the Indira wave and the pathos of the slogan of "Garibi Hatao" left no other way out Hence, it was declared that the Parliament's power to amend the Constitution extended to each and every provision of the Constitution

But the political content of the amendment which eliminated judicial review from determining the sincerity or genuineness of a socialist law, turned the tables against the Parliament, and the Supreme Court laid down that the Parliament could not amend the Constitution to such an extent as to damage or destroy the Basic Structure of the Constitution

Thereafter the Basic Structure doctrine came into play in Mrs Indira Gandhi's election petition (AIR 1975 SC 2299) during the emergency in 1975 when the 39th Amendment put the Prime Minister's election outside the jurisdiction of any court and even validated the election of the Prime Minister Mrs Indira Gandhi which had been invalidated by the Allahabad High Court The amendment was struck down unanimously, as violative of certain basic features of the Constitution, namely, the Rule of Law, the Principle of Equality, Free and Fair Elections, and above all, Democracy Chief Justice Ray, Justice Mathew, Justice Beg and Justice Chandrachud, who had earlier disfavoured the Basic Structure limitation in the case of Keshavananda Bharti, now readily subscribed to the doctrine.

In the wake of this judgment, a further Constitution Amendment Bill, which contemplated to put all crimes committed by the Prime Minister, the President or the Governors, beyond challenge in Courts was also dropped half-way in the Parliament

With this we arrive at the one month old Minerva Mill's case in which the Supreme Court has again unanimously confirmed the Basic Structure rule The judgment has struck down the amendment giving supremacy to the Directive Principles of State policy over the Fundamental Rights of the citizens, saying that social Justice is a compact of both the Directive Principles and the Fundamental Rights As such, the judgment symbolises a transition from sentiment to reason, from rhetoric to reality, and from delirium to truth The Basic Structure, it says, is not the Basic Structure of an ivory tower It is the Basic Structure of our immediate surroundings. The judgment has come as a ray of hope in a political atmosphere devoid of all commitment, morality and sense of purpose With distrust and hypocrisy and symptoms of fascism all around, this should be the finest hour in the country's history

PART III

AN IN-DEPTH STUDY OF THE CONCEPT OF BASIC STRUCTURE

The Basic Structure, let us admit, is primarily a philosophical doctrine. It is

necessary, therefore, not only to understand it in relation to law, but also in relation to life

The fundamental law of all life is an "upward movement" We live and we die And probably, we live again In that same cycle, then, do we live a thousand deaths In a way, we never die "for what is death but a second wind" The fundamental truth that moves us and in us, is a certain clan, a certain power, a certain godliness, a certain quality of nothingness and of immediate everythingness It pulsates in every single living thing and every single unliving object is its manifestation We know not what it is But still it is The realisation that behind the changing manifestations of the world, there is a persistent and zealously fundamental unchangingness, is overwhelming The thought that even at the root of all revolution there lies order and a fundamental purpose, takes us in It is in the light of this splendid inspiration that we feel that in the foundation of the Basic Structure of this or that constitution is the 'Basic Structure' of all life The Basic Structure of this or that Constitution is and can only be the overt expression of that supreme Basic Order Constitutions are methodologies of social organisations in the national units of human beings to provide an order in their lives Such methodologies must conform to the basic order of life

The Basic Structure is a concept akin to that of the famous poet, G M Hopkins, who always saw and looked for the 'essence' of things and believed that there cannot be a thing, without an 'essence'

There are many people who get disturbed at the idea of the indeterminability of the Basic Structure They find the position anarchical But it is a misguided concern It is the very tenor of the Basic Structure that it is unknown to us so long as the necessity to discover it does not arise It always exists as a concept in the minds and hearts of the people It cannot be captured and confined in its extent Life, howsoever organised it may be, has unpredictable and unending problems, and seldom does such a problem not require a fresh solution The Basic Structure of the Constitution, therefore, cannot be catalogued, but only illustrated in the background of historical events

What is possible is to draw out a list of the various features that we think should, reasonably speaking, be the basic features of our Constitution But we should not, thereafter declare that they and they alone form the Basic Structure of the Constitution We should keep our doors open for new discoveries in the field of Basic features

Justice Subba Rao gives an extremely satisfying list of the concepts of the Basic Structure in one of his essays The list contains the following features

1 Republic
2 Federation
3 Constitutional Democracy with its division and limitation of powers
4 Representative Government
5 Responsible Government, through Parliamentary Executive
6 The welfare State i e a State where there will be prosperity, gainful employment, freedom, equality and social justice Fundamental Rights and Directive Principles are the fundamentals to the governance of the country, and constitute the philosophy and objectives of the Indian Democracy
7 The high concept of the Rule of Law in which socio-economic justice and freedoms are integrated and judicial review is an integral part of it

PART IV
CERTAIN DOUBTS REGARDING BASIC STRUCTURE

It is said by some critics of Basic Structure, that a Constitution is a living organism and should not, therefore, be obstructed from changing The argument is amusing, because it should actually be advanced by the supporters of the doctrine of Basic Structure If the Constitution is a living organism, it can change only to the extent of growing, and the most precious element in it, which is that of life and which is basic, is to be protected, at all costs

Those placed against the Basic Structure might ask, how restrictions can be placed on the amendment and growth of the Constitution for protecting its life, without knowing what exactly that life looks like In reply one must ask them how they can agree with a law which forbids murder of a human being for protecting his life, without knowing what exactly that life is like The solution to this tangle is that the problems of life and death should actually be left to the department of metaphysics For practical purposes, and law is a practical matter,

it is sufficient to know the dividing line between life and death

There is need for change It has always been But it is necessary to bear in mind that 'change without continuity is anarchy While continuity without change means no-progress, change with continuity alone can be progress' It is true that no generation should have 'monopoly of wisdom' nor should any generation have 'a right to place fetters on future generations' But unless certain vital values pass from one generation to another there can be no advancement of the human cause To admit a flow is essential But to admit a flood is not the same as admitting a flow The relationship of one generation to another generation is not that of a car to a car on the assembly line, but that of a seed to a plant and of the plant to a seed

Some critics of the Basic Structure realise its importance but find the position, that it is vague and abstract, disappointing This kind of argument is the brain-child of an innocent but a misguided mind, which is oblivious of the fact that we are dealing with a thing like a Constitution, which primarily is a matter of ideas and ideals, and which as such, is bound to be abstract The fact that the Basic Structure is abstract alone is best evidence of the fact that it is a matter of perfection and that it exists The Basic Structure is not vague or indeterminable It is always there like a natural shelter in a dark, hidden forest At the time of thunder and lightning it will show itself That we cannot see or determine it, in advance, in normal circumstances is because there is no necessitating situation for its discovery

Some say that at the highest level, the checks must be only ethical or political, and not legal or judicial It is difficult to believe that in the midst of such a truncated and moth-eaten public life as ours, there can still be such an argument With decadence, vulgarity, corruption and self-aggrandisement filling the air all around, the importance of the Basic Structure rudder cannot be overstated The choice now is between the law of the jungle and the Rule of Law Nobody wants authoritarianism But does everybody also know how not to get it? Power corrupts and absolute power corrupts absolutely. Therefore, the greater the power, the greater the checks And any other check but ethical or political Nothing could be more subtle than these.

PART V

AN APPRAISAL OF BASIC STRUCTURE IN THE LIGHT OF SOCIO-ECONOMIC JUSTICE

There is a small section, which feels that the laws and the Constitution have been big obstacles to the country's socio-economic progress This is a naive idea The laws and the Constitution of a country are too weak to be obstacles in the way of human progress Laws, all over the world, contain provisions for human rights But the differences we see in the different systems relate to those minds and hands which work them, not to those words and figures, that make the statute What matters is the interpretation our leaders give to law If they interpret and implement the Constitution wrongly, selfishly, and arbitrarily, the need is to change those people, the need is to eliminate those distorted versions and interpretations of law, which turn the Constitution into a Constitution, defaced and defiled and a Constitution, derailed and denied The need is not to remove the rule of law which is benign and innocent in itself. It is in this sense that it becomes difficult to agree with Pt Nehru's suggestion that "if we are not able to solve the problems of social change soon all our paper Constitutions will become useless and purposeless"

Historically speaking, the Basic Structure has been anything, but an obstruction to any socio-economic reforms. In the case of Keshavananda Bharti (AIR 1973 SC 1461) the Right to Property was not treated as an unamendable basic feature of the Constitution and the Government was given the widest power to bring in socio-economic reforms The fact that that power has remained unutilised is a political question, but not difficult to answer. In the Election Petition case (AIR 1975 SC 2299), there was no socio-economic angle involved. And in the recent Minerva Mills case (AIR 1980 SC 1789), it was only laid down that 'Every State is goal-oriented and claims to strive for securing the welfare of its people. The distinction between the different forms of Government consists in that in a real democracy the Government will endeavour to achieve its objectives through the discipline of fundamental freedoms'.

No concept of Economic Justice is cogent enough unless it is prepared to treat the individual as the unit As regards the Right of Property, there is a lot of property which relates immediately to the

freedom and dignity of the individual Property is not merely the tax-payer's property It is also the property of the man in the street Property in household goods and domestic belongings, property in those goods and equipment, which a man works all by himself without exploiting another man, is not property which can be governed by the State or the society The State and the society have a right only to such property as gives one man the power to use and exploit another man because such property is not an instrument of freedom but of servitude One must repeat here that the authority and the power to take and govern such property has been with the Government ever since the Constitution came into being

CONCLUSION

Before I conclude, I wish to refer to those words of Surendra Malik Back in 1973 he wrote

"It is the will that has been lacking
To pin our failures on the Fundamental Rights being an impediment, is to seek an alibi for our failings How can our freedom of assembly, association, and movement, our Rule of Law be an impediment unless we are contending that the Rule of Law and Democratic set up itself are impediments, and a totalitarian state is the answer"

"THE VORTEX OF DIRECTIVE PRINCIPLES"

By Sunil Gupta, Allahabad

The Directive Principles are fast turning into a vortex and developing into a state of sentimentalism and status-symbolism It has become difficult for a person to cut ice as a progressive, if he does not go the whole hog in crowning the Directive Principles above everything else To hold an opinion, which brooks even a shade of indifference to the directives has become a clear and unforgivable case of contempt of social justice and reactionary predilection

In this context, the judgment of the Supreme Court in the Minerva Mills case (1980) 3 SCC 625 (AIR 1980 SC 1789) has troubled many a legal mind To the politician it has given another axe to grind The judgment is said to have put the clock back by giving too shabby a treatment to the Directive Principles, and, therefore, to Social Justice The minority judgment of Justice Bhagwati giving all the Directive Principles an upper hand on the Fundamental Rights has led the best of legal thinkers to question the majority opinion of Chief Justice Chandrachud which disallowed the very suggestion to have the Fundamental Rights contained in Articles 14, 19 and 31 superseded by all of the Directive Principles

A prestigious Delhi magazine (India Today, February 1-15, 1981) recently went to the extent of stamping the Judges of the highest court, interestingly enough, with labels of Left, Righ and Centre on a chart based merely on the trend of their judgments on issues relating to Directive Principles

A Supreme Court Judge, Justice O. Chinnappa Reddy, who generally carries a highly progressive image, stated in a seminar on 'Judicial Process and Social Change', organised by Andhra University (1981) SCC 9 (Jour)

"Recently in the Minerva Mills case the Supreme Court dethroned the the directive principles of State Policy from the primacy which they had been given by the 42nd Amendment, a clear victory for the bourgeoisie" (Emphasis supplied)

It is regrettable that even a person of the erudition and experience of a Supreme Court Judge must go sentimental The irony consists in the fact that in the same breath in which Justice Reddy uttered the above words, he also stated that "Recently, in the Land Reforms cases the Supreme Court upheld the validity of the Land Reform Laws enacted by the several States, a victory for the forces of change" What is this self-contradiction about? How can the same Supreme Court in the same breath represent the forces of change as well as the bourgeoisie? How can the so-called dethroning of the directive principles of State policy from the primacy which they had been given by the 42nd Amendment "be a clear victory for the bourgeoisie" at all, if they have won in principle alone and failed in application? For all you know, their victory in principle may have a moral attached to itself Possibly it aims at averting the man-make crisis of confrontation between the Directive Principles and the Fundamental Rights

All that one can say about the self-contradiction (say one must, because of the dangerous trend, it portrays) of Jus-

tice Reddy is that it must have surfaced in a rather loose moment. For in his judicial moments, when seated in the high chair of a Judge, he does not fail to remember that there is, indeed, a difference between the Fundamental Rights and the Directive Principles In Akhil Bharatiya Soshit Karmachari Sangh (Rly.) v Union of India ((1981) 1 SCC 246 at p 308) (AIR 1981 SC 298), Justice Reddy himself gives an account of the relationship between the Fundamental Rights and the Directive Principles which cannot be bettered—

"It is now universally recognised that the difference between Fundamental Rights and Directive Principles lies in this that Fundamental Rights are primarily aimed at assuring political freedom to the citizens by protecting them against excessive State action while the Directive Principles are aimed at securing social and economic freedoms by appropriate State action The Fundamental Rights are intended to foster the ideal of a political democracy and to prevent the establishment of authoritarian rule but they are of no value unless they can be enforced by resort to courts— So they are made justiciable But it is also evident that notwithstanding their great importance, the Directive Principles cannot in the very nature of things be enforced in a court of law

x x x x

The Directive Principles should serve the courts as a code of interpretation Fundamental Rights should thus be interpreted in the light of the Directive Principles and the latter should, whenever and wherever possible, be read into the former."

This is a foolproof account But what must be inferred from it is that the blood of Directive Principles must flow in and along the veins of Fundamental Rights It must not flood and overpower the latter If what Justice Reddy explains in Akhil Bharatiya Shoshit Karmachari Sangh be true, then why should the Directive Principles which 'cannot in the very nature of things be enforced in a court of law' be allowed to supersede Fundamental Rights, 'which are of no value unless they can be enforced by resort to courts'?

Justice Reddy's confusion is an example of the obsession and overreaction to which the best of jurists are prone, when it comes to the myth and slogan of the Directive Principles The confusion, however, is not of recent making The debate today on Directive Principles suffers from the same old confusion, which has again and again encouraged our politicians to kick up dust between Fundamental Rights and Directive Principles, perpetuate controversies between them and in the net result destroy the Fundamental Rights and foreclose the implementation of Directive Principles as well

As to the Minerva Mills case the comments on the difference between Justice Bhagwati's judgment and that of the majority are totally unfounded and seem to have resulted from a misguided and superficial approach The two judgments may differ in form but not in content, and by no means in intent Constitutional jurisprudence is an area of law where, due to logistic complexities and potentialities, the same thing can be expressed in various, and sometimes even directly opposite, ways One only needs to go beneath the surface to search out the essence

Justice Bhagwati approves of Art 31C only because he feels, that even if redundant it does help in putting in overt terms a position of law that should be, viz the conditioning of Fundamental Rights by the Directive Principles There is nothing new, that the Article does because there has always been the provision of 'reasonable restrictions' and reasonable restrictions cannot but, according to him, include the implementation of Directive Principles

But then this is the very reason why Justice Chandrachud does not even give cognisance to the controversy raised by politicians between Fundamental Rights and Directive Principles Because Fundamental Rights already permit such restrictions as will ensure the implementation of the Directive Principles, and not because of any preponderant aversion or disrespect for Directive Principles as against Fundamental Rights does he disallow such express provisions in the Constitution as would give legitimacy of a judicial verdict to a controversy which is not and out of which much political capital has already been made by our politicians For in his honest estimation, one cannot always depend on the consistency of a Judge and in the absence of a Judge of Justice Bhagwati's legal insight and acumen and intellectual integrity, it may not be so certain that the law, so shown to have, will truly have a real and substantial connection with the Directive Principles

Thus, while Justice Chandrachud acts as he does, because of a lurking fear, the

sceptical warning of Justice Chandrachud that 'the distinction between the different forms of Government consists in that in a real democracy the Government will endeavour to achieve its objectives through the discipline of fundamental freedoms, does not affect Justice Bhagwati — but only form a futuristic point of view For, nonetheless, Justice Bhagwati remains committed to the basic freedoms of the people—as will be evident from a reading of his numerous pronouncing judgments in recent years on the interpretation of Articles 14, 19 and 21—ranging from the epoch making Maneka Gandhi's case (1978) 1 SCC 248 (AIR 1978 SC 597) to the recent verdicts in the series of Habeas Corpus petitions involving the Bhagalpur blinding incidents In the ultimate analysis, therefore, Mr Justice Chandrachud ensures Directive Principles through the simple and traditional process, that of reasonable restrictions, Justice Bhagwati, on the other hand, does not mind having another pretext to gear up the Directive Principles for it only makes the maxim so much more foolproof

A further point to keep in mind in this connection is that if the Directive Principles were all, then mere indulgence in pursuits ranging from prohibition and cow-slaughter to animal husbandry and preservation of forests and monuments (all desired by the Directive Principles) would be sufficient to enable a person to call himself left A viewpoint which regards all of the Directive Principles as the touchstone of Social Justice, nay left thinking, is to say the least, absurd What is more, such a viewpoint, more often than not, borders on discrediting the Fundamental Freedoms of the people as if they were at any stage opposed to left thinking

What lays bare the irony to a further extent is the living example of Justice Bhagwati who having given primacy to Directive Principles (and, therefore, Article 40, which desiderates the organisation of Panchayats or local bodies) has himself emerged as the bitterest critic of those who perpetrated the atrocities on the Bhagalpur victims Now it is common knowledge, that in most cases the blindings were done by the local people themselves What should happen then, if now, the Bihar Government (which has adopted an entirely confrontationist policy towards the Supreme Court on the Bhagalpur issue) were to set up a Nyaya Panchayat in Bhagalpur, in pursuance of Article 40, to decide the blindings' case. Undoubtedly, in principle the action would be inconsistence with the so-called Bhagwati view and should enable the Bihar Government to undo the individual civil rights of the undertrials to life and personal liberty' in deference to the implementation of a Directive Principle And still, would not the lynch-law, which the peoples' Panchayat is going to result in, be in direct opposition to the view taken by Justice Bhagwati in the Habeas Corpus petitions mentioned above when it comes to the application of his decision in Minerva Mills case to a given case with tangible facts? However, the problem is only apparent At least as far as Justice Chandrachud and Justice Bhagwati are concerned they find none In actual practice, Justice Chandrachud would negative the law setting up the Panchayat as an unreasonable restriction on the undertrials' rights, while Justice Bhagwati would turn down the Government's plea that it is the implementation of a Directive Principle for according to him, an unreasonable law can never be in accordance with the Directive Principles and can never, therefore, earn the protection of Article 31C notwithstanding his approval of the rule of Article 31C in Minerva Mills We would reach the same conclusion if we were to consider how, despite his disapproval of Article 31C, Justice Chandrachud still finds it convenient to accommodate the so-called Bhagwati view, giving due respect to the Directive Principles in cases involving questions relating to land reforms and workers' rights It is strange, indeed, how a Judge's view on a provision like Article 31C, which in any case is redundant (if 'reasonable restrictions' themselves engulf the Directive Principles) can make him any the less left, even when in actual practice he is reaching the same conclusions as a so-called left Judge would, though only by means of a different strategy

The truth is that collectively the Supreme Court seems to be promising, even if by apparently opposite methodologies adopted by its individual judges an era of foolproof judicial justice and shock-proof judicial activism The dynamics of jurisprudential functionalism is in full play All that one can say is that we are all on our way to a new and welcome method of Socialism viz Constitutional Socialism Upendra Baxi writes in 'The Indian Supreme Court and Politics'—

"All in all, therefore, the Supreme Court as a group in the coming decades promises a vigorous, on going constructive involvement in national affairs, which in the past decade arose more as a result of efforts of a few individual justices than as a corporate activity of the Court" Thus road to constitutional socialism avoids the path of confrontation between Fundamental Rights and Directive Principles Instead it leads to a harmonisation of the two Justice Krishna Iyer has described this road in his characteristic style in Som Prakash Rekhi v Union of India, (1981) 1 SCC 449 (466) (AIR 1981 SC 212) in a judgment written for himself and for Justice Chinnappa Reddy "(The) expansive role of the State under Part IV is not played at the expense of the cherished rights of the people entrenched in Part III since both the sets of imperatives are complementary and coexist harmoniously

x x x x

There is no inherent conflicts between the two parts if orchestrated humanely We are at pains to emphasise this perspective because the substance of Part III, save where the Constitution says so, shall not be sacrificed at the altar of Part IV by the stratagem of incorporation"

However, it should be accepted in all honesty that though it is true that the uncharted sea of Directive Principles should not be allowed to sweep over the Fundamental Rights there is no denying of the fact that it is high time that economic justice started trickling down to the grass-roots and becoming available to the common man Something should be done to coerce the State into action for implementing the directive principles The same mechanism or technique of judicial enforcement which gives strength to the Fundamental Rights should be adopted to give meaning to the Directive Principles also The need then is of a constitutional Amendment which makes the Directive Principles incumbent and compulsory upon the State

Pascal said "Justice without power is inefficient, power without justice is tyranny." If we, the people of India feel that it is the Directive Principles of State Policy which promise social justice (though I will continue to have my reservations with regard to the provisions relating to prohibition, animal husbandry, cow slaughter and so on and so forth) let us also ensure the power to fulfil that promise That power can come to us only in the shape of judicial enforcement of the Directive Principles. Let us then as suggested above have a constitutional Amendment giving to our judiciary such a power of enforcement. For such an amendment alone will be the harbinger of a socialistic jurisprudence and that too, through peaceful evolution, not violence or bloodshed or the dictatorship of this or that class.

BOOKS REVIEWED

NANDI'S CIVIL READY REFERENCER SECOND EDITION, 1980 By A K. Nandi, Foreword by Mr. Justice Chittatosh Mookerjee of Calcutta High Court Published by Eastern Law House Pvt. Ltd 54 Ganesh Chunder Avenue, Calcutta. Price Rs. 180. Pages 1049.

Coverage of up-to-date case law is a must for every busy lawyer and also the Judge This coverage must contain law points with appropriate case law This is the crux of the matter which has been provided by Mr A. K Nandi of the West Bengal Higher Judicial Service, author of Code of Criminal Procedure and Indian Evidence Act, in his book under review

The first edition of the book was published in 1976 In the second edition the author has added new decisions of the various High Courts and the Supreme Court, made addition of a few more subjects, and given detailed treatment to the subjects

Under 38 subjects, the author has given the law point and quoted the cases. At the end is an exhaustive index arranged subjectwise to facilitate easy reference.

In the Foreword Mr. Justice Chittatosh Mookerjee of the Calcutta High Court observes: "Sri Nandi has been eminently successful in his endeavour to make a fairly exhaustive collection of notable judicial precedents on the various aspects of the Civil and Constitutional Laws . Sri Nandi's book, which contains coverage of the up-to-date case law would be of immense help to the lawyers and judges in promptly obtaining references to the relevant case law."

S.V.M.

PREVENTION OF FOOD ADULTERATION ACT WITH RULES (CENTRAL AND STATES) (1ST EDITION 1980) By Hon'ble Justice H L Capoor and Hon'ble Justice D D Seth both retired Judges of Allahabad High Court, Published by Law Publishers, Sardar Patel Marg, Allahabad Pages xxxviii + 979, Price, Rs. 110/-

Food adulteration is the greatest social evil The present commentary on the subject is another addition to the various commentaries available on this subject, but this one is by two eminent jurists whose experience as High Court Judges is bound to enrich the work in all its aspects This book gives sectionwise commentary with up-to-date case law Synopsis of most of the section contain numerous notes As usual, the book gives a table of cases in the beginning and a useful topical index in the end Even the Commentaries on some of the rules are elaborate and useful The treatment of each topic with appropriate case law is extremely nice This book is definitely going to be a good aid to the members of the legal profession as well as the authorities concerned in effective eradication of the most dangerous social menace S S G

"BANKING REGULATION ACT, 1949" 3RD EDITION (1981) By R B Sethi Advocate Published by Delhi Law House, Gokhale Market Delhi Pages xxxi + 238. Price Rs 45.00

On change of title in 1966, what was formerly known as the Banking Companies Act, 1949 is now the "Banking Regulation Act 1949" It was amended, first in 1968 and again in 1980 to bring about the nationalisation of all the major and important banks in our country The raison d'etre for the nationalisation was evidently to achieve the social control of banks requiring them to perform certain functions for the welfare of the society, especially the weaker sections In the present socio-economic structure therefore, the banks occupy a place of great importance as they are financing extensively plan projects, big and small in the industrial spheres as well as in agricultural fields It is therefore of utmost importance that the citizens must know the latest law on the subject This book is intended precisely to meet this need

The book contains the full text of the Banking Regulation Act 1949 (as amended from time to time) with its five schedules, the Banking Companies (Acquisition and Transfer of Undertakings) Acts (5 of 1970) and (40 of 1980) The Nationalised Banks (Management and Miscellaneous Provisions) Schemes 1970, the Banking Service Commission (Repeal) Act, 1978, the Banking Regulation (Co-operative Societies) Rules 1966 and the Banking Regulation (Companies) Rules, 1949 These are followed by three Appendices giving the text of (i) The Industrial Disputes (Banking Companies) Decision Act 1955 (ii) Non-Banking Financial Companies and Miscellaneous Non-Banking Companies (Advertisement) Rules, 1977, and (iii) The Bankers' Books Evidence Act, 1891

There can be no doubt that this 3rd edition of the book will receive the same popularity which it enjoyed in its earlier editions,

U S D

LAW RELATING TO FORESTS IN UTTAR PRADESH PUBLISHED IN 1981; By Shri P. L. Malik; Published by Eastern Book Company, 34 Lalbagh, Lucknow, Pages 10 + 182. Price Rs. 25/-

This handy book on Forest Laws gives the Forest Act of 1927 as applicable to U P along with the rules in force, as framed under that Act as well as the notifications, thereunder This book has also given various State Legislations in this regard in the same way Another important and latest Central Act the Forest (Conservation) Act, 1980 has also been given in the end with suitable notes The book has given the table of cases as referred to in this book in the beginning as well as suitable and useful subject index in the end Apart from being useful to the legal profession, the book will be extremely useful to the departmental and the corporation authorities as well as to the forest contractors and the persons concerned in this field

S. S. G.

1981 ALL. L. J. NOC 56
(LUCKNOW BENCH)
K. N GOYAL, J.

Smt Kamla Devi Gupta, Petitioner v Prescribed Authority and others, Respondents.

Writ Petn No. 2658 of 1978, D/- 18-12-1979

U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Section 21 (1) (i), Explanation I — Applicability — Tenant's grandmother living in her house vacating it and shifting to tenant's house some time before her death and after the commencement of the Act — House already mutated in the name of tenant — Explin. I would be attracted.

Where the tenant's grandmother who was living in her house vacated it and shifted to the tenant's house some time before her death and after the commencement of the Act and the house which the said grandmother had occupied was mutated in the name of the tenant, the tenant would be deemed to have acquired that house in a vacant state and Expln I would be attracted

P. C. Gupta, for Petitioner, L P Shukla, for Respondents.

BY/CY/A771/81/PGS/SNV

1981 ALL. L. J NOC 57
(BOARD OF REVENUE)
R. S VERMA, MEMBER

Gaya Ram and another, Applicants v Smt Brij Rani, Opposite Party

Reference No. 909 of 1972-73/Etawah, D/- 17-11-1980

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Sections 229-B and 341 — Proceedings under Sec. 229-B — Substituted service — Validity — Affixation of summons on refusal to accept — Acknowledgment of witnesses as to posting of summons not taken — Endorsement as required by O. 5, R. 17 C.P.C. not made — There is no effective service of summons. (U. P Revenue Court Manual Rr. 74, 75; Civil P. C (1908), O, 5 R 17).

Where the copy of summons was affixed on the door of the defendant on refusal to accept it and the signatures of the witnesses were also taken by the process server but their acknowledgment as to posting of summons was not taken and also no endorsement as required by O 5 R 17, CPC was made, the summons could not be said to be duly served on the defendant

The affixation of the summons according to Rule 74 of U P. Revenue Court Manual can be made only when the person to be served is absent If that person is not absent, the affixation cannot be made according to Rule 74 and in that case the provision of Rule 75 itself will not apply. Even if Rule 75 applies, an acknowledgment of witnesses that such a summons was posted must be taken and that mere signatures of witnesses will not amount to acknowledgment

Further, as provisions of C P C. apply to such proceedings in view of S 341, endorsement to the effect as to who identified the house of the defendant and mention of addresses of the identifiers were also necessary

M P. Dixit and B R Tripathi, for Applicants, B. Dixit, for Opposite Party.

LX/AY/G621/80/PGS/SNV

1981 ALL. L. J. NOC 58
R. S. SINGH, J.

Ramji, Petitioner v Deputy Director of Consolidation, Allahabad and others, Respondents.

Civil Misc. Writ Petn. No. 3315 of 1974, D/- 30-1-1981.

(A) Hindu Adoptions and Maintenance Act (78 of 1956), Sec. 16 — Registered document of adoption — Presumption as to — Burden of proof — Adoption deed though registered, not signed by natural father of child — Section 16 is not attracted — Burden of proof does not shift on person who disproves it. (Evidence Act (1872), Sections 101-104).

Under Section 16 in case of a registered adoption deed, the burden of proof is on the person who disproves the adoption and not on the person who asserts adoption. Where a registered document relating to adoption has not been signed by the natural father of the child, Section 16 is not attracted and such document cannot raise a presumption of a valid adoption

Presumption of valid adoption according to Section 16 is raised where the document has been signed by the person giving and the person taking the child in adoption Only in such cases the Court shall presume that the adoption has been made in compliance with the provisions of the Adoption Act.

(B) U P Consolidation of Holdings Act (5 of 1954), Section 27 (2) — Entry in basic year khatauni, showing name of a person recorded as adopted son of land-holder — Dispute as to correctness of entry — Burden of proof lies on person who wants to disprove the entry ILR 30 All 187, Rel. on (U P. Land Revenue Act (3 of 1901), Section 44, Hindu Adoptions and Maintenance Act (1956), Section 16, Evidence Act (1872), Secs 101, 104)

(C) U. P Consolidation of Holdings Act (5 of 1954), Section 48 — Concurrent finding by two subordinate consolidation authorities —Revision against — Reversing Order by Deputy Director Consolidation — Relevant evidence relied upon by authorities below not considered — Order based on irrelevant considerations and wrong placing of burden of proof — Order cannot be sustained C M. W P No 1753 of 1976, D/- 21-12-76, (All), Rel on

R P Dubey and V K S Chaudhary, for Petitioner, V P Sinha, K N. Tripathi, R K Malviya and Shri Prakash, for Respondents

BY/CY/A954/81/VCD/LGC

1981 ALL L J NOC 58

R R RASTOGI, J

Wahadat Ali Khan, Petitioner v State of U P and others, Respondents

Civil Misc Writ Petn No 3645 of 1979, D/- 2-1-1981

U P. Imposition of Ceiling on Land Holdings Act (1 of 1961), Sections 5 (6) Explns I (a), 10 (2) — Notice under Section 10 (2) — Land not belonging to petitioner treated as part of his holding — Suit by legal heirs of real tenure-holder for declaration that they are exclusive owners and that petitioner is not a co-tenure-holder — Decree passed accordingly after 24-1-1971 — Held, decree was not covered by expression "transfer of land", under Explns I (a) to Sec 5 (6) — That land could not be included in petitioner's account for purpose of computing surplus land (U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 229B). 1980 All LJ 563, Foll.

Vishnu Sahai, for Petitioner

BY/CY/A973/81/VCD/DVT

1981 ALL. L J NOC 60

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Zalim Singh, Appellant v Ram Swaroop, Respondent

Second Appeals Nos 113 to 116 of 1976-77/Budaun, D/- 13-1-1981

Evidence Act (1 of 1872), Section 101 — Burden of proof — Dispute regarding parentage — Burden lies on both the parties — Negative aspect could not be taken in such cases as it could not be conclusively proved — Alternate parentage ought to be proved by party disputing parentage.

Afsar Ali and G N Varma, for Appellant, Vinod Sinha, for Respondent

BY/CY/A682/81/JDD

1981 ALL. L. J. NOC 61

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Madan Lal, Appellant v Satya Pal, Respondent

Second Appeal No 251 of 1972-73/Budaun, D/- 29-11-1980.

Succession Act (39 of 1925), Section 59 — Will — Validity of — Essentials for.

In the instant case the will was written by the testator himself and signed by him An advocate as witness had proved it There was no suspicion about the writing or signatures There was no suspicion either about the condition of the testator's mind or his mind being not free And no reasonable suspicion has been made out Under such circumstance the will could not be held to be invalid

BY/CY/A681/81/JDD

1981 ALL L J. NOC 62

(BOARD OF REVENUE)

S C GOIL, MEMBER

Chandan Singh. Appellant v. Chonchu, Respondent

S A No 13 of 1978-79/Tehri Garhwal, D/- 25-7-1980

U P. Zamindari Abolition and Land Reforms Act (1 of 1951), Section 209 — Suit for ejectment of trespasser — Suit by one of the co-tenants — Other co-tenants not impleaded even as pro forma defendants — Held suit was liable to be rejected (Civil P. C. (1908), O 1, R. 9, O 7, R. 11 (d)).

AY/BY/A211/81/MRD/RSK

1981 ALL. L. J. NOC 63

(BOARD OF REVENUE)

R S VERMA, MEMBER

Munshi Singh, Applicant v Puttu Singh and others, Opposite Parties

Revn No 250 of 1976-77, Farukhabad, D/- 20-11-1980

Civil Procedure Code (5 of 1908), Section 115, O 41, R 27 — Order admitting additional evidence in appeal must give reasons — Improper exercise of discretion — Revision lies

An application in revision is maintainable against orders under O 41, R 27 of the Code admitting additional evidence in appeal 1956 All LJ 767, Rel on

An order admitting additional evidence under Order 41, Rule 27 must give reasons for so admitting it 1931 All LJ 539 (PC), Rel on

Clauses (a) and (aa) of Rule 27 (1) of Order XLI C P C lay down the condition under which the appellate Court can admit additional evidence Unless these conditions mentioned in Clauses (a) and (aa) are fulfilled, the appellate Court will have no right to admit additional evidence in appeal That is why the appellate Court is required to give its reasons in such a form so as to show that it has realised the exceptional nature of the powers it was exercising 1951 All LJ 78 (SC), AIR 1948 Mad 348, AIR 1979 All 246 Ref to

A plain reading of Order XLI, Rule 27 of Civil Procedure Code shows that there is nothing like judicial discretion' given to the appellate Court while admitting additional evidence The appellate Court has of course been given a power to admit additional evidence, but that power has been strictly circumscribed by the provisions laid down in Clauses (a), (aa) and (b) of the Rule When facts for the exercise of judicial discretion, as laid down in statute law are not present, the Court will not be at liberty in the name of judicial discretion, to pass orders which are forbidden by law

Hari Om Krishna Srivastava, for Applicant; Ram Narayan Srivastava, for Opposite Parties.

RR/AY/B620/80/KNA

1981 ALL. L. J. NOC 64

= 1981 Rev Dec 132

(BOARD OF REVENUE)

I B SINGH, MEMBER

Sukhdeo, Applicant v Hari Narain, Opposite Party

Reference No 81 of 1978-79/Allahabad, D/- 7-7-1980

U P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 229-B and S. 331(1) — Suit by person recorded as bhumidhar in revenue papers for declaration of his rights — Suit is cognizable by revenue Court alone.

Sections 229-B and 331 (1) nowhere provide that a declaratory suit under Section 229-B by a person recorded as bhumidhar in the revenue papers is not cognizable by a revenue Court If a cloud is cast on the title of a person recorded as bhumidhar in the revenue papers by any person or by any proceeding such as one under Section 145, Cr. P C Such person is entitled to get his title and status declared in a suit under S 229-B by a competent revenue Court alone as provided by Section 331 (1) and Sch II of the Act 1965 Rev Dec 216, Expl

Prem Narain Misra, for Applicant, V B L Srivastava, for Opposite Party

DY/EY/B790/81/GNB

1981 ALL. L J NOC 65

(BOARD OF REVENUE)

R S. VERMA, MEMBER

Shiva Lochan, Appellant v Bhanupratap and others, Respondents

Second Appeal No. 241 of 1974-75/Banda D/- 17-3-1981

(A) Civil P. C. (5 of 1908), S. 100 — Second appeal — Concurrent findings of lower Courts — Failure of lower courts to consider oral or documentary evidence — Appeal involves substantial question of law.

(B) U P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 210 — Suit between plaintiff and defendant's father for ejectment of plaintiff — Dismissed — Subsequent suit between plaintiff and defendant for declaring Sirdari right by adverse possession — Plaintiff paying land revenue regarding disputed land since dismissal of previous suit — Plaintiff in adverse possession of land — Plaintiff acquired prescriptive rights of Sirdar by adverse possession. (Limitation Act (1963) Arts. 64, 65).

Ratan Singh, for Appellant, Hari Shankar, for Respondents

DY/DY/B784/81/VNP/SSG

1981 ALL L J NOC 66
(BOARD OF REVENUE)
R S VERMA, MEMBER

Smt Gori Dulhan, Applicant v Mahant Janki Ballabh Das, Respondent

Revision No 7 of 1977-78/Jhansi, D/- 11-3-1981

Limitation Act (36 of 1963), Art 123, Explanation — Civil P C (1908), O 5, Rr. 20, 20-A, 19-A — Appeal against ex parte order — Limitation — Due service of summons — Benefit of substituted service not available when such service of summons is under O. 5, R. 20-A

Article 123 and its Explanation does not refer to Rules 19-A, 20-A and 21 of Order 5 C P C and hence the benefit of this Article cannot be given in a case where service is effected under any of these Rules Article 123 mentions only Rule 20 of Order 5, C P C and hence the benefit of limitation will be given only if the substituted service is made under that Rule and not otherwise

Kailash Nath Saxena, for Applicant

DY/DY/B782/81/MVJ

1981 ALL. L. J NOC 67
(BOARD OF REVENUE)
R S VERMA, MEMBER

Vasodanand, Applicant v Kali Deen and others, Opposite Parties

Reference No 337 of 1974-75/Unnao, D/- 9-3-1981

(A) U P. Zamindari Abolition and Land Reforms Act (1 of 1951), S 198 (2) (as amended by Act 4 of 1969) — Suo motu powers to cancel lease — Vest in Collector since 1969 due to substitution of word "Collector" for words "Assistant Collector in charge of the Sub-Division" — Therefore, held, on 19-1-1974 Collector had power to take suo motu action for cancelling lease.

(B) U. P. Zamindari Abolition and Land Reforms Rules (1952), Appendix III, Entry 24 — Suo Motu action for cancelling lease — Limitation as on 19-1-1974 — Was 3 years from date of knowledge of irregular allotment.

(C) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 198 (4) and R 178-A — Suo motu action for cancelling lease — Notice to allottee — Need not be given — Collector is not required to mention grounds on which he proposes to take suo motu action.

Section 198, U P Z A & L R Act, does not lay down anywhere that before exercising suo motu power under subsection (4) the Collector is required to give any prior notice to the person going to be affected Rule 178A prescribes the procedure to be adopted by the Collector when he takes suo motu action for cancellation of the lease and initiates proceeding It is nowhere required that before taking action, he shall state reasons for taking suo motu action or proceeding and shall serve a notice on the allottee, showing the reasons which had compelled him to take suo motu action against the allotment Rule 178A only lays down that when the Collector takes suo motu action he will implead the Land Management Committee and allottee and give them an opportunity of being heard before final orders are passed

Therefore, held, that before taking suo motu action under Section 198 (4), U P Z A & L R Act the Collector was not required to mention the grounds on which he proposed to exercise that power Consequently no notice was required to be given to the allottee mentioning the grounds on which the Collector intended to take suo motu action AIR 1971 SC 1045 and 1972 Rev Dec 43, Distinguished 1901 AC 495, Ref

Suresh Chandra Varma for Applicant Devendra Nath Srivastava, D G C (R) on behalf of L M C and State, for Opposite Parties

DY/EY/B783/81/HR/RSK

1981 ALL. L J NOC 68
(BOARD OF REVENUE)
R S VERMA, MEMBER

Sita Ram, Appellant v Smt Khemala, Respondent

Second Appeal No 87 of 1974-75/Hardoi, D/- 27-2-1981

(A) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S 172 (2) (b) — Inheritance of interest by widow in holding of her husband — Interest if and when extinguishes on her remarriage

If a woman inherited an interest in any holding of her deceased husband,

before the date of vesting in her capacity as a widow, or widow of a male lineal descendant in the male line of descent, or mother or father's mother, her interest will not be extinguished on her remarriage if she was intermediary, a fixed rate tenant, an exproprietary tenant in Avadh, an occupancy tenant in Avadh or a tenant on special terms in Avadh But if such a woman did not belong to any of the aforesaid categories before the date of vesting, her interest in the holding will be extinguished the moment she remarries

(B) U P Zamindari Abolition and Land Reforms Act (1 of 1951), S 172 (2) — Inheritance of interest by widow in holding of husband — Suit for ejectment of widow on her remarriage — Burden of proof — Nature of — Plaintiff not proving that she was not an intermediary or a fixed rate tenant, or an exproprietary tenant in Avadh or an occupancy tenant in Avadh or tenant on special terms in Avadh — He cannot succeed (Evidence Act (1 of 1872), Sections 101-104)

Where the plaintiff in a suit for ejectment of a widow from holding which was inherited by the widow after death of her husband, had failed to prove that the interest of widow in such holding was extinguished on grounds that she was not an intermediary or fixed rate tenant, or an exproprietary tenant in Avadh, or an occupancy tenant in Avadh or a tenant on special terms in Avadh before the date of such vesting, the plaintiff could not succeed in his suit Remarriage in itself does not carry with it the legal incident of forfeiture of the rights of the widow The person, who alleges extinction of rights on remarriage, has to prove it

Suresh Chandra Verma, for Appellant.
Surya Nath Pandey, for Respondent

DY/DY/B785/81/PGS/SNV

1981 ALL L J NOC 69

S D AGARWAL, J

Smt Sheela Jain and others, Petitioners v The 1st Addl Dist Judge Kanpur and others, Respondents

Civil Misc Writ No 1632 of 1980 D/- 2-2-1981

U P Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972) S 20 (1) — Eviction suit — First date of hearing — Dismissal of suit in default of landlord — Case restored at landlord's instance — First date of hearing, is the date fixed for hearing after restoration of case

Where in a eviction suit, the tenant deposited arrears of rent on the first date of hearing, but the amount deposited was short, on the next date the suit was dismissed for default of landlord, thereafter the suit was restored on the application of landlord, the first date of hearing was, therefore, the date fixed for hearing after restoration of suit, and since the tenant had made good the deficit before such date, he was entitled to benefit of Section 20 (4).

S C Agarwal, for Petitioners G N Chandra, for Respondents

EY/EY/C190/81/VCD/DHZ

1981 ALL. L. J. NOC 70

A N VARMA, J

Thakur Prasad Pandey, Petitioner v Deputy Director Consolidation, Azamgarh and another, Opposite Parties

Civil Misc Writ Petn No 4615 of 1972. D/- 12-1-1981.

Constitution of India, Art. 226 — U.P. Consolidation of Holdings Act (5 of 1954), S. 48 — Order of Revisional Authority reversing the orders of Tribunals below failing to refer specifically to oral evidence on record — Absence of reference to oral evidence not resulting in patent error or injustice — High Court will not interfere with the impugned order. 1980 RD 250. Rel. on. AIR 1978 All 241, Referred.

B B P Singh, for Petitioner, R N Singh and Standing Counsel, for Opposite Parties

BY/CY/B106/81/AAJ/SNV

1981 ALL. L. J. NOC 71

AMITAV BANERJI, J

Chittar, Appellant v Goverdhan and others, Respondents

Second Appeal No 2910 of 1972. D/- 5-12-1980

(A) Transfer of Property Act (4 of 1882), S 106 — Notice to quit — Lease deed reserving yearly rent — Lease deed stipulating that on failure to pay rent for any year by a certain date, the lease would stand determined without service of notice — Notice under Section 106) is not necessary. AIR 1952 All 141, Relie-

(B) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 29A — Applicability — Permanent structure erected by tenant before commencement of S 29A but without landlord's consent — S 29A would not be applicable — Mere existence of structure for number of years is not tantamount of having raised it with landlord's consent.

G N Verma and S C Agarwal, for Appellant, R P Goel, for Respondents

BY/EY/A499/81/MBR

1981 ALL. L. J. NOC 72
(BOARD OF REVENUE)
I B SINGH, MEMBER

Ramesh Chandra Sharma, Petitioner v Sukhendra Singh, Respondent

Reference No 1555 of 1975-76/Etah, D/- 30-10-1980

U. P. Zamindari Abolition and Land Reforms Act (I of 1951), S. 331-A — Applicability — Procedure given in Section 331-A has to be followed irrespective whether the defendant or the plaintiff holds the land as bhumdhar — Word 'held' — Meaning of (Words and Phrases)

In Section 331-A it is not laid anywhere as to which party to the suit relating to bhumidhari land should hold the land as bhumidhar Therefore, even if the defendant holds the land as bhumidhar and question is raised or arises that it is not used for purposes connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming and a declaration has not been made in respect of such land under Section 143 or Section 144, the Court shall frame an issue on the question and send the record to the Assistant Collector in charge of the sub-division for the decision of that issue only, and according to proviso to Section 331-A if the suit has been filed in the Court of S D. O it shall proceed to decide the question in accordance with the provisions of Section 143 or 144 as the case may be

Word 'held' used in Section 331-A is used in the sense that it refers to title that had legal origin, a person trespassing on land of another and constructing building is not covered by the word 'held' This expression connotes lawful right or title and excludes wrongful possessory claims

AY/AY/A208/81/VVG/SSG

1981 ALL. L. J NOC 73
(BOARD OF REVENUE)
D S MISRA, MEMBER

Chhedu, Petitioner v Mahabir, Respondent

Ref No 450 of 1974-75/Fatehpur, D/- 12-9-1980

U P. Zamindhari Abolition and Land Reforms Act (I of 1951), S 198 (3) — Application for cancellation of patta — Applicant showing that land was not vacant land and was being used as public utility for irrigation purposes and for providing drinking water for the cattle — Held application for cancellation could not have been rejected.

BY/CY/A567/81/MRD/RSK

1981 ALL. L. J NOC 74
(BOARD OF REVENUE)
P C SAXENA, MEMBER

Ram Singh, Petitioner v Bahadur Singh, Respondent

Revision No 54 (z) of 1979-80/Mathura. D/- 12-6-1980

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 176 — Suit by plaintiff for partition of land against co-tenant — Order for partition passed — Subsequent application by transferee of plaintiff's share prior to partition order to set aside order — Court should set aside its order and decide case afresh after impleading new co-tenant.

Where in a suit by the plaintiff against his co-tenant for partition of land the Court passes an order allocating lots in terms of compromise between the parties and subsequently a third person makes an application to the Court to set aside its partition order on the ground that the plaintiff had no title left in the land on the date of that order as he had sold his share to him before that date, it is patent duty of the trial Court to review and set aside its order and after impleading the new co-tenant as a party decide the case afresh because the order of the trial Court stands vitiated by the mere fact that it partitions the land in dispute between certain parties

one of which was not a co-tenant on the date of the partition order

DY/EY/B792/81/GNB

1981 ALL. L J NOC 75
(BOARD OF REVENUE)
I B SINGH, MEMBER

Sheo Prasad, Appellant v Smt Longshree, Respondent

Second Appeal No 202 of 1972-73/ Etawah, D/- 4-7-1980

U. P Zamindari Abolition and Land Reforms Act (1 of 1951), Section 171, Serial No (m) — Married sister — Widowed sister having inherited as married sister does not lose her rights by remarriage after becoming widow.

Ratan Singh, for Appellant, S D Pathak and S K Subedar, for Respondent

BY/CY/A570/81/MRD/RSK

1981 ALL. L J NOC 76
(BOARD OF REVENUE)
I B SINGH, MEMBER

Ram Kishun, Appellant, v Suraj Deen Respondent

Second Appeal No 5 of 1976-77/ Fatehpur, D/- 9-6-1980

Civil P. C (5 of 1908), Order 9 R 9 — Suit by minor to evict trespasser dismissed because of gross negligence of his next friend who was not his natural guardian — Subsequent suit by minor through his natural guardian is not barred under O 9 R 9

Where the previous suit to eject the trespasser filed on behalf of the minor by his next friend who was not his natural guardian was dismissed because of gross negligence of the next friend (default of appearance and giving of wrong date of dismissal of suit in restoration application resulting in its dismissal) the subsequent suit filed on behalf of the minor by his natural guardian to eject the trespasser would not be barred under Order 9 Rule 9 especially because the cause of action for ejectment of a trespasser is a recurring and continuing cause of action and is different from that of the previous suit AIR 1947 Mad 483 and 1934 All LJ 900 (PC) and AIR 1961 All 427 Rel on, 1948 RD 276 and 1968 All LJ 4 (Rev) Dist.

Nasim Hussain, for Appellant, M P Dixit, for Respondent.

DY/EY/B787/81/GNB

1981 ALL. L J NOC 77
R R RASTOGI, J.

Prabandh Samiti Lady Parsan Kaur Inter College, Basdila Sardarnagar and others, Appellants v Saudagar Prasad Yadav, Respondent.

Second Appeal No 2082 of 1974 D/ 27-2-1981

U P Intermediate Education Act (2 of 1921), Ss. 16-G (3) (a) & (c); 16-G (4) — Termination of services of teacher with prior approval of Inspector of Schools — Remedy is by way of appeal to Deputy Director of Education — Jurisdiction of Civil Court is barred — ((i) Civil P. C. (1908), S. 9 — (ii) Education — Termination of services of teacher).

Where the Managing Committee of a college passed a resolution to terminate the services of the plaintiff-teacher, by serving him with one month's notice and the action of the Managing Committee was approved by the District Inspector of Schools, the remedy available to the plaintiff-teacher was to file an appeal to the Deputy Director Education under Section 16-G (3) (c), against the order of Inspector approving termination of his services The jurisdiction of the Civil Court being expressly barred under S 16G (4), a civil suit for declaration that order of termination is illegal was not maintainable AIR 1980 All 379 (FB) AIR 1971 SC 71 and AIR 1969 SC 78 Foll.

In the instant case, what was challenged by the plaintiff-teacher in the civil suit, was the notice and the letter of the Manager of College terminating his services the order of the District Inspector of Schools approving the termination of plaintiff-teacher was not challenged. Held that challenge was ineffective because the notice was issued only in pursuance of the order of the Inspector and so also the letter of the Manager. Without challenging the order of the Inspector of Schools, the challenge to the notice and the letter of the Manager was ineffective

Mohanji Verma, for Appellants; T P Asthana and Rameshwar Nath, for Respondent

CY/DY/B554/81/VCD/SNV

"COGNIZANCE"

By: Trilok Saran, Prosecuting Officer, Directorate of Prosecution, U. P. Lucknow.

No court can decide a case unless it has taken cognizance of the offence What is taking cognizance, however, has not been defined in the Code of Criminal Procedure

If we go through the pages in law journals and commentaries, we find that there is consensus of opinion as to what taking of cognizance means It is the application of mind by the trying court towards suspected commission of the offence Unfortunately, there is no definite criteria to judge if the trying court has really applied its mind with a view to take steps towards a trial In a recent case, the order of the Magistrate to get the copies of documents prepared for the accused was held to mean that the Magistrate has applied his mind, even though in that case, the order was not in his own handwriting, but it did bear his initials

It is, however, a matter of concern (which should also be a concern of the Hon'ble Supreme Court) that in many cases the trial courts do not apply their minds initially Otherwise there would not have been cases which, on appeal or revision, would have been remanded or (accused) acquitted solely on the point of wrong cognizance

In a number of enactments e g, Prevention of Corruption Act, Indian Arms Act, there are specific provisions that no court shall take cognizance of an offence without a sanction by an authority as given in the statute Similarly, there are also Acts like Essential Commodities Act, Prevention of Food Adulteration Act, Telegraph Wires (Unlawful) Possession Act which require complaints by or on behalf of a particular authority Cognizance under all such Acts cannot naturally and legally be taken unless there is a requisite sanction or complaint, as the case may be Then there are cases for which a limitation has been prescribed In all such cases, if the pre-requisites are absent, the trials become invalid

Under the circumstances, it should be made a rule of procedure by way of amendment in Code of Criminal Procedure that before a trial starts, the courts must look up if the requisites of cognizance are there or not The pre-requisites of cognizance are —

(1) whether the court has jurisdiction to try the case or not,

(2) whether the complaint or charge-sheet has been filed within the period of limitation,

(3) whether the sanction has been accorded in cases where sanction is necessary for cognizance and also whether the sanction is in order, and

(4) whether the document on which cognizance is being sought is in accordance with the law

If the trial court is satisfied that all these pre-requisites are in existence, then and then only it should embark on the trial It may, however, be open to the parties at this very stage to go in appeal to a higher court to adjudicate on this matter of cognizance, the decision on which should be final

In case the trial court comes to the conclusion that the requisites for initiation of prosecution are missing, it should refuse to take cognizance unless these conditions are fulfilled

It may be argued that such a procedure will be in the nature of filling up the lacuna of prosecution In effect, however, it would not be so The purpose of trial is to explore the commission or otherwise of an offence Acquittal of a bribe taker e g, in absence of proper sanction seems strange to a layman It shakes his confidence in judiciary Justice should not only be done but seen to be done.

BOOK REVIEWS

JUDICIAL PANORAMA (Judges — their appointments, transfers and role: By G. D. Srivastava, Senior Advocate Foreword by the Hon'ble Mr. M. H. Beg, Former Chief Justice of India. Published by Law Book Company, Sardar Patel Marg, Post Box No. 4, Allahabad-1 Price Rs. 10, Pages 48.

The book consists of three essays on (1) Appointment of Judges (2) Role of Judges and (3) Transfer of Judges, which are the subjects under discussion in the press, platform and the public The author has quoted the opinions of legal luminaries in the country, the practice followed in other countries and has

given "a philosophical analysis of the essential purpose of the judicial institutions and the basic goals and values to be served by a legal order" and views the contemporary events through the spectacles of such philosophical analysis

With regard to the appointments of Judges, in the opinion of the author, the system of nomination with sufficient safeguards seems to be best viable method of selection of Judges, but suggests the inclusion of more participants in the process of consultation

On the subject of role of the Judges, the author states that although "we may concede the major task of law reform to the legislature, nevertheless the Judges have a duty to lead the moral sentiment of society and to inaugurate in a judicial decision a new conception of justice in accord with the highest knowledge and truest insight perceptible to the human mind"

On the question of transfer of Judges the author states "The Government's proposal to transfer Chief Justices and Judges as a matter of policy has nothing objectionable in it It is a matter which should have been adopted much earlier"

Mr M H. Beg, former Chief Justice of India, in his Foreward states To every tired mariner in search of the art of pearls from the sea of facts and laws, I recommend Shri G D Shrivastava's booklet as a strong tonic which will remove his tiredness and restore the strength in our efforts to extract those pearls"

The booklet is a valuable addition to the literature on the subject of Judges, their appointments, role and transfer

S V M

"RAILWAY PROPERTY (UNLAWFUL POSSESSION) ACT, 1966 TOGETHER WITH RAILWAY PROTECTION FORCE ACT, RULES AND REGULATIONS." 1st Edition (1981): By **Hasan Askari B. A., LL. B., Advocate Chief Law Instructor of J. Ram R.P.F. Training College, Lucknow (with a foreword by Mr. S. Murtaza Fazal Ali Judge, Supreme Court of India. Published by Eastern Book Company Law Publishers & Book-Sellers Lucknow Pages xxiv + 101 + 348. Price Rupees 60 00.**

This book contains a Critical Commentary on the Railway Property (Unlawful Possession) Act, 1966 as amended up to date This act was brought on the statute book to tackle the urgent problem of mounting thefts and robberies on trains and misappropriations of railway property The author, Mr Hasan Askari by virtue of his experience as Chief Law Instructor of the R P F. Training College is best suited to write this book in which he has highlighted certain important aspects of the Act which had not received due attention

Although the Act contains only 16 sections, a lot of case law has grown around it and the author has in his commentary analysed the more important case law on the subject and in doing so he has brought out the ratio decidendi and the obiter part of a case separately so that it may be helpful in the growth of 'judicial legislation'

In his section-wise commentaries the author has made a comparative study of various provisions of the Act vis-a-vis similar provisions in the other Acts and has brought out that the provisions of this Act are no less efficacious if properly interpreted and implemented In his comments, the author has also furnished enforcement data and their evaluation at suitable places

Appendices which cover the bulk of this book (348 pages), contain inter alia the text of the Railway Protection Force Act, 1957, the Railway Protection Force Rules 1959, the Railway Protection Force Regulations, 1966 Standing Orders 1967, etc,

This book is, no doubt, a valuable addition to our legal literature and it would be of great use not only to the trainees of the R P F Training College but also to the legal practitioners and Courts alike.

U. S. D

1981 ALL L. J. NOC 78

(BOARD OF REVENUE)

S C GOIL, MEMBER

Anirudh Rai and another, Appellants v Pitambar Rai and others, Respondents

Second Appeals Nos 23 and 24 of 1978-79/Azamgarh, D/- 28-7-1980

(A) U P Consolidation of Holdings Act (5 of 1954), Ss. 12 and 49 — Order of Consolidation Officer in proceedings under S 12 obtained by leading officer into believing that summons was served on aggrieved party by forging signature of aggrieved party on summons — Order is nullity — Declaratory suit under Section 229-B of U P Z A & L R Act — Suit in revenue court is not barred by S 49 — Remedy in such a case, cannot be said to be civil suit only. (U. P Zamindari Abolition & Land Reforms Act (1 of 1951), S 229-B)

(B) Civil P. C. (5 of 1908), O 41, R. 31 — Appeal — Appellate Court agreeing with the view of trial Court on evidence — Its order need not restate effect of evidence nor reiterate reasons given by trial Court — Expression of general agreement is enough.

BY/DY/A571/81/SNV

1981 ALL L J NOC 79

(BOARD OF REVENUE)

H N AGRAWAL, MEMBER

Tota Ram and another, Applicants v Smt Lcelawati etc, Respondents

Revision No 1 of 1973-74/Bareilly, D/- 20-2-1980

Civil P C. (5 of 1908), O. 23 R. 1 (3) — Application for permission to withdraw suit filed under S 229-B of U P. Z. A & L. R. Act and file fresh suit at the stage of appeal — Rejection of — Validity. (U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 229-B)

Where permission to withdraw the suit with the liberty to file a fresh suit was refused by the appellate court in the appeal filed by the plaintiff in a suit under Section 229-B after having lost his case in the trial Court, the Court could not be said to have committed illegality or material irregularity on the ground that there was formal defect in suit of not sending notices under Section 80 of C P C and Section 105 of Panchayat Raj Act to the State Government and Gaon Sabha when neither of them as defendants nor anybody else had ever taken the plea on the basis of those defects If there was any omission, it was on the part of the plaintiff and he could not at the stage of appeal be permitted to derive the advantage of his own omission and given permission to file a fresh suit and thus harass the opposite party once again having lost the original suit AIR 1958 SC 274, AIR 1969 All 162 and 1977 Rev Dec 208 (BR), Rel on

DY/DY/B789/81/PGS/SNV

1981 ALL L. J NOC 80

C S P SINGH AND

M P MEHROTRA, JJ

Prem Prakash Agarwal, Petitioner v The Assistant Sugar Commissioner and others, Respondents

Civil Misc Writ Petn No 617 of 1976. D/- 8-12-1980

(A) U. P. Sugar Cane (Purchase Tax) Act (9 of 1961), S 3-B — Limitation of six months is confined to an assessee's or State Government's application and cannot refer to the suo motu power of the Revising Authority.

(B) U. P Sugar Cane (Purchase Tax) Act (9 of 1961), S 3-B — Although no assessment is made, Revising Authority can enhance tax where taxes have escaped due to omission to make assessment

J C Bhardwaj, for Petitioner, S anding Counsel, for Respondents

BY/DY/A483/81/MRD/RSK

1981 ALL L J NOC 81

(BOARD OF REVENUE)

R S VERMA, MEMBER

Suresh Chandra, Appellant v Smt Phoolmati etc., Respondents

Second Appeal No 318 of 1974-75/Etawah, D/- 4-11-1980

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S 229-B — U. P Consolidation of Holdings Act (5 of 1954), S 49 — Suit under S 229-B for declaration as sole tenant on death of co-tenant — Defendants claiming co-tenancy on the basis of sale deed by deceased co-tenant — Defendants' names were ordered to be recorded in revenue records but records were not duly corrected by revenue officers and deceased' co-tenant's name remained on record though wrongly — Determination of title of plaintiff

and deceased as co-tenants in consolidation proceedings — Held, on facts, determination of title did not bar the defence and suit must be dismissed. (U. P. Consolidation of Holdings Act (5 of 1954), S. 49).

The bar of Section 49 of U P Act 5 of 1954 is absolute and the determination of title in the course of consolidation proceedings is conclusive But this principle of law cannot be rigidly applied to all circumstances irrespective of the merits of the case There are certain, though very rare circumstances, in which, though the principle of Section 49 U P C H Act will remain unaltered, the principle will be applied taking into consideration the circumstances of that special case The court will consider as to what was the decision — whether there was any contest or not and many other factors No hard and fast rule can be laid down for application to all kinds of circumstances because human nature and circumstances are so varied that no law can envisage all types of circumstances which arise in daily human life. 1974 Rev Dec (Suppl) 37, Foll

Plaintiff filed a suit in 1971 under Section 229-B of U P Act (1 of 1951), for declaration as sole tenant of suit land on death of co-tenant It was found that the defendants were co-tenants of the suit land on the basis of transfer of share of deceased co-tenant by a sale deed in 1944 Their names also were ordered to be recorded in place of deceased co-tenant in 1956 but the revenue records were not duly corrected by revenue officers and the name of deceased co-tenant remained on record, though wrongly. Plaintiff also did not raise any objection to that continuance in consolidation proceedings, which intervened in the meantime, even though he had knowledge of that transfer of share The defendants had no notice of consolidation proceedings since their names were not on record. They were minors also till the close of proceedings. When the defendants found that their names were not entered in the records, a case for correction of papers was filed in which deceased co-tenant admitted transfer of share and revenue records were duly corrected in 1966 and the defendants' names were recorded as co-tenants of suit land There was no objection from plaintiff to this when deceased was alive.

Held, on facts, that the suit must be dismissed. Names of defendants would be presumed to have been recorded in revenue records as co-tenants though in fact the name of deceased co-tenant was there. Determination of title of plaintiff and deceased co-tenant in consolidation proceedings was not disturbed by interpretation of facts as above.

Ram Narayan Srivastava, for Appellant; B Dixit, for Respondents

KX/FY/G295/80/AKJ/RSK

1981 ALL. L. J. NOC 82

(BOARD OF REVENUE)

I B. SINGH, MEMBER

Rajendra Prasad, Applicant v. State, Opposite Party

Revision No 467 of 1975-76/Allahabad, D/- 2-9-1980

(A) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 134 and 135 — Application under — Twenty times of rent deposited by applicant and on the same day he sold the plot — During pendency of revision against order rejecting objections, applicant died — Effect. (T. P. Act (1882), S. 43).

Change of status of sirdar into a bhumidhar occurs when Assistant Collector makes judicial grant, that is, when order is passed by him that applicant has become bhumidar. Grant of actual sanad of bhumidari follows such order and is completed by ministerial staff If judicial order for grant of sanad has not been passed and death of applicant takes place, sanad cannot be granted in his name although it can be granted in names of his heirs but Section 43, T P. Act will not be applied to his heirs. The vendee from applicant prior to grant of sanad cannot claim grant of sanad in his name by application of Section 43, T. P. Act If any grant has been made in the name of deceased person after his death such grant is nullity.

(B) U. P. Land Laws (Amendment) Act (8 of 1977), S. 73 — U. P. Z. A. and L. R. Act (1 of 1951), S. 134 — Revision before Board against order granting certificate of bhumidari rights in proceedings under Section 134 — Revision pending by 22-1-1977 — Revision as well as proceedings abated under S. 73, 1977 Rev Dec 363 (BR), Rel. on.

B B Paul, for Applicant, Hari Shanker and D N. Srivastava (D. G. C.), for Opposite Party.

DY/FY/B786/81/VSS

1981 ALL. L. J NOC 83

=1981 Rev Dec 333

(BOARD OF REVENUE)

I B SINGH, MEMBER

Smt Jubba, Appellant v Ram Dular etc, Respondents

Second Appeal No 190 of 1976-77/ Allahabad, D/- 20-8-1980

(A) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 202 — Suit for ejectment of asami — Maintainability — Notice determining asami rights is a condition precedent — Case law discussed.

(B) Civil P. C. (5 of 1908), Order 41.* Rr. 25, 26 — Omission to frame issue — Remand by appellate Court on ground of — Propriety — Duty of court.

Where a decree in a suit for ejectment of an asami passed by the trial Court was set aside and the case was remanded for framing of issue by the lower appellate Court on ground that although the allegation made by the plaintiff in the plaint that he had given notice for determining the rights of the asami was denied by the defendants in their written statement no issue was framed on this point, the order of the lower appellate court setting aside the decree of the trial court and remanding the case was unsustainable in view of the non-compliance of the provisions of Order 41, Rules 25, 26 The proper course for the lower appellate court was to frame the required issue, refer it to the trial court for taking additional evidence on the issue and giving its finding thereon with reasons and after receiving the finding of the trial court and after giving time to the parties to file objections to determine the appeal on merits

AY/AY/A207/81/VVG/SSG

1981 ALL. L. J. NOC 84

(BOARD OF REVENUE)

I B SINGH, MEMBER

Prithavi Pal, Applicant v. Gram Sabha, Opposite Party

Reference No 384 (Z) of 1975-76/Kanpur, D/- 30-7-1980

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Sec. 11-B — Combined revision application against two orders — Such application is not maintainable — Review application in absence of specific statutory provision is also not maintainable.

BY/DY/A569/81/MRD/RSK

1981 ALL L. J. NOC 85

= 1980 Rev Dec 320

(BOARD OF REVENUE)

I B SINGH, MEMBER

Jamuna Prasad, Appellant v Gaon Sabha, Respondent

Second Appeal No 1 of 1973-74/Farrukhabad, D/- 1-7-1980

Uttar Pradesh Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 229-B and 289 — Suit for ejectment by Gaon Sabha — Maintainability — In earlier proceeding under R. 115-E (3) (as deleted from 1-11-1975). defendant found to be in legal occupation of land as tenure-holder and admitted as Sirdar — Suit by Gaon Sabha not maintainable under R. 115-H as expression "any person" in that Rule does not include Gaon Sabha. (U. P. Z. A. and L. R. Rules (1952), Rr. 115-E and 115-H).

R K Srivastava, for Appellant, D N Srivastava, for Respondent

AY/AY/A31/81/KJK/LGC

1981 ALL L. J. NOC 86

(BOARD OF REVENUE)

I B SINGH, MEMBER

Mahabir, Applicant v Arvind Kumar, Opposite Party

Revision No 874 of 1976-77/Allahabad, D/- 8-4-1980

Civil P. C. (5 of 1908), O. 22, Rr. 3, 4 and 9 — Limitation Act (1963), S. 5 — Application for substitution filed beyond period of limitation — If can be allowed.

An application for substitution of legal representatives of deceased person under Order 22, Rule 3 or Rule 4 presented after prescribed limitation of 90 days can be treated as an application for setting aside abatement under Order 22, Rule 9. Where the application for substitution period of limitation was made on the next day after the file was received by trial court from Board of Revenue which decided a reference and vacated the stay of proceedings, the fact that the proceedings had been stayed was itself a good ground for condoning delay under Section 5 of Limitation Act The benefit of Section 5 cannot be refused for the reason that no application was made for

employing Section 5 1958 All LJ 326 and 1965 Rev Dec 356, Foll

R N Srivastava and M C Tewari, for Applicant

DY/FY/B791/81/VSS

1981 ALL. L. J. NOC 87

(BOARD OF REVENUE)

H N AGARWAL, MEMBER

Abdul Hasan, Appellant v Laila and others, Respondents

Second Appeal No 202 of 1974-75/Moradabad, D/- 20-2-1980.

U. P. Consolidation of Holdings Act (5 of 1954), S. 49 (as it stood before amendment by Act 38 of 1959) — Consolidation proceedings completed before amendment of S. 49 — Unamended S. 49 is no bar to suit for declaration of title in revenue Court. 1963 Rev Dec 67 Held overruled by 1965 Rev Dec 417.

Where the consolidation of holdings had been completed before the Amending Act 38 of 1959 came into force, a suit for declaration of title in a regular revenue Court is not barred under unamended Section 49 The position, however, is different after Act 38 of 1959 came into force and a suit for declaration of title would be barred in a revenue Court after amended Section 49 came into play 1965 Rev Dec 417 and 1965 Rev Dec 406, Rel on. 1963 Rev Dec 67 Held overruled by 1965 Rev Dec 417, 1967 Rev Dec 372. Dist

BY/CY/A572/81/GNB

1981 ALL. L. J. NOC 88

A N VARMA, J

Khacheru Singh, Petitioner v Deputy Director of Consolidation and others, Respondents.

Civil Misc. Writ Petn. No 8826 of 1978, D/- 3-3-1981.

U. P. Consolidation of Holdings Act (5 of 1954), S. 48 — Parties — On death of petitioner his sons not impleaded as heirs and legal representatives — Held order in revision was liable to be recalled, irrespective of whether one of them had knowledge of proceedings or whether he was doing pairavi of the case or not. 1978 All LJ 282, Rel. on; AIR 1965 SC 1949 and AIR 1975 SC 733, Disting.

Narendra Kumar Sharma, for Petitioner, Anchumaq Singh, S K. Sharma and Standing Counsel, S. P Kapoor, for Respondents.

FY/GY/C988/81/MRD/RSK

1981 ALL. L. J NOC 89

P N GOEL, J

Vijai Singh, Appellant v Ram Lakhan and others, Respondents

Criminal Appeal No 732 of 1974, D/- 9-12-1980.

Criminal P. C. (5 of 1898), S. 423 — Complaint for theft of cattle — Additional Munsiff Magistrate ignoring date fixed for case to be put up by Incharge Additional Munsif Magistrate and deciding case earlier — Accused acquitted after consideration of evidence — Case could not be remanded for further trial according to law when trial had proceeded for 10 long years (Penal Code (45 of 1860), S. 378).

Where in a case under Section 378 of Penal Code for theft of buffaloes the Additional Munsif Magistrate ignored the date fixed for the case to be put up by the Incharge Additional Munsif Magistrate and decided the case a few days earlier, the case could not be remanded for further trial according to law when the trial had proceeded for 10 long years and the Additional Munsif Magistrate had considered the evidence before him and had then acquitted the accused, and the complainant himself was not an eye witness to the crime and the cattle were not in the custody of the accused but that of Supurdgar. The fact that the complainant was prejudiced by the case being decided earlier would be immaterial as the accused would be harassed if a retrial was ordered 1956 All LJ 76 (SC), Rel on.

Ramesh Sharma and U. Malviya, for Appellant, R P. Singh, for Respondents

BY/BY/A486/81/SMA/SNV

1981 ALL. L. J. NOC 90

(LUCKNOW BENCH)

MAHAVIR SINGH, J.

Ram Kumar, Applicant v The State, Opposite Party

Criminal Revn. No 347 of 1980, D/- 8-10-1980.

Essential Commodities Act (1955), Section 6-A — Car of accused with bottles of liquor seized — Orders of Collector for confiscation of car — Validity — No

material on record except report of excise Authorities — Allegation in report denied by accused — No opportunity to substantiate his case given to accused — Order is not valid

Car of accused was seized with bottles of liquor and in the proceeding under Section 6-A the accused was held guilty and the Collector ordered confiscation of car on the basis of report of the Excise Authorities that the accused was driving the car but avoided arrest There was no material on record except the report of the Excise Authorities and the allegation in that report was denied by the accused in reply to the show cause notice issued to him but the Collector proceeded on the assumption that the bottles of liquor were seized from his car The accused moved an application that identification proceeding be held to contest the veracity of the witnesses that he was present when car was being seized, but this application was rejected by the Collector and no opportunity to substantiate his case was given to the accused and it was alleged that he had not led any evidence

Held that the orders passed by Collector was against the law and deserved to be set aside

It is true that the Collector under Section 6-A can act irrespective of the fact whether a criminal prosecution on the same charge has been instituted or not and that even if it is instituted, he need not wait till it is decided one way or the other, but it does not at the same time mean that the Collector can pass an order without any material on record

EY/EY/C403/81/SAD/SNV

1981 ALL L J NOC 91
(LUCKNOW BENCH)
MAHAVIR SINGH, J

Durjan, Applicant v The District Magistrate, Kheri and another, Opposite Parties.

Criminal Misc Case No 1774 of 1978 D/- 25-1-1980

(A) Criminal P. C. (2 of 1974), Ss. 20, 29, 397 — Order of exterument by District Magistrate under U. P Act 8 of 1971 — Not a punishment — Revision before Sessions Judge against such order — Not maintainable. (U. P. Control of Goondas Act (8 of 1971), S. 3).

Where the District Magistrate ordered exterment of the accused under control of Goondas Act, the revision before Sessions Judge against order of District Magistrate would not be maintainable when the action taken by the District Magistrate was under the Special Act which has its own procedure A District Magistrate has no doubt been given some powers under Code, but it does not mean that whatever action he takes must have been done by him under Code

Further, revision before Criminal Court would not be maintainable as exterament is not treated as punishment under the Code and even under Control of Goondas Act

(B) Criminal P. C (2 of 1974), S 482 —Order under S 3 of U. P. Act 8 of 1971 — Appeal against, not filed by aggrieved party — Order becomes final — Such final order cannot be questioned in revision or in petition under S. 482. (U.P Control of Goondas Act (8 of 1971), Sections 3, 6)

I B Singh and T N Gupta, for Applicant, Govt Advocate, for Opposite Parties

EY/EY/C372/81/PGS/SSG

1981 ALL. L. J. NOC 92
(LUCKNOW BENCH)
SATISH CHANDRA, C J

Ram Kishore Gupta, Applicant v State of U P, Opposite Party,

Criminal Revn No 227 of 1979, D/- 13-11-1980

(A) U. P. Roadside Land Control Act (10 of 1946), S 13 (2) — Authority to direct restoration of land to its original state — Sub-divisional Magistrate has no jurisdiction to give such direction under S 13 (2)

(B) U. P Roadside Land Control Act (10 of 1946), S. 16 (a) — Applicability — Plot on which impugned addition was being constructed, not only entered in Town Area records as abadi but having constructions of houses and shops prior to notification — S 16 (a) is attracted.

Section 16 (a) makes the Roadside Control Act inapplicable to (i) the erection or re-erection of buildings, (ii) upon sites in a municipal, notified or town area and (iii) it is already built up on the date of the issue of notification.

In the instant case the plot on which accused was making impugned construction by way of addition to his existing house, had several houses built upon it

and, thus was partly built up on the date of notification The plot was not merely entered in the Town Area records as an abadi but it was the site upon which several houses and shops had been constructed Consequently the alleged extension was in an already built up site and Section 16 (a) was attracted

Kunwar Shanti Prakash, for Applicant, Govt Advocate, for Opposite Party.

EY/GY/C406/81/SAD/SNV

1981 ALL. L. J. NOC 93

A. N VARMA, J.

Kunj Behari Lal and others, Appellants v Smt Premawati and others, Respondents

Second Appeal No 677 of 1972, D/ 15-7-1981

(A) Transfer of Property Act (4 of 1882), Ss. 106 and 45 — Heirs of deceased tenant — Succeed as tenants-in-common — Notice under S. 106 on some of the heirs — Not a valid notice.

It is always open to a tenant succeeding as an heir to surrender his rights in the property if he finds the obligations irksome If in regard to any immoveable properties generally the heir gets a separate and distinct share in the property inherited by him, there would be no valid reason why he would not do so even in regard to leasehold rights inherited by him

The heirs of a deceased tenant become tenants-in-common after his death having a separate and distinct interest in the leasehold rights Therefore notice of determination of tenancy on some of the heirs only will not be a valid notice. AIR 1977 All 38, AIR 1978 All 88 and 1977 All WC 12, Rel on.

(B) U P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3 — Permission under — Sought against some tenants-in-common — Permission is not valid one.

Where all the heirs of a deceased tenant succeeded to the leasehold rights as tenants-in-common, as a matter of operation of law, each of the heirs taking a separate and distinct interest in the tenancy, the fact that the landlords were not aware of some of the heirs left out in their application for permission could afford defence against the invalidity of the permission There could not be partial permission In order to enable a landlord to file a suit for eviction of his tenant, the landlord was under an obligation under Section 3 of the aforesaid Act to obtain a valid permission against all the persons sought to be evicted 1968 All LJ 573, Dist, 1969 All LJ 1116, Rel on.

H S Nigam, for Appellants; Swami Dayal, Beni Prasad Agarwal and G K Khanna, for Respondents

HY/HY/D500/81/JDD

1981 ALL. L. J. NOC 94

(BOARD OF REVENUE)

R. S. VERMA, MEMBER

Bhagwan Din, Petitioner v Kali Din, Respondent

Revision No 22 (2) of 1979-80/Jalaun, D/- 9-7-1981.

U. P. Revenue Court Manual, Para 124 — Requisitioning of judicial records — Requisition not showing Court's satisfaction as to existence of good grounds — Order cannot be sustained.

Where the plaintiff had applied for requisitioning of judicial records and the trial Court ignoring mandatory provisions made under para 124, mechanically passed an order for summoning of records in that the requisition did not show that the Court was satisfied that good grounds for requisitioning the record were shown, the order was liable to be set aside

GY/HY/D301/81/HSS/SNV

1981 ALL. L. J. NOC 95

S D. AGARWALA, J.

Bhola Nath Gupta and another, Petitioners v. The Additional Civil Judge, Allahabad and others, Respondents.

Civil Misc. Writ No. 4165 of 1979, D/- 19-2-1981.

U. P. Nagar Mahapalika Adhiniyam (2 of 1959), S. 538 (2) (c) — Vesting of property in State — Property vests in State only on supersession and not on dissolution of Mahapalika.

N C Upadhyay, for Petitioners, S. S Chauhan and Ashok Mahiley, for Respondents.

FY/GY/C985/81/MRD/RSK

1981 ALL. L. J. NOC 96

M P MEHROTRA, J

Devi Prasad and others, Petitioners v Raghunath Sahai and others, Respondents

Civil Misc Writ Petn No 2888 of 1974, D/- 21-5-1981

(A) U. P. Consolidation of Holdings Act (5 of 1954), Ss. 48, 42 and 4A — Power of transfer — Director of Consolidation can transfer revision from file of one Deputy Director to that of another Deputy Director. (U. P. Consolidation of Holdings Rules (1954), R. 65 (1A)).

The provisions of the Act read alongwith the various notifications issued by the State Government from time to time clearly show that a revision application can be made to a Deputy Director of Consolidation and that all Deputy Directors of Consolidation in U P have jurisdiction to hear a revision application made under S. 48 of the Act Therefore, the jurisdiction of a Deputy Director of Consolidation to hear a revision application is not conferred by an order passed under R. 65 (1A) of U P Consolidation of Holdings Rules but by the provisions of the Act and the notifications of the State Government When this is the position, the mere fact that the revision was entertained by the Deputy Director of Consolidation, Allahabad as result of the transfer made by the Director of Consolidation and not by the District Deputy Director of Consolidation is of no consequence. The contention that under S. 48 a Deputy Director (Consolidation) is not subordinate to the Director of Consolidation, is not relevant It is correct that while hearing a revision under S 48 the Deputy Director exercises the powers of a Director of Consolidation and, therefore, the Deputy Director cannot be said to be subordinate to the Director of Consolidation However, this is not the controversy in this petition. The controversy is whether the Director of Consolidation could transfer a revision from the file of one Deputy Director to that of another Deputy Director. Reading Ss. 42 and 4A together, it is clear that administratively Deputy Directors of Consolidation are subordinate to the Director of Consolidation, and therefore, the latter could exercise the powers of transfer as the superior authority. 1970 All L J 520 Foll.

(B) U. P. Consolidation of Holdings Act (5 of 1954), S. 19 (1) — 'as far as possible' — Departure by Revisional Court from mandatory provisions in matter of carving out chak by reason of ignorance of meaning of 'as far as possible' — Case remanded for fresh disposal.

S R Singh, K N Tripathi, S P Srivastava, M Katju, D P L Srivastava, B P Srivastava, for Petitioners, Satya Prakash Saxena, R H Zaidi, S P Srivastava, Shishir Kumar and Standing Counsel, Rajendra Pd Srivastava, for Respondents

GY/HY/D211/81/JHS

1981 ALL. L. J. NOC 97

M N SHUKLA AND N N MITHAL, JJ

Smt Shailandri Devi, Appellant v Swami Dayal and another, Respondents

First Appeal No 167 of 1971, D/- 11-5-1981

(A) Hindu Law — Joint family — Family arrangement — Does not end with death of party — Remains binding on heirs.

(B) Hindu Law — Joint family — Family arrangement — Family dispute is not necessary condition to family settlement or arrangement. AIR 1966 S C 1836 and AIR 1965 All 528 : 1965 All L J 158, Foll.

(C) Contract Act (9 of 1872), Ss. 37 and 40 — Contract not of personal nature — Death of party — Effect.

A contract in which no individual skill or confidence or special qualification is involved does not determine on the death of a party to the contract but remains binding on the heirs and legal representatives

K C Saxena, for Appellant, B N L. Katiyar and Standing Counsel, for Respondents

GY/HY/C967/81/JHS

1981 ALL. L. J. NOC 98

A N VERMA, J

Kali Charan, Petitioner v Dy Director of Consolidation, U P Lucknow and others, Respondents

Civil Misc Writ Petn No 2147 of 1980 D/- 7-5-1981

(A) **Transfer of Property Act (4 of 1882), S. 52 — Section protects the right only of party to the suit or proceeding who had not made transfer — Transferor himself cannot fail back on this section.**

(B) **Constitution of India, Art. 226 — Conduct of petitioner — Petitioner agreeing to allot the very plots which he had already sold — Held conduct of petitioner disentitles him to any relief under Art. 226.**

(C) **Evidence Act (1 of 1872), S. 44 — Claim made before consolidation authorities based on compromise decree — Opposite party is entitled to establish that said decree was result of fraud or collusion.**

G N Verma, for Petitioner. P D Kashik, H N Shukla, R C Misra, A N Sinha and Standing Counsel, R N Sinha, for Respondents

FY/IY/C977/81/MRD/RSK

1981 ALL. L. J. NOC 99

V K MEHROTRA, J

Raj Narain, Appellant v Hari Shanker and another, Respondents.

Second Appeal No 2267 of 1974, D/- 7-5-1981

Civil P. C. (5 of 1908), O. 3, Rr. 1, 4 — Plaintiff expressly authorising counsel to compromise case if necessary — No suggestion that counsel did not act bona fide — Held no error of law was committed in holding that compromise by the counsel was binding upon the plaintiff. AIR 1975 S C 2202 Rel. on.

H. N Shukla, for Appellant, Shrila Prasad, for Respondents.

FY/GY/C950/81/MRD/RSK

1981 ALL. L. J. NOC 100

1981 All Cri R 206

MURLIDHAR, J

Ashiq, Petitioner v State, Respondent

Criminal Revision No. 740 of 1980, D/- 17-2-1981

Prevention of Food Adulteration Act (37 of 1954), Ss. 7, 16 — Prevention of Food, Adulteration Rules (1955), Appendix B, Entries No. A.11.01.11 — Conviction under S. 7/16 — No evidence to show that vendor was avoiding to give class of the milk — Evidence to show that Food Inspector never cared to find out what class of milk accused claimed to be carrying — No presumption can be raised that milk was offered for sale without any indication of class — Standard for buffalo milk would not be applied — Milk would not be adulterated — Conviction would not be sustained. 1980 All L J 141 Rel. on.

EY/EY/C183/81/AAJ

1981 ALL. L. J. NOC 101

GOPI NATH, J

Phool Chand and others, Appellants v Sheo Prasad and others, Respondents

Second Appeal Nos 2142, 2415 and 2215 to 2218 of 1971, D/- 6-1-1981.

Hindu Law — Joint family — Alienation by Karta of joint family property asserting exclusive title in himself — Alienation is not binding on other co-parceners. (1912) 9 All L J 509 and (1923) 21 All L J 372 : AIR 1923 All 581 Followed.

S R. Misra and Sudhir Chand, for Appellants.

DY/GY/C63/81/JHS

1981 ALL. L. J. NOC 102

DEOKI NANDAN, J

Mohd. Siddiq, Appellant v. Haji Mohammad Khalil, Respondent.

Second Appeal No. 2196 of 1974, D/- 22-12-1980

Transfer of Property Act (4 of 1882), Ss. 58(b), (c), (d), (g) and 67 — Mortgage whether a simple mortgage or mortgage by conditional sale or usufructuary mortgage or anomalous mortgage — Determination — Suit for foreclosure of mortgage, if maintainable.

A usufructuary mortgagee, as such, cannot on the terms of S. 67 of the Act bring a suit for foreclosure or for sale. A mortgagee by

conditional sale may bring a suit for foreclosure, but he cannot bring a suit for sale A mortgagee, under an anomalous mortgage may bring a suit for foreclosure provided he is entitled to foreclose by the terms of the deed There is no bar to a mortgagee under an anomalous mortgage to bring a suit for sale, but his right to bring a suit for foreclosure is conditional by his being entitled to foreclose by the terms of the mortgage deed

The mortgage deed in the instant case authorised mortgagee to retain possession of mortgaged property until payment of mortgage money by a certain date Until that date the mortgagee was authorised to receive rent and profits accruing from the property and appropriate the same towards interest on mortgage money The deed contained a further (second) condition that if mortgagor did not pay mortgage amount on due date, the deed shall be deemed to be a deed of absolute sale On a construction of the clauses of the deed Held The mortgage could not be a simple mortgage because possession of the property was delivered to mortgagee In view of the second condition in the deed, the mortgage could not be deemed to be a mortgage by conditional sale in as much as a mortgage by conditional sale has to be ostensibly a sale of mortgaged property The transaction in the present case is ostensibly a usufructuary mortgage and not a sale The redemption of property on a certain date on payment of mortgage money did not amount to any personal covenant on the part of mortgagor to pay mortgage money and therefore did not change its nature from an usufructuary mortgage to an anomalous mortgage Even if the deed is deemed to be an anomalous mortgage, the deed did not authorise the mortgagee to foreclose, as required by S 67 The deed created an usufructuary mortgage as defined by S 58(d) The suit for foreclosure of the mortgage is not maintainable.

S A. Ansari, for Appellant. V. Sahai and B Dayal, for Respondent.

BY/DY/A518/81/VSS

1981 ALL. L. J. NOC 103

N D OJHA, J

Shubh Kumar Malhotra, Petitioner v 3rd Additional District Judge and others, Respondents.

Writ Petition No. 10464 of 1979, D/- 8-12-1980

(A) Constitution of India, Art. 226 — Writ petition challenging eviction order — Concurrent finding of courts below that need of landlord is bona fide, based on appraisal of evidence — Is a finding of fact — Cannot be challenged in writ petition. AIR 1974 S C 1596; AIR 1978 S C 45 Foll. (U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 21(1)(a)).

(B) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 21(1)(a) — Release of accommodation — Application for — Change in family circumstances, such as marriage of landlord's son — Relevant consideration, in finding out whether need of landlord is bona fide — Social status of landlord — Also, not a wholly irrelevant consideration (U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, (1972), R. 16(1)(a) and (b)).

(C) Constitution of India, Art. 226 — Writ petition challenging eviction order — Question of comparative hardship considered by court below — Categorical finding that landlord will suffer greater hardship, recorded — Mere fact that tenant has no alternative accommodation — Is no ground for refusing order of eviction to landlord. AIR 1979 S C 272 Foll. (U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 21(1)(a)).

Bharatji Agrawal, for Petitioner, R N Bhalla, for Respondents

BY/BY/A668/81/VCD

1981 ALL. L. J. NOC 104

DEOKI NANDAN, J

Ram Lagan and others, Appellatns v Basdeo and another, Respondents

Second Appeal No 809 of 1970, D/- 27-11-1980

Civil P. C. (5 of 1908), S. 145 — Failure by supurdar of attached property to restore it to judgment-debtor on its release — Order/decree by court for recovery of value of attached property against supurdar — Suit for cancellation of such order/decree under S. 31 Specific Relief Act — Order/decree cannot be cancelled, since court has jurisdiction to pass such order under S. 145 — Question whether amount ordered to be recovered is excessive or not cannot be gone into in such suit — (Specific Relief Act (1963), S. 31), (Evidence Act (1872), S. 44.).

J S Gupta, for Appellants, Faujdar Rai, for Respondents

AY/AY/A184/81/VCD/DVT

1981 ALL. L. J. NOC 105

K N GOYAL, J

Maqsood Ali Khan, Petitioner v. Shuhab Khan and others, Respondents

Civil Revision No 159 of 1978, D/- 11-11-1980

(A) Civil P. C. (5 of 1908), O. 34 R. 1; O. 1 R. 10 — Mortgage suit — Necessary parties — Person claiming a paramount title — Not a necessary party — Impleading of paramount claimant in spite of plaintiff's opposition — Cannot be sustained.

In a suit on mortgage, if the plaintiff himself impleads the paramount claimant or where all the parties desire the question of paramount title to be investigated, it is certainly open to the Court to exercise its discretion under O 1 R 10 C P.C. But in a case where plaintiff has brought a suit impleading all the necessary parties, and he does not want the paramount claimant to be impleaded, and the trial of his suit to be bogged down in a detailed investigation of matters extraneous to mortgage, he cannot be compelled to have those irrelevant matters investigated in his suit based on the mortgage The impleading of paramount claimant in such a case inspite of opposition by plaintiff cannot be sustained. AIR 1955 All 4 1954 All L J 645 (F B) Foll., AIR 1939 Cal 692, AIR 1941 Nag 133 Rel on

(B) Civil P. C. (5 of 1908), S. 115, O. 34, R. 1, O. 1, R. 10 — Mortgage Suit — Order of trial court impleading paramount claimant — Revision against — High Court can interfere AIR 1941 Nag. 133; 1963 All W R (H C) 780; 1951 All L J 700 Rel. on.

A K. Yog for Petitioner, N. Lal and P Srivastava, for Respondents

AY/AY/A35/81/VCD/DVT

1981 ALL. L. J. NOC 106

A. N VARMA, J

Madan Lal, Petitioner v District Judge, Saharanpur and others, Respondents

Civil Misc. Writ Petn No 6824 of 1979, D/- 25-10-1980

Civil P. C. (5 of 1908), O. 15, R. 5 (U. P.) (as it stood before amendment in 1976) — Suit for ejectment — Deposit of arrears of rent — First date of hearing — It would be the date when Court applies its mind for first time to pleadings of parties.

It is settled that the first date of hearing in a suit for the purposes of application of O 15, R 5 (as it stood prior to its Amendment in 1976) would be the date when the Court applies for the first time its mind to the pleadings of the parties.

A suit was filed on 9-12-1976 and 11-2-77 was fixed as the first date of hearing and for filing of written statement of defendant. That day the Court fixed merely further date for hearing. Subsequent dates were fixed for hearing and many adjournments were granted to file written statements Ultimately 28-10-1977 was fixed for final hearing, on which date the defendant-tenant moved an application to deposit arrears of rent and for condonation of delay in depositing the same. On 20-3-1978 plaintiff applied for striking off defence of defendant as there was no compliance of O 15 R. 5 by not making deposits before the first date of hearing i.e. on 11-2-1977. The Court holding that date to be the first date of hearing struck off the defence.

Held, that, 11-2-1977 could not be regarded as the date of first hearing. It was only 28-10-1977 on which date the Court applied for the first time its mind to the pleadings of the parties and it was therefore the first date of hearing Consequently striking off defence was illegal. AIR 1977 All (NOC) 253, 1976 All L J 494 Rel on. AIR 1980 All 136 Disting

Rajesh Tandon, for Petitioner, H S. Nigam, Standing Counsel, for Respondents

KX/LX/G255/80/AAJ/MVJ

1981 ALL. L. J. NOC 107

SATISH CHANDRA, C.J.

Smt. Munni Devi, Applicant v. Hem Prakash and others, Respondents.

Civil Revision No. 326 of 1978. D/- 25-9-1980.

Civil P. C. (5 of 1908), O. 22 R. 4 — Application under — Substitution of legal representatives of deceased defendant — Application made within time — One of the legal representatives not impleaded — Order

abating suit as a whole without disposing of application — Not valid.

Where an application is made under O 22 R 4 within the time limit, and the court finds that it is defective inasmuch as it has not prayed for the impleadment of one or more of the legal representatives, but only some of the legal representatives of the deceased, it is still an application for substitution under O 22 R 4, and the court cannot without disposing of the application, order abatement of suit even against the deceased defendant

In the instant case, on the death of the deceased defendant, his two sons were already on record as defendants The application under O 22 R 4 was made within the time limit, but the widow of the deceased, defendant was not asked to be impleaded as a party in substitution of the deceased defendant The estate of the deceased defendant was represented, though partly The court on being apprised of the fact should have asked the plaintiff to amend the application, by incorporating a prayer for impleading the widow as well The court had the jurisdiction and in order to advance the cause of justice it was incumbent upon the court to do so. Without doing so, and without disposing of substitution application, which was made within time, order abating suit as a whole could not be sustained. AIR 1955 S C 425 Rel. on

B. C. Dey, for Applicant

AY/AY/A58/81/VCD/DVT

1981 ALL. L. J. NOC 108

K C. AGARWAL, J

Anwar Ali, Appellant v Abdul Halim and others, Respondents.

Second Appeal No 958 of 1973, D/- 22-9-1980.

(A) Mohammedan Law — Guardian of property of a person of unsound mind — Brother cannot act as guardian. AIR 1918 P C 11 : 16 All L J 800 (P C), Applied.

(B) Transfer of Property Act (4 of 1882), S. 43 — Applicability — Defendants as guardians selling share of brother of unsound mind — Appellant knowing that defendants have no right of ownership over brother's share — Held S. 43 would not apply. AIR 1973 S C 814 Rel. on.

(C) Transfer of Property Act (4 of 1882), S. 43 — Availability of benefit of S. 43 — Section deals with transfer which fails for want of title and not want of capacity to transfer — Transferor lacking capacity to sell share as guardian of brother of unsound mind — Transferors' subsequent acquisition of brother's share on his death does not entitle transferee to benefit of S. 43. AIR 1962 S C 847 Rel. on.

M A Qadeer, for Appellant. R N Singh, for Respondents

JX/KX/F184/80/HR/RSK

1981 ALL. L. J. NOC 109

K P SINGH, J

Ram Sewak and others, Petitioners v Deputy Director of Consolidation and others, Opposite Parties

Civil Misc Writ Petn No 2886/1973, D/- 19-9-1980

Constitution of India, Art. 226 — Subsequent legislation — If petitioners are entitled to equitable relief and litigation can be cut short, subsequent legislation should be taken into account. AIR 1976 S C 49 and 1977 All L J 70 Foll.

N K Saxena, H P Dubey, for Petitioners. Sankatha Rai, for Opposite Parties

LX/AY/F677/80/MBR

1981 ALL. L. J. NOC 110

T S MISRA, J

U P State Electricity Board, Applicant v U P Hotels and Restaurant Ltd , and another, Respondents

Civil Revision No 70 of 1980, D/- 6-8-1980

(A) Arbitration Act (10 of 1940), S. 33 — Arbitration agreement not challenged before arbitrators — Proceedings pending before umpire — Stay for — Cannot be granted.

Where the petitioner had filed a copy of agreement containing arbitration clause in the court and also made a reference to the subsequent agreements between the parties however the petitioner had not challenged

the arbitration agreement before the arbitrators in their 32 sittings and the matter was referred to the umpire by the arbitrators, the arbitration agreement could be said to be subsisting and the stay order to the proceedings pending before the umpire could not be granted on the ground of balance of convenience, to the petitioner

(B) Civil P. C. (5 of 1908), S. 115 — No illegality or material irregularity shown in decision of lower court — Decision not causing irreparable loss to party — Cannot be interfered with under S. 115.

High Court while exercising its jurisdiction under S 115 C P C cannot correct errors of fact howsoever gross or even errors of law unless the errors have relation to the jurisdiction of the court to try the dispute itself If a subordinate court is found to possess the jurisdiction to decide a matter, it cannot be said to exercise it illegally or with material irregularity even if it decides the matter wrongly The High Court has no power to interfere with such decision merly because it differs from the conclusions of the subordinate court on questions of fact or law

K. B Sinha and Jagdish Swaroop, for Applicant, P K Mathur, for Respondents

BY/BY/A775/81/VNP

1981 ALL. L. J. NOC 111

A N VERMA, J

Smt Shakuntala Devi and others, Appellants v Ram Sewak, Respondent

Second Appeal No 1333 of 1979 connected with Civil Misc Writ Nos 3379 and 3382 of 1979, D/- 14-7-1980

(A) Civil P. C. (5 of 1908), O. 41 R. 27 — Additional evidence in appeal — Power to admit is not so wide as to permit a party to fill in lacunae.

Where the appellant seeks permission during arguments to examine an expert whose report was filed by him in the lower court, he cannot be permitted to do so when he has not filed an application under O 41, R 27. Such application would have afforded an opportunity to the respondent to meet the appellant's case for additional evidence In the absence of any affidavit or other material, it is not possible to accept that the omission to examine the expert in the lower court was the result of an error of judgment of the appellant's counsel in that Court and not a deliberate decision of the party to withhold that evidence from the court However wide the amplitude of O 41 R 27 may be, it is not so wide as to permit a party to fill in lacunae When the issue in relation to which the appellant is seeking to examine the expert was squarely before the courts below with the burden of proof thereof on the appellant and the lower court has on evidence given a finding against the appellant, there is no legitimate excuse for the failure of the appellant to have examined the expert There is no reason in such a case to allow the appellant's plea on ground of interest of justice Interest of justice is not the same thing as permitting one of the parties to improve its chances of litigation The litigation had been pending for about eleven years is also a factor to be reckoned in considering the request for additional evidence. Thus in such a case the appellant's plea cannot be permitted.

(B) Civil P. C. (5 of 1908), S. 100 — Second appeal — Specific performance of contract — Setting aside decree — Permissible considerations. (Specific Relief Act (1963), S. 14 (1) (b))

The High Court will not be justified in setting aside or modifying the lower court decree in a case for specific performance of contract on imaginary or hypothetical considerations Setting aside is possible only if there is an error of law as contemplated by S 100.

When the finding of fact of the lower court is that the contract in question is not incapable of specific performance, the decree cannot be challenged on the ground that if the executing court finds the execution of the decree not reasonably feasible, the decree will be in vain and contrary to S. 14 Specific Relief Act. The decree in such a case cannot be said to be unjustified, or vitiated by an error of law much less a substantial one.

Triloki Nath and J Swarup, for Appellants: S P. Kapoor and P. K. Sinha, for Respondent

HX/AY/E135/81/JRM

1981 ALL. L. J. NOC 112

1981 Rev Dec 114

(BOARD OF REVENUE)

I. B. SINGH, MEMBER

Ayodhya, Appellant v Jag Mohan, Respondent

Second Appeal No 226 of 1972-73/Etawah, D/- 27-6-1980

(A) U. P. Panchayat Raj Act (26 of 1947), S. 109A — Copy of Kutumb register not certified by Pradhan to be true copy, as required by S. 109A, is not admissible in evidence under S. 76, Evidence Act. (Evidence Act (1872), S. 76).

(B) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 137A (Before amendment) — Bhumidari Sanad issued on 7-3-70 in name of H — Application filed by appellant on 17-7-71 stating that H died on 4-3-70 and that therefore sanad was wrongly issued in H's name — Held previous statement of applicant on 10-12-70 in mutation case that H had died after 7-3-70 was binding on him, he being a party to mutation proceeding and present case. 1968 Rev. Dec. 99 Disting.

AY/IY/A212/81/HR/RSK

1981 ALL. L. J. NOC 113

K. N. SINGH AND B. D. AGARWAL, JJ

Bharat Singh and others, Petitioners v State of U. P. and others, Respondents.

Civil Misc. Writ Petn. No 10494 of 1978, D/- 13-6-1980

(A) Land Acquisition Act (1 of 1894), S. 3 (e) — 'Company' — Central Warehousing Corporation incorporated under Warehousing Corporations Act, 1962 is company. AIR 1963 S C 1890 : 1964 All L J 639 Relied on.

(B) Land Acquisition Act (1 of 1894), S. 6 (1) — Acquisition for public purpose — Absence of statement in notification that part of cost of acquisition was to come out of public revenues is not fatal. AIR 1963 S C 151 Followed.

(C) Land Acquisition Act (1 of 1894), S. 6 (1) Second Proviso — Compliance — Token contribution of Rs. 100/- by Government towards cost of acquisition is sufficient compliance. AIR 1963 S C 151 and AIR 1971 S C 1033 and AIR 1975 S C 1182 Followed.

R. K. Jain, for Petitioners, Standing Counsel, for Respondents

HX/IX/D862/80/JHS

1981 ALL. L. J. NOC 114

R. S. SINGH, J

Sidhi Prakash and others, Appellants v Uttar Singh and others, Respondents

Second Appeal No 103 of 1971, D/- 26-2-1980

Civil P. C. (5 of 1908), O. 22, R. 3 — Death of one of plaintiffs — Death of plaintiff-respondent during first appeal — Decree in favour of other plaintiffs except deceased — No claim in disputed land made by deceased — Death has no effect on appeal — Abatement only against deceased and not in toto. AIR 1962 S C 89, AIR 1963 S C 1901 : 1964 All L J 109 and 1963 All L J 222, Distinguished.

N. Lal, for Appellants, Dhruwa Narayan and Y. S. Saxena, for Respondents

CX/FX/B434/80/JRM

1981 ALL. L. J. NOC 115

D. N. JHA, J

Ram Naresh and another, Appellants v Kalika Prasad and another, Respondents

Second Civil Appeal No. 452 of 1977, D/- 21-2-1980

(A) Contract Act (9 of 1872), S. 16 — Transactions by pardanashin ladies and transactions by weak, ignorant and illeterate persons — Distinction — Presumption and burden of proof, (Evidence Act (1872), Ss. 101-104 and 114).

So far as the Pardanashin ladies are concerned the law persumes them, from the very fact that they live in seclusion, to be incapable of protecting themselves and, therefore entitled to protection. This presumption is undoubtedly rebuttable while in other cases in order to seek protection as

presumed to be available to Pardanashin ladies it has to be proved from the fact that a person claiming protection has to prove that as a matter of fact he was on account of weakness of his power of understanding and intellect, liable to be imposed upon by those who would take advantage of his position, and therefore needs protection. It is this fine distinction that lies between the cases of a Pardanashin lady and an equally weak, ignorant, illiterate and infirm person

(B) Evidence Act (1 of 1872), Ss. 101-104 — Burden of proof — Both parties aware of contest and adduced evidence — Question of burden of proof loses importance.

GX/IX/D378/80/IHS

1981 ALL. L. J. NOC 116

M P MEHROTRA, J

Ram Kumar, Petitioner v State of U P. and others, Respondents

Civil Misc Writ Petn No 5264 of 1980, D/- 21-5-1981.

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), Ss. 12A and 13 — Order passed under S. 12A — Is an independent order passed simpliciter under S. 12A and is not a part of the proceedings under S. 11 or S. 12 — Hence not appealable 1977 All L J 375; 1978 All L R (SOC) 92. Ref. to.

Ravi Kant, for Petitioner

GY/HY/D300/81/HSS/VSM

1981 ALL. L. J. NOC 117

R M SAHAI, J

Brij Raj Singh and others, Petitioners v 3rd Additional District Judge, Banda and others, Respondents

Civil Misc Writ No 2576 of 1980, D/- 9-3-1981.

(A) Civil P. C. (5 of 1908), O. 41, R. 22 — Cross-objection against co-respondent — Appeal filed under S. 14, U. P. Imposition of Ceiling on Land Holdings Act — Held cross-objection taken out by State against co-respondent was not maintainable since case was not an exceptional one where no relief could be granted to appellant without disturbing order passed in favour of co-respondent. AIR 1963 S C 1516 and AIR 1950 Mad. 379 (F B) Applied.

(B) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 3 (of Act 20 of 1976) and Ss. 10 (2) and 12 (2) — Order passed by prescribed Authority under S. 10 (2) not appealed against and order becoming final — Order is not open to challenge in view of rule of finality contained in S. 12 (2) and rule of res judicata contained in S. 11, Civil P. C. — Also, order having been passed after 10-10-75, it cannot be re-opened in view of S. 3. (Civil P. C. (1908), S. 11).

R K. Trivedi, for Petitioner

FY/HY/C665/81/HR/RSK

1981 ALL. L. J. NOC 118

K. M DAYAL, J.

Tilak Dhari Singh and others, Petitioners v Additional District Judge, Jaunpur and others, Respondents.

Civil Misc. Writ No 9978 of 1979, D/- 14-11-1980.

(A) Civil P. C. (5 of 1908), Ss. 11 and 47 — Principle of res judicata — Applicability as between two stages of execution.

The principle of res judicata applies as between two stages in same litigation to this extent that a court whether trial court or higher court having at an earlier stage decided a matter in one way will not allow the parties to reagitate the matter again at a subsequent stage of the same proceeding. Thus, where in an execution second appeal certain objections raised by judgment-debtors were decided against them and their appeal was dismissed and thereafter they filed revision against subsequent order of executing court to proceed with execution raising the very same objections, the decision in second appeal was binding on the parties and the revisional court had no jurisdiction to hold otherwise. AIR 1971 S C 2385 and AIR 1977 S C 1226 Distinguished.

(B) U. P. Consolidation of Holdings Act (5 of 1954) S. 5 — Decree for specific performance of agreement for sale of certain plots of grove and fixed rate tenancy passed in 1957 — Its execution not barred by S. 5.

R. N Singh, for Petitioners.

LX/DY/G598/80/VSS

1981 ALL. L. J. NOC 119

DEOKI NANDAN J

Usman Khan, Appellant v Khwajul Rahman and another, Respondents

Second Appeal No 1701 of 1970, D/- 20-2-1980

(A) Evidence Act (1 of 1872), S. 90A (U. P.) — Registered document — Court cannot presume its due execution when document is basis of suit.

(B) Muhammadan Law — Registered gift deed not showing that gift was made And completed in accordance with requirements of Muhammadan Law — Proof of due execution of gift deed can hardly validate gift. (Transfer of Property Act (1882), S. 123). (Evidence Act (1872), S. 67)

V K S Chaudhary, for Appellant, N B Nigam, M P Srivastava, for Respondents

EX/IX/C334/80/JHS

1981 ALL. L. J. NOC 120

DEOKI NANDAN, J

Ram Singar Rai, Appellant v Ram Daras Rai and others, Respondents

Second Appeal No 2414 of 1970, D/- 18-9-1980

U. P. Consolidation of Holdings Act (5 of 1954), S. 49 — Consolidation proceedings had already ended by the time suit with respect to rights to land was filed — Suit if barred by S. 49.

Where the consolidation proceedings had already ended before the suit was filed, there was no question of a Civil Court or a revenue court not entertaining any suit or proceeding with respect to rights or any matter for which a proceeding could or ought to have been taken under the Consolidation of Holdings Act. Where the plaintiff was not the executant of sale deed in question, (as in the instant case), in order to establish his title to the land, he need not have to get the same deed cancelled as he could have got a declaration of his right to land in case he could show that it did not affect his right to suit land. Whether by showing that the sale deed was void for want of capacity in the executant or by showing that the sale deed did not affect his rights to the property. Even if the suit was not maintainable in Civil Court in view of S 49 of the Act as the plaintiff on the case set out by him would become entitled to possession of land and as the executant of sale deed died during pendency of first appeal, it would not be appropriate to return the plaint for presentation to proper court by the High Court in second appeal.

R N Singh, for Appellant, B D Pandey for Respondents

KX/HY/G276/80/VSS

1981 ALL. L. J. NOC 121

S. J. HYDER J

Chunni Lal Aneja, Appellant v Lala Atar Sen and another, Respondents

Second Appeal No 2741 of 1972, D/- 5-9-1980

Easements Act (5 of 1882), S. 15 — Easement — Proof. (Evidence Act (1 of 1872), Ss. 101 to 104).

An easement is a right which creates an impediment in the right of the owner of the servient heritage to its absolute user to which he would otherwise be entitled. Easement being restriction on the rights of another person it has to be proved by clear and cogent evidence.

Thus where in support of his right of prescriptive easement the plaintiff examined only two witnesses A and B who were 24 years and 19 years of age respectively when the suit was instituted, held that the evidence of those witnesses should not have been taken into account in proof of the easement claimed by the plaintiff inasmuch as A would have been only 4 years at that time when the exercise of right of easement is said to have commenced and B would not have been even born at that time.

Sankatha Rai, for Appellant, N C Rajvanshi, for Respondents

JX/LX/F679/80/JHS

1981 ALL. L. J. NOC 122

N N MITHAL, J

Harbans Lal Tauh, Applicant v Allahabad Bank Ltd., Ghaziabad, Respondent

Civil Revn. No 1137 of 1979, D/- 8-9-1981

(A) Civil P. C. (5 of 1908), S. 152 — Scope — Error or mistake committed by concerned parties in pleadings — Can be corrected by court — Correction as to mistakes occurring in document forming basis of suit; can also be made by court.

Under S 152 C P C the court has the power not only to correct its own mistakes which arise in the judgment, decree and order but it can also correct those mistakes which may have been initially committed by the parties in the pleadings which was then repeated in the judgment, decree and order of the court. Even the mistakes occurring in the documents which formed the basis of the suit and which had somehow been repeated in the pleadings, can also be corrected provided the mistakes result in misdescription of the property and there is no dispute about the actual identity of the property in suit. Where the very identity of the property was in dispute, S 152 C P C cannot be called in aid.

The Court, therefore, has power to correct in appropriate case where the nature of the mistake and other circumstances justify allowing of the amendment sought. No such amendment can, however, be allowed when rights of third party get involved and are likely to be adversely affected.

(B) Civil P. C. (5 of 1908), S. 152 — Application under — Limitation for — Not provided — Application can be entertained by court after any lapse of time.

There is no period of limitation prescribed for moving an application under S 152 C P C either in the Limitation Act or elsewhere. Consequently an application under S 152 can be entertained by the court after any lapse of time provided the applicant has acted in a bona fide manner with sufficient diligence provided no third party has acquired a vested interest therein. Subject to these conditions the court is free to exercise its powers under S 152 C P C.

Law of limitation is restrictive of a litigant's right and unless there is any particular section or article of the law of limitation which may bar the moving of the application, the bar cannot apply. Rules of limitation are applicable to the acts to be performed by the litigants and do not apply to acts which the court has to or may perform suo motu. Ss. 151, 152 and 153 C P C deal with special powers of the court which can always be pressed into service by the court suo motu in order to correct mistakes etc. and also to do justice between the parties. From the very nature of these powers, there cannot be any restrictions of limitation on the act of the court.

(C) Civil P. C. (5 of 1908), S. 152 — House 'A' mortgaged to bank — However House 'B' was shown to be mortgaged at the foot of plaint — Such mistake could not be said to be arithmetical or clerical mistake.

A. K. Banerji, for Applicant; M. C. Pant, for Respondent.

JY/JY/E558/81/VNP

1981 ALL. L. J. NOC 123

N. D. OJHA, J.

Smt. Sita Goel and others, Petitioners v. 5th Addl. District Judge, Meerut and others, Respondents.

Civil Misc. Writ No. 10015 of 1979, D/- 11-8-1981.

(A) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 20 (4) — Amount deposited by tenant falling short of requirement of S. 20 (4) — Tenant cannot be relieved of liability of eviction on the grounds mentioned in S. 20 (4). 1976 Ren C J 594 (All); 1978 (U. P.) R. C. C. 308 (All) Rel. on. 1976 All L J 124, Distinguished.

(B) Civil P. C. (5 of 1908), S. 11 — Principles of res judicata — Applicability.

The principle of res judicata applies also as between two stages in the same litigation to this extent that a court whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to reagitate the matter again at a subsequent stage of the same proceedings.

A. S. Rai, for Petitioners; A. K. Sharma, for Respondents.

[Y/JY/E39/81/CWM

1981 ALL. L. J. NOC 124

V. K. MEHROTRA, J.

Suraj Bhan Gupta, Appellant v. State of U. P. and others, Respondents.

Second Appeal No. 3103 of 1979, D/- 10-7-1981.

(A) U. P. Education Code (1958), Para 143 (i) — It was a mere executive instruction — No status of a statutory rule can be given to it — Termination of member of clerical staff without obtaining approval of District Inspector of Schools — Validity.

Para 143 (i) was a mere executive instruction and could not be given the status of a statutory rule and an order of termination of services of a member of the clerical staff of girls' institution cannot be successfully assailed on the ground that the approval of the District Inspector of Schools had not been obtained nor could the order be said to be subject to an appeal before the Deputy Director of Education because of the provision in that regard contained in paragraph 143 (i) itself. Hence a member of the clerical staff aggrieved by an order of termination of his service has no statutory right to seek redress against the impugned order before the departmental authorities. He has to seek his remedy before the Civil Court. 1979 All L J 1351 (F B). Followed

Para 14 (i) does not contain any provision to the effect that the order of termination will remain ineffective during the pendency of an appeal by the aggrieved employee. No other provision is there either in the U P Education Code or in the U P Intermediate Education Act or the Regulations framed thereunder providing that the aggrieved employee was precluded from approaching the Civil Court for redress without seeking redress from the departmental authorities.

(B) Limitation Act (36 of 1963), Sch., Art. 113 — Applicability — Termination of service — Suit for declaration that order of termination was wrongful and illegal — Computation of period of limitation to file a suit

Unless there is a statutory right of departmental appeal or revision against an order of termination of service and there is a provision to the effect that the order will not take effect until the disposal thereof or the order is made inoperative in appropriate proceedings or there is a rule requiring exhaustion of departmental remedies before approaching the civil court, a suit for declaration that the order of termination was wrongful and illegal must be brought within the period of limitation of three years prescribed for it under the Limitation Act computed with effect from the date of communication of the order to the aggrieved employee.

A S Rai, S S Bhatnagar, for Appellant
K M Upadhyaya, for Respondents

IY/IY/E233/81/AAJ

1981 ALL. L. J. NOC 125

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Iftikhar Husain, Applicant v State, Opposite Party

Revision No 32 of 1976-77 (Pilibhit) D/- 3-6-1981

Limitation Act (36 of 1963), S. 5 — Condonation of delay — Sufficient cause — Affected person filing suit for injunction and not pursuing alternative remedy of filing objection to auction sale of his property through court — Plea of delay due to wrong advice by counsel — Circumstances indicating that advice was not bona fide and litigant was inactive — Held, sufficient ground to condone delay not made out

M A Qadeer, for Applicant, A N Srivastava, for Opposite Party

IY/JY/E120/81/DVT

1981 ALL. L. J. NOC 126

1981 Rev Dec 103

(BOARD OF REVENUE)

KAUSHAL KISHORE, I B SINGH AND R P GUPTA, MEMBERS

Bhola Nath, Appellant v Mangaroo, Respondent

Second Appeal No 21 of 1976-77/Mirzapur, D/- 18-3-1981

U. P. Consolidation of Holdings Act (5 of 1954), S. 49 — Bar of suits under — Applicability — Defendant recorded in representative capacity prior to, during and after close of consolidation operations — Suit for declaration by co-tenant under S. 229B of Zamindari Abolition Act — Bar of S. 49 is not attracted — (U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 229B).

The bar under S 49 to a suit by a co-tenant for declaration under S 229B of the U P Z A & L R Act will not be applicable if a

defendant is recorded in a representative capacity prior to during and after the close of consolidation operations and the plaintiff not being recorded, remained in possession as a co-tenant The co-tenants under the family arrangement being peacefully in separate possession over their respective areas, really might not have felt the need of any change in the recorded entries during the consolidation operations, even though the entry in a representative capacity may not be recognised by the present revenue law It must be remembered that mere entries in revenue records do not create or confer rights It is only that existing rights are represented by the entries and if there is any mistake in the entries, the rights cannot suffer

Triveni Shanker, for Appellant, Sankatha Rai for Respondent

IY/JY/E123/81/SNV

1981 ALL. L. J. NOC 127

(LUCKNOW BENCH)

K. N. GOYAL, J

Pt Mani Lal Tripathi, Petitioner v Smt Kamla Devi and others, Opposite Parties

Writ Petn No 3462 of 1980, D/- 18-3-1981

(A) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 34 (1) (a) and (b) — Suit for ejectment — Landlady filing affidavits in support of her case — Prayer of tenant for opportunity to cross-examine landlady rejected — Order would not be invalid — (Constitution of India, Art. 226).

Where the Prescribed Authority, in a suit for ejectment rejected the prayer of tenant for opportunity to cross-examine the landlady and her witnesses who had filed affidavits in support of her case, the order could not be said to be invalid, as both parties are at an equal advantage or disadvantage in having their own and their witnesses' affidavits considered, although the deponents are not examined the observance of natural-justice is ensured in the proceedings. Of course, in the exceptional cases it is always open to the Prescribed Authority to call a deponent for cross-examination

No rigid principle, can be laid down in respect of all statutory Tribunals It is open to the Tribunal to follow such procedure as may seem to it just, so long as it is not contrary to law or to basic rules of natural justice

(B) Constitution of India, Art. 226 — Writ Petition — Interference — Prayer for opportunity to cross-examine witnesses — Rejection without reason — It would not be proper for High Court to interfere with such order merely on such technical ground.

H. N. Tilhari, for Petitioner, A. A. Siddiqui Z. Zilani and Z. R. Farooq, for Opposite Parties

IY/JY/E318/81/PGS

1981 ALL. L. J. NOC 128

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Kalika Singh, Appellant v. State, Respondent

Second Appeal No 160 of 1973-74/Farrukhabad, D/- 6-3-1981.

(A) Limitation Act (36 of 1963), S. 12 — Application for certified copies — Made before expiry of limitation — Time required for certified copies — Ought to be excluded.

It must be held regular if the copy of the judgment of the trial court had been applied for within the extended period of limitation, and time taken in obtaining the copy of the judgment/decree of the trial court must also be excluded in computing the period of limitation.

(B) Civil P. C. (5 of 1908), S. 100 — Mixed question of law and facts — Question as to adverse possession — Whether could be split into question of law and question of fact.

Question whether there is adverse possession is mixed question of law and facts. However, this question could not be split into (1) question of fact namely, regarding possession; (2) question of nature of possession. It is open to the second appellate court to deal with inference from facts found by the lower courts.

(C) Limitation Act (36 of 1963), Sch. I Art. 65 — Adverse possession — Proof of — Continuity in possession — Essential.

V. B. Varma, for Appellant; Ratan Singh, for Respondent.

IY/JY/E122/81/JDD

1981 ALL. L. J. NOC 129

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Smt Shakooran, Appellant v. Shyam Sunder, Respondent

Second Appeal No 314 of 1971-72/Budaun, D/- 18-7-1981

U. P. Consolidation of Holdings Act (5 of 1954), S. 49 — Bar under — Applicability.

Consolidation means re-arrangement of holdings in a unit amongst several tenure-holders in such a way as to make their holdings more compact. This could be done only under the UPCH Act and the fate of any single plot could not be decided under S 229B of the UPZA & LR Act. In the instant case the courts below failed to find out if the valuation of the plot concerned had been included in the consolidation scheme and to check if holder had already been allotted land equal to the valuation of that plot thus inadvertently concurring in their mistake. **Held**, that that plot was not outside consolidation, there is no mistake either in the entries and the bar under section 49 of the UPCH Act would apply to the instant suit

Shrikant Mishra, for Appellant, Tej Ram, for Respondent

IY/JY. E126/81/JDD

1981 ALL. L. J. NOC 130

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Smt. Amrican, Appellant v. Mohabbey Ali Khan, Respondent

Second Appeals Nos 373 to 382 of 1972-73/Budaun, D/- 19-2-1981

(A) U. P. Tenancy Act (17 of 1939), S. 35 (d) — Sirdari rights, inherited by widowed mother from her son — Remarriage of widow — Does not affect and extinguish her rights.

(B) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 172 (2) (b), 171 — Widowed mother inheriting sirdari rights on death of her son — Subsequent remarriage of widow — Death of widow — Succession would be governed by S. 171 — Second husband of widow would not be her successor — S. 172 (2) would also be applicable.

(C) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 172 (2) (a) (ii) — Widow holding sir and khudkast land, which became bhumidhari — Absolute interest in land of widow — Remarriage of widow — Second husband of widow would inherit the land on her death — Daughter from her first husband would have no right in such land.

(D) U. P. Tenancy Act (17 of 1939), Ss. 19, 180 — Ejectment of tenant — Tenant not in unauthorised possession of land — Tenant becoming sirdar of erstwhile occupancy holding under S. 19 — Held tenant could not be ejected, since the grounds were not inconsistent with law.

Ratan Singh, for Appellant, Haji Iqbal Ahmad, for Respondent

IY/IY/E117/81/VNP

1981 ALL. L. J. NOC 131

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Smt Sukhdei, Appellant v Ram Swaroop, Respondent

Second Appeal No 186 of 1976-77/Bareilly D/- 31-1-1981

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 331 — U. P. Revenue Court Manual, R. 38 — Applicability — Lower Appellate Court reversing finding of trial court without assigning reason — Finding is liable to be set aside — R. 38 would be applicable.

Where the lower Appellate Court reversed the finding of trial court by ignoring the important evidence which was considered by the trial court and relied on the other evidence which was rejected by the trial court without assigning any reason for differing from the trial court, the finding of the lower appellate court was liable to be set aside. R 38 would apply all the more and it was necessary for the Lower Appellate Court to subject the evidence with regard to the points raised, to a fresh examination independently to the appraisement of the evidence by the trial court and its judgment must show that it has done so AIR 1968 S C 466. Rel on

T. S. Dabas, for Appellant, K. G. Srivastava, for Respondent.

IY/IY/E116/81/PGS/SNV

1981 ALL L. J NOC 132

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Bhajja, Appellant v Chandra Prakash, Respondent

Second Appeal No 92 of 1974-75/Shahjahanpur D/- 31-1-1981

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 229B — Sirdari right against tenant by adverse possession — Continuous possession of trespasser — Cannot be presumed merely because he is not evicted. (Limitation Act (1963), Arts. 64, 65).

In respect of adverse possession of a trespasser, there can be no presumption of continuity The adverse possession has to be proved from year to year In case of a residential house the possession of trespasser would be presumed to continue unless evicted therefrom However this relates to possession of a residential house and must be distinguished from the cultivatory possession on a plot The cultivatory possession may not continue from year to year even if not evicted, just because the person in adverse possession may not choose to cultivate the plot for one or more years and may resume cultivation later on Thus eviction in the case of adverse possession cannot form the sole basis of a test whether the adverse possession continued or not AIR 1954 S C 355 Disting

Thus where the entries in the record of rights showed sporadic cultivatory possession of Zamindar for some years as against tenant, his adverse possession for six continuous years could not be presumed Therefore, he would not be entitled to sirdari rights

S N Pandey, for Appellant K G Srivastava, for Respondent

IY/JY/E127/81/DVT

1981 ALL. L. J. NOC 133

(BOARD OF REVENUE)

I B SINGH, MEMBER

Nathu, Applicant v Gaon Sabha, Opposite Party

Reference No 1910 of 1974-75/Bulandshahr, D/- 3-11-1980

(A) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 194 — Application of Gaon Sabha u/s. 194 for possession of land is not maintainable in absence of resolution of Land Management Committee as required by Para. 128 U. P Gaon Sabha and Bhumi Prabhandak Samiti Manual. (U. P. Gaon Sabha and Bhumi Prabhandak Samiti Manual, Para. 128). 1975 Rev. Dec 287 (B R) Rel. on

(B) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 194 — Person in possession of disputed land during lifetime and even after death of tenant — Remedy of Gaon Sabha lies in seeking ejectment of said persons u/s. 209 and order of ejectment u/s 194 is illegal.

N C Raibanshi for Applicant, D N Srivastava D G C (R), for Opposite Party

BY/JY/A568, 81-HR R5K

1981 ALL. L. J. NOC 134

(BOARD OF REVENUE)

I B SINGH, MEMBER

Gajadhar Prasad, Applicant v State, Opposite Party

Reference No 939 of 1973-74-Farrukhpur, D/- 19-5-1980

U. P. Zamindari Abolition and Land Reforms Rules (1952), Rr. 214 (a)(b), 214-I and 214-J — Proceedings under R. 214 (a) and (b) — It is a judicial proceeding objection filed under R. 214-I and R. 214-J — Order passed therein by S.D.O. is not administrative or executive but is an order passed by Subordinate Revenue Court — Revision against it is maintainable under S. 333-A of Act 1 of 1951 — ((i) Evidence Act (1872), S. 3 — (ii) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 333 — (iii) U. P. Land Revenue Act (3 of 1901), S. 4(8).)

The objection filed under R 214-I is decided by S D O i.e. a Revenue Court under R 214-J because Revenue Court is also an "authority" enumerated in S. 4(8) of the U P. Land Revenue Act Therefore the Prescribed Authority while deciding an objection under R. 214-I following the procedure prescribed in R 214-J is legally authorised to take evidence and is a "Court" under S. 3 of Evidence Act and works as a Revenue Court in a judicial proceeding and is a Subordinate Court to the Board of Revenue. Therefore, against an order passed

by such Authority revision lies under S 333 of Act I of 1951 1972 All L J 658 Rel on

Hari Shanker, for Applicant, Ratan Singh for Opposite Party

AY/AY/A210/81/AAJ

1981 ALL. L. J NOC 135

DEOKI NANDAN, J

Ram Swaroop, Appellant v Aziz Ahmad and others, Respondents

Second Appeal No 166 of 1968, D/- 10-4-1980

Easements Act (5 of 1882), S. 60 — Irrevocable license — Illustration.

In the present case, the plaintiffs were the owners of the land in suit The property in question was held by a tenant at will under a lease deed After his migration to Pakistan, his tenancy rights in the land with the building which belonged to him vested in the Custodian of Evacuee Property. The defendant against whom the suit for ejectment was filed had entered into possession of the house property as an allottee from the Custodian who was the owner of the house property and tenant of the land The defendant subsequently purchased the house property from the Custodian in auction sale Permission was granted for raising permanent construction on the land and it was coupled with transfer of land inasmuch as the transfer was made by a registered deed of lease

Held that the defendant's position after purchasing the evacuee property from the Custodian was that of a licensee and the license was irrevocable The rights of the evacuee in the property vested absolutely in the Central Government free from all encumbrances u/s. 12 of the Displaced Persons (C & R) Act, 1954 and the same could be transferred by it under that Act The license was granted on the conditions of lease. The lease granted a tenancy at will but the license to raise permanent construction coupled with the grant of lease made the license irrevocable AIR 1958 Madh. Pra 343 Rel. on

B D Tripathi and Gyanendra Nath Verma, for Appellant, A K Banerji, Santosh Kumar, for Respondents.

EX/HX/C501/80/MBR

1981 ALL. L. J. NOC 136

DEOKI NANDAN, J

Nand Kishore, Appellant v Parmanand and another, Respondents

Second Appeal No 2205 of 1970, D/- 28-11-1980

(A) Evidence Act (1 of 1872), S. 3 — Fact in issue when can be said to have been proved — Test to be applied in civil and criminal matters

A prudent man faced with the conflicting probabilities concerning the fact in issue acts on the supposition that the fact exists if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact in issue That is the test to be applied in civil matters. The initial burden of proof does lie on the plaintiff in a civil case but when all the evidence is led on the issues between the parties, the burden of proof is not the decisive factor The entire evidence led by the parties on several issues between them has to be weighed and an inference is drawn on the basis of preponderance of probabilities

A criminal trial, on the other hand, involves the liberty of citizens and, therefore, the court insists upon proof beyond reasonable doubt in criminal matters, and if the probabilities are so nicely balanced that a reasonable, not a vacillating mind cannot find where the preponderance regarding the existence of fact to be proved lies, the benefit of such reasonable doubt goes to the accused

(B) Limitation Act (9 of 1908), Arts. 142, 144 — Suit for possession based on title — Whether Art. 142 or Art. 144 applies.

The present suit for possession over a house was based on title and not on past possession The fact of dispossession was pleaded as the cause of action for the suit Although it was pleaded by the plaintiff that he was dispossessed by the defendants, they did not admit the allegation, but further pleaded that the plaintiff or his predecessor had never been in possession of the suit house at any time within 12 years before institution of the suit and that they were in adverse proprietary possession of the house for more than 12 years before the date of institution of the suit They did not set up any source of title to the suit house nor did they plead the precise date when their possession became adverse to the plaintiff or his predecessor-in-

interest in the circumstances, the present suit on the own case of the defendants was not governed by Art 142 but was governed by Art 144 AIR 1970 All 289 (F B), Foll

(C) **Limitation Act (9 of 1908), Art. 144 — Evidence of adverse possession — Defendant has to prove since when and in what manner his possession became adverse to plaintiff.**

S P Gupta, M M Lal, for Appellant

AY/DY/A337/81/MBR

1981 ALL. L. J. NOC 137

(1981) All W C 5

K M DAYAL, J

Ram Singh and another, Petitioners v The District Judge, Jalaun at Orai and others, Respondents

Civil Misc Writ Petn No. 6638 of 1980, D/- 12-11-1980

Civil P. C. (5 of 1908), S. 115, O. 9, R. 13 — Ex parte decree — Application for setting aside; by Lekhapal of Gaon Sabha — Lekhapal not properly authorised to make such application — Trial Court not giving finding on his authority — Restoration of suit — Invalid, as there was serious mistake of jurisdiction.

U K Saxena, for Petitioners, R B Mehrotra and K B Garg, for Respondents

LX/LX/G615/80/VNP/SSG

1981 ALL. L. J. NOC 138

B. N. SAPRU, J

Dina Nath, Appellant v Lalta Prasad and others, Respondents.

Second Appeal No 92 of 1971, D/- 10-11-1980

(A) Civil P. C. (5 of 1908), Ss. 151, 152 and O. 6, R. 17 — Amendment — Suit property — Misdescription in plaint — Amendment application for correction of description — Court under Ss. 151, 152 has power to allow the application — Suit proceeding ex parte — Notice of amendment to other party not necessary.

In a partition suit in respect of two adjacent houses, both the houses were described in the plaint as situated in one locality Subsequently the plaintiff on finding that one of the houses belonged to another locality made an application for correction of the misdescription The application was allowed by the Court without giving notice to the other party

Held, the order was valid The Court could allow the amendment in exercise of its powers under Ss 151, 152 AIR 1973 All 116 (F B), Rel on

Further as the suit was proceeding ex parte and as the amendment was intended only to correct the misdescription without altering the suit property, notice of amendment to the other party would not be necessary

(B) Civil P. C. (5 of 1908), O. 32, R. 3 — Defective appointment of guardian ad litem — Prejudice occasioned thereby while defending not shown — Defective appointment does not render the representation of minors in suit void. AIR 1974 Punj & Har 315 (F B), Rel. on.

V K S. Chaudhary and V. B. Khe, for Appellant; U. S Saxena, B. D. Madhyan and Rajeshwari Prasad, for Respondents.

LX/LX/G677/80/VVG/LGC

1981 ALL. L. J. NOC 139

V K. MEHROTRA, J.

Smt Mohaniya, Appellant v. Banwari Lal and others, Respondents.

Second Appeal No. 434 of 1974, D/- 17-7-1981

U. P. Consolidation of Holdings Act (5 of 1954), S. 5 (2) — Abatement — Suit for cancellation of sale deed on ground that it was void — Decree passed in plaintiff's favour reversed by lower appellate court — Notification u/s. 4 (2) issued during pendency of second appeal — Suit lands covered by notification — Both second appeal and suit out of which it arises abate u/s. 5 (2). 1978 All L J 661, Rel. on; AIR 1975 All 90, Disting.

V K. S. Chaudhary, for Appellant; J. N. Agarwal, for Respondents.

IY/IY/D916/81/HR/RSK

1981 ALL. L. J. NOC 140

N. D. OJHA, J.

Vishnu Deo Poddar, Petitioner v. 1st Addl. Distt. Judge, Etah and others, Respondents.

Writ Petn. No. 6217 of 1980, D/- 14-9-1981.

Civil P. C. (5 of 1908) O. 15, R. 5 (U. P.) — Ejectment suit — Tenant not complying with R. 5 — Non-compliance not explained — Order of trial court striking off defence is in accordance with law — Order reversing trial Court's decision in absence of explanation for default is erroneous.

Where the tenant had on several occasions failed to deposit monthly rent 'within a week from the date of its accrual' as required by O. 15 R. 5 (U. P.) and there was no representation by the tenant, nor any material on record sufficiently explaining the default, the trial court striking off the defence of the tenant acted in accordance with law. Reversal of such order by the appellate court without there being sufficient explanation for the default of the tenant is erroneous. 1981 All. L. J. 82, 1981 All. L. J. 908 (S. C.) and AIR 1980 S. C. 954, Relied on.

Prakash Gupta, for Petitioner; S. N. Agarwal, Standing Counsel, for Respondents.

JY/KY/E740/81/AGM/MVJ

1981 ALL. L. J. NOC 141

M. P. MEHROTRA, J.

Mustafa, Petitioner v. State of U. P. and another, Respondents.

Civil Misc. Writ Petn. No. 10083 of 1980, D/- 31-8-1981.

(A) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), Ss. 29, 3(8) — Subsequent declaration of further land as surplus — Land held by father not grove land on 21-1-71 — Subsequent conversion into grove — Death of father — Land inherited by son — Proceedings under S. 29 — Son cannot plead that land should be treated as grove land as it was so on date of inheritance.

(B) Constitution of India, Art. 226 — Writ petition — Proceedings under S. 29 of U. P. Act 1 of 1961 — Authorities finding that entire land is irrigated — Writ against, on ground that part of land is not irrigated — Availability of facility of irrigation and not actual irrigation is to be considered — Khasara entries not showing that facility was available only to part of Land — No interference. (U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961) S. 29)

JY/KY/E898/81/VVG

1981 ALL. L. J. NOC 142

(BOARD OF REVENUE)

R. S. VERMA, MEMBER

State of Uttar Pradesh, Petitioner v. Salamullah and another, Opposite Parties.

Reference No. 118 of 1975-76, Allahabad, D/- 27-8-1981.

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 333 — Revision — Interference — Erroneous decision on question of law or fact — No interference (Civil P. C. (1908), S. 115) (U. P. Zamindari Abolition and Land Reforms Rules (1952), R. 115-C).

There is an impression prevailing that the revisional court can interfere whenever it finds that the order of the trial court is wrong or incorrect. This is not the correct legal position. For the revision to succeed there must be an error relating to jurisdiction committed by the lower court (a) either by way of assumption of jurisdiction which it does not have, or (b) failure to exercise a jurisdiction which it has or (c) by exercising its jurisdiction illegally or with material irregularity.

When a court has no legal authority to 'enter upon an enquiry in question' at all, but in spite of that proceeds to do so under an erroneous construction of the law or a misapprehension of facts, it exercises a jurisdiction not vested in law. When a court has jurisdiction to enter upon the enquiry in question, but erroneously thinks under a misapprehension of law or facts, that it has no such jurisdiction and so declines to exercise that jurisdiction, there is a failure to exercise the jurisdiction vested in it. When the law has prescribed the manner in which a jurisdiction has to be exercised, and the court acts in violation of that provision, it can be said that the court acted illegally or irregularly in the exercise of its jurisdiction. But if the court exercises its jurisdiction according to the provisions of law but arrives at an erroneous decision on question of law or of fact, it cannot be held that the court

acted illegally or with material irregularity If there is an illegality in the exercise of the jurisdiction the order of the court becomes void, and the revisional court will interfere without further reasoning But when there is an irregularity in the exercise of jurisdiction such irregularity must be shown to be a material one, i e., one which would have affected the decision of the case on merits. The 'illegality' or the 'material irregularity' must be in the procedure adopted by the court but not of either law or fact. Where the law expressly prohibits a thing to be done, a violation of such a provision amounts to an illegality (1884) 11 I A 237 (P C), AIR 1971 S C 2324, AIR 1949 P C 156 and AIR 1968 S C 1355 Foll

In a case under R 115-C of the U. P. Z. A and L. R. Rules, the trial court discharged the notice in Form 49-Ka and did not proceed with ejectment on the ground that bona fide question of title was involved

Held, existence of bonafide dispute of title was always a question of fact and trial court was free to decide it Trial court's order might be wrong or incorrect but that could not be a ground for interference. It did not act illegally or with material irregularity

Devendra Nath, D G. C (R) I, Allahabad, for Petitioner. Wasi Ullah, for Opposite Parties

IY/KY/E470/81/AKJ

1981 ALL. L. J. NOC 143

M. P. MEHROTRA, J

Mohammad Mahmood Ali Khan, Petitioner v. State of U. P. and others, Respondents

Civil Misc. Writ Petn. No. 2063 of 1980, D/- 24-8-1981.

Constitution of India, Art. 226 — Writ jurisdiction — Interference — Dispute about grove and Usar land decided by Consolidation Authorities on basis of material and evidence on record — In narrow ambit of writ jurisdiction, High Court will not interfere with such finding — (U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 3(8) and (20).)

R. K Jain for Petitioner Standing Counsel for Respondents

IY/SY/E561/81/SMA/SNV

1981 ALL. L. J. NOC 144

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Dig Vijai Singh, Applicant v. L. M. C., Opposite Party

Reference No. 496 of 1979-80/Etawah, D/- 30-7-1981

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951) S. 333 — Revision — Maintainability — Order of S. D. O. approving proposal of Land Management Committee for allotment of plots reserved for play-ground for construction of school building — Order being administrative order and not one passed in any judicial proceeding revision is premature and not maintainable (U. P. Zamindari Abolition and Land Reforms Rules (1952), R. 115N)

R. N. Srivastava, for Applicant; B Dixit, for Opposite Party.

IY/JY/E471/81/SAD/SNV

1981 ALL. L. J. NOC 145

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Nanbudda, Appellant v. Latif Ahmad, Respondent.

Second Appeal No. 105 of 1973-74/Fatehpur, D/- 11-6-1981.

U. P. Consolidation of Holdings Act (5 of 1954), Ss. 27(2) and 49 — Bar under S. 49 — Applicability — Mistake in village map — Suit for its correction — Not barred under S. 49.

Where there was no adjudication of the consolidation authorities as to the actual land in dispute, and there was mistake in the preparation of the consolidation map, the bar under S. 49 did not apply to the suit for correction of map. Consequently the correctness of the map prepared during the consolidation proceedings could not be presumed under S. 27(2) and in view of the finality of the map, it could not be said that no corrections in the map could be carried out and the suit was barred under S. 49.

Hari Shanker, for Appellant; S. N. Gupta, for Respondent.

IY/JY/E118/81/VNP

1981 ALL. L. J. NOC 146

= 1981 All Cri R 151

MURLIDHAR, J

Sharif Ahmad and others, Applicants v State of U. P., Respondent

Criminal Revn. No. 1671 of 1980, D/- 10-2-1981

Evidence Act (1 of 1872), S. 9 — Application for identification proceedings — Delay in applying — Application made after case was committed to court of session and after securing release on bail — Held application was rightly rejected as too belated. AIR 1971 S C 363, Disting.

Palok Basu, for Applicants, Keshav Sahai and Addl. Govt. Advocate, for Respondent

CY/JY/B542/81/MRD/RSK

1981 ALL. L. J. NOC 147

(BOARD OF REVENUE)

R. S. VERMA, MEMBER

State, Applicant v. Pran Shankar etc., Respondents

Revision No. 714 of 1976-77/Fatehpur, D/- 17-9-1981

U. P. Panchayat Raj Act (26 of 1947), S. 28C — Prohibition on acquisition of interest in L. M. C. (Land Management Committee) property — Prohibition precludes only a member and not his relative from acquiring any interest in L. M. C. property — 1975 Rev. Dec. 43 (B R) Held per incuriam : not followed.

Devendra Nath, D G C (R) I, for Applicant.

IY/JY/E468/81/MRD/RSK

1981 ALL. L. J. NOC 148

(BOARD OF REVENUE

R. S. VERMA, JUDL. MEMBER

Badri, Appellant v Naram, Respondent

Second Appeal No. 126 of 1973-74/Etawah, D/- 15-9-1981.

(A) U. P. Agricultural Tenants' Acquisition of Privileges Act (10 of 1949), Ss. 3, 3-A; 3-B and 3-C — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 18(2) — Person not recorded as tenant — Whether can acquire privileges provided by U. P. Act 10 of 1949.

In the instant case, 'A" the defendant gave application under S. 3-B of Act 10 of 1949 'A' had admitted that he had no share in the holding before he got the bhumidhari sanad. This means that before the issuance of bhumidhari sanad he could not claim co-tenancy rights in the holding. Thus it would further mean that he could not have applied for bhumidhari sanad under S. 3-B of Act X of 1949. A person, who admits, that before the grant of a bhumidhari sanad, he had no share in a holding could not, in all fairness, claim to be entitled as co-tenant of a holding. And, if he really made such a claim the fraud practised becomes apparent. The Commission of the fraud was facilitated by the facts that the recorded tenant was an old man of more than 70 years, that his eye-sight had been affected by old age, that for the last 2-4 years of his life he was so weak and infirm that he could not even walk, that 'A' the unrecorded person was the grand-son of the recorded tenant and was in a position to inspire confidence in the recorded tenant and that the only person to be prejudicially affected by the bhumidhari sanad was father's brother of A who was kept in the dark about this transaction. S. 3-B envisages an antecedent title in the unrecorded person and only then it can be made compatible with Ss. 3 and 3-A of the Act 10 of 1949. In this case the unrecorded person, that is, A had no semblance of any right and title in the land in suit and therefore he could not except in case of fraud, reasonably claim co-tenancy rights in the holding and therefore he could not apply for grant of bhumidhari sanad under section 3-B of the Act. If he did so and obtained a bhumidahri sanad, it must be ignored because he could not, on the basis of that fraud, become a co-tenant of the holding. 1963 Rev. Dec. 333 (All), Dist.

(B) Civil P. C. (5 of 1908), S. 100 — Concurrent findings of facts — However a particular point remaining untouched — Held second appellate court can come to its own conclusion. AIR 1980 S C 1754, Foll.

Mahesh Prasad Dixit, for Appellant, Ratan Singh, for Respondent.

IY/JY/E469/81/JDD

1981 ALL. L. J. NOC 149

M. P. MEHROTRA, J.

Jaswant Singh and another, Petitioners v Addl. District Judge, Naintal and others, Respondents.

Civil Misc. Writ Petn. No. 4658 of 1980, D/- 10-9-1981

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 12 — Surplus area — Determination of — Notice under, to party by treating him as tenure-holder — Objections by petitioners who claimed that some of their land was wrongly included in holding of tenure-holder — No material on record showing petitioners to be Bhumidhars or Sirdars or Adhivasis of the land in question on 8-6-1973 which was material date — Surplus area could be declared by disregarding subsequent order of S.D.M. mutating names of petitioners in respect of the land in question.

Lalji Sahai Srivastava, for Petitioners, Standing Counsel, for Respondents

JY/JY/E548/81/SAD

1981 ALL. L. J. NOC 150

(BOARD OF REVENUE)

R. S. VERMA, MEMBER

Ram Singh, Applicant v Ram Sewak, Opposite Party

Reference No. 834 of 1975-76 Etawah, D/- 4-9-1981

Civil P. C. (5 of 1908), S. 30, O. 19, Rr. 1-2 — Affidavit evidence — Court cannot order evidence by affidavit regarding whole case — Procedure in taking evidence by affidavit.

Under O. 19, R. 1 the court can order proof of certain fact,or facts, but it cannot order evidence by affidavits regarding the whole case AIR Commentary on C. P. C. 1977 Edn. Vol. III page 518 Rel. on

On facts held the procedure adopted by Collector suffered from material irregularity in so far as (i) he had not passed any order that the evidence of the parties will be taken on affidavits, (ii) the parties themselves had not applied that their evidence be taken on affidavits, (iii) no sufficient reason had been shown to exist for passing any such order, and (iv) the whole case was going to be decided on the affidavits of the parties, which could not be done because the court could order proof of only a particular fact or facts by affidavit and it had to mention as to what those fact or facts were, which required to be proved by affidavits.

M. P. Dixit, for Applicant, R. N. Srivastava for Opposite Party

IY/JY/E128/81/MRD/RSK

1981 ALL. L. J. NOC 151

(BOARD OF REVENUE)

I. B. SINGH AND KAUSHAL KISHORE, MEMBERS

Mohd. Mian, Applicant v Miroomal, Opposite Party.

Review Petn. No. 201 of 1979-80/Pilibhit, D/- 24-8-1981.

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 198 (4) — Cancellation of lease on alleged ground of fraud — Passing of orders without any enquiry, as provided for in law, by competent Court — It constitutes a mistake apparent on the face of record — Subsequent orders based thereon also liable to be set aside.

R. P. Lal, for Applicant, Hari Shanker, for Opposite Party.

IY/IY/E125/81/AAJ

1981 ALL. L. J. NOC 152

(BOARD OF REVENUE)

R. S. VERMA, JUDL. MEMBER

Sheo Kumar, Applicant v Bhaggu, Respondent.

Reference No. 142 (Z) of 1974-75/Hardoi, D/- 29-7-1981.

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 198 (3) — U. P. Zamindari Abolition and Land Reforms Rules (1952), App. III, S. No. 24 — Surreptitious allotment of pattas by Land Management Committee — Pattas so allotted executed after one year — Cancellation of pattas by Collector on time barred application — Legality.

In the instant case the allotment of pattas by the Land Management Committee was illegal and surreptitious. Furthermore the pattas so allotted were executed after one year of their allotment. The Collector on an application for cancellation of pattas made after 6 months of their allotment, cancelled the allotment. Held that his order was valid as the collector in the special circumstances of the case would be deemed to have acted in exercise of his suo motu powers.

If the exercise of a power can be traced to an existing power in any authority, under certain circumstances, even though the

exercise of that power. It can be presumed that the particular authority acted on the strength of that undisclosed but undoubted power

S C Varma, for Applicant. G N Varma. For Respondent

IY/JY/E473/81/VVG

1981 ALL. L. J. NOC 153

S J HYDER, J

Bharat Prasad Shukla, Appellant v Suresh Chandra Garg and others, Respondents

Second Appeal No 2563 of 1972, D/- 21-7-1981

(A) Civil P. C. (5 of 1908), O. 6 R. 4 — Pleadings — Averments as to fraud, undue influence and coercion — Particulars of — Must be pleaded by the party relying on the same in its pleading.

(B) Evidence Act (1 of 1872), Ss. 101-104 — Burden of proof — Pardanashin lady — Illiterate old woman unable to see and hear, though she may not be pardanashin strictly — Should also be afforded equal protection available to pardanashin lady — Allegation of execution of lease deed by such lady — Burden of proof as to its intelligent execution — Is on person who alleges its execution. AIR 1963 S C 1203; AIR 1939 All 348; 1965 All L J 1080 Rel. on. (Contract Act (1872), S. 16).

(C) Civil P. C. (5 of 1908), S. 100 — Second Appeal — Finding of fact — Lease deed executed by illiterate old woman unable to see and hear — Concurrent finding by courts below that document though physically executed by her was not her intelligent act — Finding cannot be called in question in second appeal.

Amar Jeet Singh, for Appellant; Trilok Nath, for Respondents.

HY/JY/D616/81/VCD

1981 ALL. L. J. NOC 154

K. C. AGRAWAL AND V. K. KHANNA, JJ.

Vijai Kumar Saraswat, Petitioner v. Principal, Meerut College, Meerut, Respondent.

Civil Misc. Writ No. 8851 of 1981, D/- 27-8-1981.

Constitution of India, Art. 226 — Admission to educational institution — Involvement of student in criminal activities — Admission refused on that count — High Court would not interfere under Art. 226. (Education).

In the instant case a student was refused admission on account of his involvement in criminal activities. The action of principal could not be said to be arbitrary or based on irrelevant consideration and as such the Court exercising jurisdiction under Art 226 of Constitution would not interfere

Ambrish Kumar Sharma, for Petitioner

JY/JY/E579/81/JDD

1981 ALL. L. J. NOC 155

K P SINGH, J

Mohd Saddiq, Petitioner v Board of Revenue, U P and others, Respondents

Civil Misc Writ No 7392 of 1981, D/- 1-10-1981

(A) Constitution of India, Art. 226 — Procedure — Parties — Determination of lease — Subsequent lessees acquired the disputed land during course of litigation giving rise to writ petition — Their non-impleadment is not fatal to maintainability of writ petition as they will be bound by decision in writ petition.

(B) Constitution of India, Art. 226 — Natural justice — Administrative order — Principles of natural justice apply.

There is a very thin difference between the administrative order and judicial order as regards the applicability of the principles of natural justice. The principles of natural justice apply to the exercise of administrative powers as well.

In the present case the lease in favour of the petitioner was going to be determined on the ground that he had not paid the agreed rent in time. It was obligatory on the part of the authorities to afford a reasonable opportunity to the petitioner to put forward his stand. Since the Trial Court did not give any opportunity to the petitioner to contest the report of the Tahsildar against the petitioner, the impugned order of the Trial court determining the lease is bad in law being in breach of principles of natural justice

Banarasi Das, for Petitioner, K B Garg, for Respondents

KY/KY/F59/81/LGC

1981 ALL. L. J. NOC 156

DEOKI NANDAN, J

Girwar Singh (Deceased), (Administrator General U. P substituted) Appellant v Bhagwan Dass (Deceased through his L R s), Respondent

Second Appeal No 1038 of 1970. D/- 20-2-1981

Limitation Act (36 of 1963), Art. 125 and S. 18 — Decree for ejectment and arrears of rent — Execution — Application on 4-12-67 that by a compromise of fresh letting and payments made or promised to be made, the decree stood satisfied — Payments found acknowledged on 17-10-67 and 13-11-67 — Held, receipt dated 13-11-67 operated as acknowledgment in respect of right claimed by judgment debtor — He was entitled to compute limitation from that date — Application was within time, being within 30 days from 13-11-67. (Civil P. C. (1908), S. 47).

K C Agrawal, for Appellant, J. M Chatterji, for Respondent.

CY/KY/B555/81/AKJ

1981 ALL. L. J. NOC 157

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Pooran Singh, Appellant v Ram Lal, Respondent

Second Appeal No 6 of 1974-75/Shahjahanpur, D/- 30-5-1981

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 209 — Suit for ejectment — Compromise between parties, before consolidation Authority that whole plot was abadi land — Factually plot was being used for three different purposes including agricultural one — Defendant found in adverse possession of agricultural part for the first time — Held, sub-division of plot was proper — Defendant could be ejected from agricultural part. (U. P. Land Records Manual, Para 4-57).

Radha Krishna for Appellant; R. N. Srivastava, for Respondent

IY/KY/E486/81/AKJ

1981 ALL. L. J. NOC 158

(BOARD OF REVENUE)

I B SINGH AND KAUSHAL KISHORE MEMBERS

Daulat Ali etc., Applicants v. Amanat Ullah etc., Opposite Parties.

Review No. 11 of 1979-80/Allahabad, D/- 25-3-1981

Civil P. C. (5 of 1908), O. 41, R. 22 and S. 151 — Appeal — Cross-objection of Respondent is almost cross-appeal — It has to be decided along with appeal — Not deciding it along with appeal is illegality.

D. S Shukla, for Applicants, S P Tandon, for Opposite Parties

IY/KY/E477/81/AKJ

1981 ALL. L. J. NOC 159

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Raghubir Sahai, Applicant v. Gaon Sabha, Opposite Party.

Reference No. 100 of 1976-77/Farrukhabad, D/- 29-7-1981.

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 122-B — Suit for ejectment — Area of plot as shown in Khatawani was 0.08 acre, and in village map was 0.10 and on spot inspection it was found 0.09 — Held, on facts, area in Khatawani could be relied upon — It was not proper to accept area as 0.09 acre and find encroachment of 0.01 acre on the basis of existing boundary.

R. N. Srivastava, for Applicant; D. N Srivastava, D.G.C. (R) for Opposite Party.

IY/KY/E472/81/AKJ

1981 ALL. L. J. NOC 160

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Faujdar, Revisionist v. Gaon Sabha, Respondent.

Reference No. 276 of 1976-77/Kanpur, D/- 1-6-1981.

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 122-B — Proceedings under — Opposite parties no

appearing before court inspite of notice — Held when opposite parties did not contest, it could not be said that bona fide question of title was involved necessitating interference in revision.

D. N Srivastava, D G.C. (R), for Respondent

IY/KY/E485/81/MRD/RSK

1981 ALL. L. J. NOC 161
(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Sita Ram, Applicant v Jagdish Prasad, Opposite Party

Reference No 52 of 1975-76/Etawah. D/- 17-6-1981.

(A) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 198 (2) — Proceedings under — Are special proceedings for which jurisdiction and procedure are provided in section itself as r./w. R. 178A of Rules — Hence it is sufficient if parties are given opportunity of hearing before passing final orders and it is not necessary to take oral evidence as required by R. 182 which is general and has no application to S. 198 (2).

(B) Civil P. C. (5 of 1908), O. 19, Rr. 1 to 3 — Affidavits produced under O. 19, Rr. 1 to 3, constitute evidence. 1973 J & K L R 602 and AIR 1964 Bom 38 Rel. on.

(C) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 198 (2) — Cancellation of lease — Suo motu action — Collector acting upon application for cancellation of lease filed beyond time by party not being an aggrieved party — Question of limitation does not arise and application shall be deemed to be information upon which Collector initiated and took suo motu action.

When the Collector chooses to take suo motu action u/s. 198 (2), neither the question of limitation arises nor the question as to maintainability of the application filed by a party not being an aggrieved party arises. If an application for cancellation of lease is filed beyond time by a party not being an aggrieved party, such application shall be deemed to be only an information for considering whether enquiry and action for cancellation of lease should be taken or not. Even in case of an application by an aggrieved party, there is no bar to its being treated as information, if the application is time-barred and considering the seriousness of irregularities and harm done to the cause of other eligible persons much higher in the order of preference, like landless Harijans or landless labourers, the Collector decides to take action suo motu 1975 Rev Dec 43 (B R) Rel on.

M. P. Dixit, for Applicant

IY/KY/E121/81/HR/RSK

1981 ALL. L. J. NOC 162
M P MEHROTRA, J

Rameshwar Nath, Petitioner v State of U P and others, Respondents

Civil Misc Writ Petn. No 5952 of 1981. D/- 18-9-1981.

(A) Constitution of India, Art. 226 — Writ petition — Delay — Passing of ex parte order under S. 11 (1) of U. P. Imposition of Ceiling Act on non-filing of objections subsequent to notice under S. 10 (2) of the Act — Writ Petition for setting aside order — Same is not liable to be dismissed on basis of S. 6 of Limitation Act as the same in terms, is not applicable to writ jurisdiction of High Court — Further filing of objection on behalf of minor tenure-holder under S. 10 (2) is not deemed to be "a right to institute suit or to make application for execution of decree' as expressed by S. 6 of Limitation Act 1963 — (II) Limitation Act (1963), S. 6 — (II) U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 10 (2).

(B) Constitution of India, Art. 226 — Finding of appellate authority under U. P. Ceiling Act — Interference in writ jurisdiction — (U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 10 (2).)

Where the minor tenure-holder was held by the Authorities to have been served through his natural guardian, namely, the mother, and the appellate court had given reasons for not accepting the contention which was pressed on behalf of the mother that she had not been served with the notice under S. 10 (2) of U. P. Ceiling Act, no interference could be made by High Court within the narrow ambit of petition under Art. 226 in the said finding recorded by the Authorities below.

(C) Constitution of India, Art. 226 — Writ petition — Delay — Petition against ex parte order under S. 11 (1) of U. P. Ceiling Act passed on non-filing of objections subsequent to notice under S. 10 (2) — De facto guardian of minor tenure-holder even though filing application for restoration of Ceiling Proceedings and subsequent appeal against order rejecting application, filing writ petition after long delay — Delay held, cannot be condoned — (U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 10 (2).)

Dhanajai Prasad, for Petitioner

JY/KY/E758/81/SAD/SNV

1981 ALL. L. J. NOC 163

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Mangal Sen, Applicant v. Roshan Lal, Opposite Party

Revn No 87 of 1975-76/Bareilly, D/- 27-6-1981

U. P. Zamindari Abolition & Land Reforms Act (1 of 1951), Ss. 198, 229 — Validity of leases can be examined only u/s. 198 — No bar to cancellation of allotment u/s. 198 even if allottees obtain declaratory rights from competent court based on lease — Held though judicial officer has looked into legality of allotment under S. 229 question can be reopened u/s. 198.

S P Kumar, for Applicant

JY/JY/E124/81/MRD/RSK

1981 ALL. L. J. NOC 164

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Baboo Ram Revisionist v. Mohd. Anwar, Respondent.

Reference Nos 913 and 914 of 1975-76 Shahjahanpur D/- 30-5-1981.

U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 198 — Suo motu action — Action taken considering general village community interest is suo motu action — Limitation clause would not be bar to such action. 24 Rev Dec 43 Rel. on.

M K Sharma, for Respondent.

JY/KY/E484/81/JDD/SSG/H

1981 ALL. L. J. NOC 165

(BOARD OF REVENUE)

KAUSHAL KISHORE, MEMBER

Hori Lal, Applicant v. Ram Kali, Respondent.

Revn No. 168 of 1975-76/Bareilly, D/- 28-2-1981

Civil P. C. (5 of 1908), O. 18, R. 4 — Statements of witnesses not bearing certificate that they had been recorded in presence of Presiding Officer — Effect.

Absence of a certificate that statements of witnesses had been recorded in the presence and under the direction of the Presiding Officer cannot always be taken to mean that there was no compliance of O. 18, R. 4. Thus where the statements bear the initials of the Presiding Officer, in the absence of any proof to the contrary it must be held that there was due compliance of R. 4. 1976 Rev Dec 246 and 1976 Rev. Dec. 339 Followed.

K. G. Srivastava, for Applicant; S K Singh for Respondent.

IY/JY/E115/81/JHS

1981 ALL. L. J. NOC 166

K. N. SINGH AND B. N. SAPRU, JJ.

Smt. Sheelawati and others, Appellants v Narain Das and others, Respondents.

F A. F. O. No. 69 of 1975, D/- 28-8-1981.

Motor Vehicles Act (1939), S. 110B — Compensation — Claim for — Accident causing death of person standing on left patri of road — Vehicle being driven with great speed — 24 ft. wide road without traffic and right side patri also vacant — Driver instead swerving his vehicle towards right side took his vehicle to extreme left and hit the deceased — Held, the driver was driving vehicle in rash and negligent manner — Claimants, entitled to compensation. AIR 1972 S C 221, Disting.

A. N. Bhargava, for Appellants; G. P. Bhargava, S. O. P. Agarawal and A. K. Banerji, for Respondents.

KY LY, E91, 81 \ CD